

## BREACH OF PROMISE SUITS

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One of the lurid and sensational forms of American court activity is the suit known technically as a suit for the breach of a contract to marry, but more popularly by the simple designation of a "breach of promise" suit. All suits for breach of contract are technically for the breach of a promise, but when the term "breach of promise" suit is used, neither lawyer nor layman has any difficulty in understanding what is meant. It is that action dear to the heart of the reporter for the sensational newspaper, which is normally brought by young and attractive but sophisticated women against mature and wealthy men, and where the plaintiff very often wins a competence for life. It is the purpose of this article to examine some of the legal aspects of this well-known type of action.

### ANOMALOUS NATURE OF THE ACTION

In theory, the basis of the action is simple enough. While marriage itself is not a contract,<sup>1</sup> it is generally, if not always, the result of a contract. That a cause of action should be allowed for its breach seems as natural and proper as to allow an action for the breach of a contract to purchase merchandise. Actually, however, this action cannot be so simply explained. The differences between it and an ordinary contract action are so striking as to demonstrate that it is a contract action only in name. Some of these differences are worthy of consideration.

#### *History*

In the first place, the history of this action is quite different from that of ordinary contract actions. No doubt history itself is of no present importance, but it will soon appear that this historical development still has important effects. Such an action was originally not within the assumed jurisdiction of the common

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<sup>1</sup> Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723 (1888).

law courts. All matrimonial actions were considered to be within the exclusive jurisdiction of the ecclesiastical courts, which themselves had no power to decree damages. Their remedy was to decree the specific performance of the contract to marry, and it might well be expected that the courts of equity, which are in part the lineal descendants of the ecclesiastical courts, would adopt the same expedient. It was early decided by the courts of equity, however, that such a decree was improper, not because damages would be an adequate remedy, but rather on grounds of public policy.<sup>2</sup> Accordingly, the common law courts, apparently without noticing the rather obvious fact that damages must be an inadequate remedy, concluded that they should give damages when the ecclesiastical courts had failed to function.<sup>3</sup> This soon came to be the sole remedy upon such contracts, and, since the ecclesiastical jurisdiction was never recognized in the United States, the common law action for breach of contract to marry has been the sole remedy in this country.<sup>4</sup>

#### *Who May Be Plaintiff?*

Another, and more striking difference, is that in practice only a woman can bring this suit. There is no theoretical basis for this distinction, since the contract can only be between a man and woman, and it would seem that the man is as much entitled to sue for the breach thereof by the woman as the woman for the breach by the man. Indeed, one or two early cases did allow suit by the man.<sup>5</sup> But a more recent American case, *Kelly v. Renfro*,<sup>6</sup> states frankly that only the woman can sue, basing this rule upon "public morals," though without any explanation of what morals have to do with it. But whatever the reason, no one can doubt the fact; such suits never are, and probably never will be, brought by men.

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<sup>2</sup> *Cork v. Baker*, 1 Strange 34 (1717).

<sup>3</sup> *Baker v. Smith*, Style 295 (1651); *Holcroft v. Dickenson*, Carter 233 (1685).

<sup>4</sup> *Short v. Stotts*, 55 Ind. 29 (1877).

<sup>5</sup> *Harrison v. Cage*, Carthew 467 (1698).

<sup>6</sup> 9 Ala. 325 (1846).

*Survival*

Still another distinction is that the suit does not, according to the weight of authority, survive the death of the defendant. There are statements in the cases that it will survive in the case of special damages,<sup>7</sup> but the general view now seems to be that it will not survive at all.<sup>8</sup> Conversely, the death of the plaintiff before verdict will generally cause the action to abate.<sup>9</sup> In this respect also the suit seems to be unique among so-called contract actions. One rather peculiar distinction was taken in the case of *Johnson v. Levy*,<sup>10</sup> but this distinction does not seem to clarify the situation. Here the male party to the contract had met his death at the hands of the plaintiff's father—a result of his stubborn refusal to fulfill his contract. Suit was then brought against his estate to recover damages for the same fatal delinquency. The court held that an action for compensatory damages would survive, but one for exemplary damages would not.

*Arrest*

All of these distinctions with respect to damages indicate a very clear difference between this action and that for the breach of an ordinary contract, but this matter of damages will be commented on more fully hereafter. It is also held that the defendant can be arrested, in some cases at least, in this kind of action,<sup>11</sup> and arrest of the defendant is, of course, a rather unusual remedy in an ordinary contract action.

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<sup>7</sup> A leading case is *Smith v. Sherman*, 4 Cush. 408 (Mass. 1849), where the court apparently thinks that "special" means "aggravated" damages. See *In re Oldfield's Estate*, 175 Iowa 118, 156 N. W. 977 (1916) (where it would seem to be implicit in the discussion of the court that, but for the disease of the defendant, his estate would be liable); *Finlay v. Chirney*, 20 Q. B. D. 494, 507 (1888).

<sup>8</sup> The matter is elaborately discussed, and this conclusion reached, in *Quirk v. Thomas*, [1916] 1 K. B. 516. Of course this rule may be changed by statute, as in *Allen v. Baker*, 86 N. C. 92 (1882), and it does not apply if verdict is obtained against the defendant before his death, as in *Kelley v. Riley*, 106 Mass. 339 (1871).

<sup>9</sup> *Chamberlain v. Williamson*, 2 M. & S. 408 (1814).

<sup>10</sup> 122 La. 118, 47 So. 422 (1908).

<sup>11</sup> *Perry v. Orr*, 35 N. J. L. 295 (1871); *Matter of Sheahan*, 25 Mich. 145 (1872); *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397 (1892).

*Statute of Frauds*

Still more peculiar is the application of the *Statute of Frauds* to this action. There are two subdivisions of Section IV of the *Statute of Frauds* which might naturally be supposed to apply here, the third subdivision: "to charge any Person upon any Agreement made upon Consideration of Marriage," and the fifth: "Upon any Agreement that is not to be performed within the Space of One Year from the making thereof." In fact the fifth subdivision is generally applied to this kind of contract,<sup>12</sup> though there is some dispute even as to this.<sup>13</sup> The third subdivision is, however, invariably held inapplicable,<sup>14</sup> upon the ground that this is an agreement upon consideration of a promise to marry, rather than upon marriage itself. This may be technically correct, but it seems to be the only instance where Section IV of the *Statute of Frauds* is held not to apply to bilateral contracts.

*Evidence*

The application of the rules of evidence to this sort of case is also much more liberal than is at all usual. It must, of course, be admitted that such promises are usually made without any witnesses, so that their proof must depend upon circumstantial evidence,<sup>15</sup> including such extraneous matters as the apparent conduct of the parties towards each other,<sup>16</sup> and perhaps the statements of the parties to other persons.<sup>17</sup> On the other hand, such

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<sup>12</sup> *Derby v. Phelps*, 2 N. H. 515 (1822).

<sup>13</sup> *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459 (1900). Even where this subdivision is applied, it is limited very stringently; but this limitation is not peculiar to contracts to marry.

<sup>14</sup> *Cork v. Baker*, *supra* note 2, overruling, *Philpott v. Wallet*, 3 Lev. 65 (1683). The American rule is the same. *Derby v. Phelps*, *supra* note 12; *Ulman v. Meyer*, 10 Fed. 241 (C. C. S. D. N. Y. 1882).

<sup>15</sup> *Dyer v. Lalor*, 94 Vt. 103, 109 Atl. 30 (1920).

<sup>16</sup> *Sprague v. Craig*, 51 Ill. 288 (1869). *Contra*: *Pearce v. Stace*, 207 N. Y. 506, 101 N. E. 434 (1913). *Munson v. Hastings*, 12 Vt. 346 (1839), holds that a contract to marry may not be inferred from mere attentions.

<sup>17</sup> The present tendency is rightly to exclude evidence of such declarations unless the other party to the suit was present when they were made. *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. 321 (1886). But there is considerable dispute on this point. The other view is maintained in *Liebrandt v. Sorg*, 133 Cal. 571, 65 Pac. 1098 (1901), where declarations of the plaintiff concerning the intended marriage were admitted to show the humiliation which she suffered.

evidence is often seriously prejudicial and is put in manifestly for that purpose. For example, in *Anderson v. Kirby*<sup>18</sup> the plaintiff offered evidence to show that at the time of the alleged promise she was nursing the mother of the defendant through a serious illness, taking the place of her sister who had, while acting in a similar capacity, caught the disease and died from it. All of this evidence was admitted by the court as tending to prove the promise. This is perhaps sound enough, but no one can doubt that its chief purpose was to prejudice the jury against the defendant, by arousing sympathy for the plaintiff. An even more glaring example of this sort of prejudice is *Lauer v. Banning*,<sup>19</sup> where evidence that the defendant had committed rape upon the plaintiff was admitted. The court conceded that this did not tend to prove the promise—indeed it would have quite the opposite effect.<sup>20</sup> It was admitted, however, as part of the “history of the transaction,” but, of course, could have no possible effect other than to violently prejudice the jury in favor of the plaintiff and to cause them to decide in her favor notwithstanding the fact that the evidence itself would tend to prove that no contract to marry could have been made.

The reason for these, and other peculiarities of the action which will be considered hereafter, is stated by the courts as resting in the peculiar nature of the contract to marry. For instance, it is said in *Homan v. Earle*:<sup>21</sup>

“Contracts of marriage are unlike all others. They concern the highest interests of human life and enlist the tenderest sympathies of the human heart, and the acts and declarations done and employed by parties in negotiating them are often correspondingly delicate and emotional.”

All of this seems undoubtedly sound, but it does not seem to have occurred to the courts that these very circumstances make the whole policy of giving damages for the breach of such contract somewhat dubious. But of this, more hereafter.

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<sup>18</sup> 125 Ga. 62, 54 S. E. 197 (1906).

<sup>19</sup> 140 Iowa 319, 118 N. W. 446 (1908), *aff'd*, 152 Iowa 99, 131 N. W. 783 (1911).

<sup>20</sup> *Giese v. Schultz*, 65 Wis. 487, 27 N. W. 353 (1886).

<sup>21</sup> 53 N. Y. 267, 272 (1873).

### *Defenses*

Corresponding in part to these peculiarities in the plaintiff's case are certain defenses unique to this kind of action. For example, the actual unchastity of the plaintiff is generally considered to be a complete defense to the action.<sup>22</sup> This defense, however, is not extended so far as to embrace merely immodest and improper conduct by her, though evidence of such conduct is usually admitted in mitigation of damages.<sup>23</sup>

A more important defense is that relating to the diseases of either party. The general rule is that any disease in either party which will make the marriage dangerous (especially, but not necessarily, a contagious disease), or make it impossible to perform the usual marital functions, will constitute a complete defense to the action.<sup>24</sup> This is true even though the defendant knew the facts, since, even in that case, the enforcement of the marriage contract is generally recognized to be against public policy.<sup>25</sup> Of course, a disease which is readily curable is not ordinarily a defense;<sup>26</sup> and a disease which has actually been cured is likewise no defense, no matter how serious and dangerous it may previously have been.<sup>27</sup>

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<sup>22</sup> *Bell v. Eaton*, 28 Ind. 468 (1867); *Sprague v. Craig*, *supra* note 16; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875 (1895); *Colburn v. Marble*, 196 Mass. 376, 82 N. E. 28 (1907); *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642 (1911). Of course, the unchastity of some other member of the plaintiff's family is not a bar. *Lewis v. Tapman*, *supra* note 13. Michigan has the unique rule that the plaintiff's unchastity is a defense only if known to the defendant at the time of the promise. *Sheahan v. Barry*, 27 Mich. 217 (1873); *Houser v. Carmody*, 173 Mich. 121, 139 N. W. 9 (1912).

<sup>23</sup> *Colburn v. Marble*, *supra* note 22; *Albertz v. Albertz*, 78 Wis. 72, 47 N. W. 95 (1890); *Gerlinger v. Frank*, 74 Ore. 517, 145 Pac. 1069 (1915).

<sup>24</sup> *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621 (1899); *Gardner v. Arnett*, 21 Ky. L. Rep. 1, 50 S. W. 840 (1899); *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79 (1900); *In re Oldfield's Estate*, *supra* note 7. In *Gring v. Lerch*, 112 Pa. 244, 3 Atl. 841 (1886), a malformation of the plaintiff, making sexual intercourse impossible, was held to constitute a bar, the court saying that a man does not marry a woman "for the mere pleasure of paying for her board and washing." *Contra*: *Hall v. Wright*, E. B. & E. 765 (1859); *Smith v. Compton*, 67 N. J. L. 548, 52 Atl. 386 (1902).

<sup>25</sup> *Grover v. Zook*, 44 Wash. 489, 87 Pac. 638 (1906). See *Allen v. Baker*, *supra* note 8, at 98; *Trammell v. Vaughan*, *supra* note 24, at 222. A note in (1903) 16 HARV. L. REV. 604 takes the same position.

<sup>26</sup> *Shepler v. Chamberlain*, 226 Mich. 112, 197 N. W. 372 (1924).

<sup>27</sup> *Baker v. Cartwright*, 10 C. B. (N. S.) 124 (1861) (where the plaintiff had been in an insane asylum, but had recovered her sanity before the contract was made).

These defenses are perhaps not peculiar to marital contracts, since many of them may be considered as being applications of the rule that a supervening impossibility is a defense, especially in contracts involving personal relations or capacities. However, this will not explain the defense relating to the plaintiff's unchastity, and will likewise not cover the case where a disease of one of the parties is considered a defense, although known to the plaintiff at the time the promise was made. The application of rules of public policy, while not unknown in other sorts of contracts, is certainly much broader here than elsewhere. The question still remains whether it is broad enough.

The distinctions already outlined and the matter of damages, discussion of which follows, show that this is a contract action only in name; in substance it is a tort action, as many courts frankly admit.<sup>28</sup> It has even been held that an action may be brought in tort for damages sustained by the plaintiff when the defendant, being already married, promises to marry her.<sup>29</sup> There is thus general agreement with the statement of Pollock, C. B., in *Hall v. Wright*:<sup>30</sup>

"I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority."

### *Compensatory Damages*

But the most extraordinary and most important characteristic of this kind of action remains to be considered. This is the question of damages. The correct measure of damages in an ordinary contract action is, of course, the amount which the plaintiff has lost, without his own fault, through the defendant's breach. This may be conceded to arouse somewhat difficult questions, especially in connection with cases where the plaintiff should

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<sup>28</sup> *Wilson v. Stever*, 202 Iowa 1396, 212 N. W. 142 (1927) (holding that a breach of promise suit is governed by the statute of limitations with respect to injuries to person or reputation); *Haymond v. Sauce*, 84 Ind. 3 (1882); *Drobnich v. Bach*, 159 Minn. 258, 198 N. W. 669 (1924); see *Perry v. Orr*, *supra* note 11, at 297.

<sup>29</sup> *Pollock v. Sullivan*, 53 Vt. 507 (1881).

<sup>30</sup> *Supra* note 24, at 795.

have lessened his damages; but the matter could not be very difficult in the sort of case under discussion, especially as a man who would break his promise would not naturally be expected to be a provident, or otherwise desirable, husband.<sup>31</sup> Except from a purely mercenary standpoint, therefore, more than nominal damages would appear to be improper.

But a question of greater importance now appears: how much money is the defendant worth? It cannot be denied that at least from a mercenary standpoint the loss of a rich husband is more serious than that of a poor one; but the defendant's wealth is in fact given a position of far greater importance than would be justified by this consideration, and is almost invariably a considerable factor in the result.

There is considerable dispute as to the method of proof of the defendant's financial resources. Probably the greater weight of authority rests the answer principally upon the defendant's reputation for wealth, or the contrary.<sup>32</sup> Some few cases, like *Meyer v. Mayo*,<sup>33</sup> base it, rather, upon the actual property of the defendant, the court there stating with reference to the plaintiff: "She cannot live on the reputed wealth." It would seem that this test is also more fair to the defendant and that it would be unjust to mulct him in damages computed upon the basis of the wealth which he may be merely supposed to possess. In computing the actual wealth of the defendant his interest in estates of deceased relatives is taken into consideration.<sup>34</sup> It has even been

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<sup>31</sup> *Baldy v. Stratton*, 11 Pa. 316 (1849); *Gerlinger v. Frank*, *supra* note 23 (where the court upheld, as adequate, damages of \$1 only, suggesting that the jury may have believed that the defendant would be as bad as a husband, as the plaintiff painted him as a man).

<sup>32</sup> *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8 (1880); *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308 (1891); *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581 (1895); *Smith v. Compton*, *supra* note 24; *cf.* *Johansen v. Modahl*, 4 Neb. (Unof.) 411, 94 N. W. 532 (1903) (holding that, under the circumstances, evidence of the defendant's reputation for wealth was too remote to be pertinent).

<sup>33</sup> 173 App. Div. 199, 204, 159 N. Y. Supp. 405, 410 (1916).

<sup>34</sup> *Clark v. Hodges*, 65 Vt. 273, 26 Atl. 726 (1893); *Salchert v. Reinig*, 135 Wis. 194, 115 N. W. 132 (1908); *Lemke v. Franzenburg*, 159 Iowa 466, 141 N. W. 332 (1913). This principle does not extend so far as to enable the plaintiff to put in evidence of the wealth of the defendant's father, who is still living, on the theory that the defendant will inherit this wealth at some future time. *Spencer v. Simmons*, 160 Mich. 292, 125 N. W. 9 (1910).

held that his wages may be considered,<sup>35</sup> and some few authorities avoid the difficulty of determining as between actual and reputed wealth by admitting evidence of both.<sup>36</sup>

But here arises another situation where the sauce for the goose is denied to the gander. If the plaintiff is entitled to show that the defendant is wealthy in order to increase her damages, it would seem altogether reasonable that the defendant should be able to show his poverty for the purpose of reducing them. However, the general trend is to deny him this privilege, the courts saying the defendant's poverty is wholly immaterial.<sup>37</sup>

But we have only begun a catalogue of the elements of damages in this extraordinary kind of action. The plaintiff, it is held, may recover for the injuries to her reputation and her social position through the defendant's failure to marry her,<sup>38</sup> and she may also recover for various mental elements which are subdivided into the following classifications (these classifications not being mutually exclusive): injury to affections,<sup>39</sup> anxiety,<sup>40</sup> mortification and distress of mind<sup>41</sup> and mental suffering.<sup>42</sup> It is also held that the length of the engagement may be taken into consideration in computing the damages,<sup>43</sup> and the plaintiff may recover, of course, for any injury to her health.<sup>44</sup> And there are not want-

<sup>35</sup> *Rime v. Rater*, 108 Iowa 61, 78 N. W. 835 (1899).

<sup>36</sup> *McKee v. Mouser*, 131 Iowa 203, 108 N. W. 228 (1906). In *Lawrence v. Cooke*, 56 Me. 187 (1868), it was held that evidence of the defendant's property was admissible to show the amount of injury to the plaintiff's affections; apparently a judicial recognition that everybody loves a rich man.

<sup>37</sup> *Coryell v. Colbaugh*, 1 N. J. L. 77 (1791); *Wilbur v. Johnson*, 58 Mo. 600 (1875). In *Rime v. Rater*, *supra* note 35, the defendant, a railroad engineer, was denied the right to show that he had been blacklisted by a railroad for which he had previously worked. However, in *Sprague v. Craig*, *supra* note 16, the defendant was permitted to show, in mitigation of damages, that some of his property had been lost by foreclosure.

<sup>38</sup> *Barry v. DaCosta*, L. R. 1 C. P. 331 (1866); *Gauerke v. Kiley*, 171 Wis. 543, 177 N. W. 889 (1920).

<sup>39</sup> *Harrison v. Swift*, 13 Allen 144 (Mass. 1866). In *Stewart v. Anderson*, 111 Iowa 329, 82 N. W. 770 (1900), it was held that the fact that the plaintiff had borne two illegitimate children, of whom the defendant was the father, sufficiently showed her affection for him.

<sup>40</sup> *Tobin v. Shaw*, 45 Me. 331 (1858).

<sup>41</sup> *Harrison v. Swift*, *supra* note 39.

<sup>42</sup> *Reed v. Clark*, 47 Cal. 194 (1873).

<sup>43</sup> *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936 (1883).

<sup>44</sup> *Hively v. Goinick*, 123 Minn. 498, 144 N. W. 213 (1913).

ing authorities to the effect that the plaintiff may recover additional damages by reason of the fact that she has at the defendant's instance broken another engagement,<sup>45</sup> although some recent authorities have denied this.<sup>46</sup> To allow the plaintiff to recover additional damages because she has done the very thing for which she is suing the defendant, seems going beyond any reasonable theory even for this unique kind of suit.

There is still another item of damage in many of these cases; one which, where it exists, is apt to be the most important. It is the rule in practically all jurisdictions that the plaintiff may recover additional damages if she has been seduced by the defendant as a result of his promise to marry her.<sup>47</sup> This is not allowed as a separate cause of action,<sup>48</sup> but it presents difficulties all the same, since it goes squarely against the settled rule that a woman cannot sue for her own seduction. Many of the courts recognize the difficulty, but succeed in surmounting it by some system of reasoning more or less satisfactory to themselves.<sup>49</sup> Where by statute a woman can sue for her own seduction this does not offer such serious theoretical difficulties, except that here it would seem

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<sup>45</sup> *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (1901); see *Beachey v. Brown*, E. B. & E. 796, 805 (1860).

<sup>46</sup> *Hahn v. Bettingen*, 81 Minn. 91, 83 N. W. 467 (1900).

<sup>47</sup> *Millington v. Loring*, 6 Q. B. D. 190 (1880); *Wilbur v. Johnson*, *supra* note 37; *Wilds v. Bogan*, 57 Ind. 453 (1877); *Poehlmann v. Kertz*, 204 Ill. 418, 68 N. E. 467 (1903) (here it was held unnecessary to plead the seduction); *Graves v. Rivers*, 123 Ga. 224, 51 S. E. 318 (1905); *Salchert v. Reinig*, *supra* note 34; *Dalrymple v. Green*, 88 Kan. 673, 129 Pac. 1145 (1913); *Morgan v. Muench*, 181 Iowa 719, 156 N. W. 819 (1916) (even though the seduction occurred before the plaintiff was divorced from her former husband). *Contra*: *Weaver v. Bachert*, 2 Pa. 80 (1845); *Wrynn v. Downey*, 27 R. I. 454, 63 Atl. 401 (1906).

<sup>48</sup> *Salchert v. Reinig*, *supra* note 34.

<sup>49</sup> *Wrynn v. Downey*, *supra* note 47, has an apparently conclusive analysis of the matter, showing that the doctrine has no basis in logic or theory. The only attempts to support the doctrine are *Hood v. Sudderth*, *supra* note 11, where the court solves the matter by concluding that the whole theory of seduction as a matter of damages for loss of service should be done away with, and a woman allowed to sue for her own seduction, and *Sheahan v. Barry*, *supra* note 22, containing an able opinion by Campbell, J., the precise basis of which is, however, not readily apparent. In *Stokes v. Mason*, 85 Vt. 164, 81 Atl. 162 (1911), the court admitted that the doctrine has no theoretical justification, but upheld it as a matter of precedent and of public policy.

to be an additional cause of action.<sup>50</sup> The courts sometimes claim that seduction by the defendant constitutes fraud as respects the plaintiff,<sup>51</sup> but there seems to be no definite basis for this theory, especially as the claim is made only in breach of promise suits. Furthermore, fraud by the plaintiff is at best a very weak defense in this kind of suit,<sup>52</sup> so that no undue weight should be given to fraud by the defendant. At any rate this item of damages is not only a very large one, but the claim of a seduction is a most effective way of prejudicing the jury against the defendant and thereby adding to the damages in other respects.

One further item of damages which, like the last, does not appear in all cases but is most effective when it does appear, is in connection with the defense. As already seen,<sup>53</sup> proof of the plaintiff's actual unchastity is a bar to the action, but for some reason the courts have permitted the pleading of such a defense to subject the defendant to the danger of having the damages increased if he fails to prove it.<sup>54</sup> There is at least one authority that this result follows even if the defendant has acted in good faith,<sup>55</sup> thus making his use of this defense distinctly at his peril, especially as the jury is likely to blame him for using it, even if they are convinced that the facts alleged are true. The distinct weight of authority is, however, that the damages cannot be increased unless the defendant acted in bad faith;<sup>56</sup> but even this presents the rather extraordinary situation of adding to the dam-

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<sup>50</sup> Indiana has a statute permitting a woman to sue for her own seduction. In *Ireland v. Emmerson*, 93 Ind. 1 (1883), it was held that a previous suit by the plaintiff for her seduction by the defendant was no bar to a subsequent suit for breach of promise, although the plaintiff had, in the previous suit, alleged the promise to marry as inducing the seduction.

<sup>51</sup> *Matter of Sheahan*, *supra* note 11; *Kurtz v. Frank*, 76 Ind. 594 (1881).

<sup>52</sup> See *VanHouten v. Morse*, 162 Mass. 414, 415, 416, 38 N. E. 705, 706 (1894).

<sup>53</sup> See *supra* p. 479.

<sup>54</sup> *Lawrence v. Cooke*, *supra* note 36; *Thorn v. Knapp*, 42 N. Y. 474 (1870); *Blackburn v. Mann*, 85 Ill. 222 (1877); *Albertz v. Albertz*, *supra* note 23.

<sup>55</sup> *Kaufman v. Fye*, 99 Tenn. 145, 42 S. W. 25 (1897). See criticism of this case in (1897) 11 HARV. L. REV. 268.

<sup>56</sup> *Hunter v. Hatfield*, 68 Ind. 416 (1879); *Pearce v. Stace*, *supra* note 16; cases cited *supra* note 54.

ages by reason of facts occurring during the trial.<sup>57</sup> It cannot be denied that juries often do this very thing, but it is unusual for the courts to specifically justify them in so doing.

In the matter of mitigating damages, the defendant has some rights, though it may be doubted whether they are of much substance. As already shown,<sup>58</sup> evidence of the plaintiff's improper conduct is generally admitted in mitigation of damages even though such conduct falls short of actual unchastity. There is also considerable authority that promises by the defendant to marry the plaintiff, made subsequent to his breach of the original contract, may be allowed in mitigation of damages.<sup>59</sup> The Supreme Court of Michigan took the opposite view<sup>60</sup> on the theory that the plaintiff's "virtue and sensibility" would shrink from the defendant's "polluted touch," but this seems to be assuming a quality of the plaintiff which, if it really existed, would tend to prevent her ever bringing such an action. It is held, however, that such offers are not admissible if made after action has been brought.<sup>61</sup>

### *Punitive Damages*

The foregoing is a rather incomplete characterization of the elements of compensatory damages in this sort of action. As has already been intimated, however, the authorities are practically unanimous that this action will admit of punitive damages also.<sup>62</sup> The only question is upon what theory and in what circumstances such punitive damages are recoverable. Some authorities take the

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<sup>57</sup> In *Spencer v. Simmons*, *supra* note 34, the court pointed out that such allegations in the answer may enhance damages but are not an independent ground of damages. But in *Hively v. Golnick*, *supra* note 44, a charge in the defendant's pleadings which was derogatory to the plaintiff but did not impute unchastity was held not a proper consideration in connection with damages, it being a separate libel, if anything.

<sup>58</sup> See *supra* p. 479.

<sup>59</sup> *Kurtz v. Frank*, *supra* note 51; *Kendall v. Dunn*, 71 W. Va. 262, 76 S. E. 454 (1912). *Contra*: *Chapman v. Brown*, 192 Mo. App. 78, 179 S. W. 774 (1915); *Vogt v. Guidry*, 220 S. W. 343 (Tex. Civ. App. 1920).

<sup>60</sup> *Bennett v. Beam*, *supra* note 32.

<sup>61</sup> *Kendall v. Dunn*, *supra* note 59.

<sup>62</sup> *Chesley v. Chesley*, 10 N. H. 327 (1839); *Roberts v. Druillard*, 123 Mich. 286, 82 N. W. 49 (1900); *Jacoby v. Stark*, 205 Ill. 34, 68 N. E. 557 (1903).

position that they are allowable in the case of seduction.<sup>63</sup> This is believed to be unsound, since the only basis for permitting damages for seduction to be recovered at all is that the seduction aggravates the damages for the breach of contract. It must be admitted, however, that the distinction in this sort of case between aggravated and punitive damages seems to be one of terminology only.<sup>64</sup>

The correct theory of punitive damages would seem to be that they are given for the bad faith and malice of the defendant in breaking the contract. They will thus be given if the defendant acts in a way which shows his intent to inflict special suffering and humiliation on the plaintiff; otherwise not.<sup>65</sup> Thus they have been given where the defendant, having caused the plaintiff to give up her position, shammed illness at the last minute when all preparations for the wedding had been made.<sup>66</sup> They were also allowed where it was shown that the defendant had invited the plaintiff to his house with the intention of seducing her, although he had not been able to do so.<sup>67</sup>

It should also be noted that several courts have taken the extraordinary position that evidence of the defendant's property is admissible on the question of punitive damages.<sup>68</sup> It is true that no less an authority than the Bible throws much doubt upon the desirability of riches, but even that can hardly be cited to justify the judicial punishment of a man for the offense of being wealthy. The suggestion is, of course, wholly unsound, and is not generally followed. But, with all restrictions which can possibly be made, the doctrine of punitive damages opens a wide door of discretion, which juries are not slow to enter.

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<sup>63</sup> *Kurtz v. Frank*, *supra* note 51; *Leise v. Meyer*, 143 Mo. 547, 45 S. W. 282 (1898).

<sup>64</sup> In *Trammell v. Vaughan*, *supra* note 24, the court took the position that punitive damages are improper in breach of promise suits, but admitted that certain circumstances might be shown to "aggravate" damages. The distinction is obviously merely verbal; the amount of money which the unfortunate defendant has to pay is the same in either case.

<sup>65</sup> *Chesley v. Chesley*, *supra* note 62; *Baldy v. Stratton*, *supra* note 31; *Jacoby v. Stark*, *supra* note 62; *Drobnich v. Bach*, *supra* note 28.

<sup>66</sup> *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308 (1891).

<sup>67</sup> *Kaufman v. Fye*, *supra* note 55. It would seem that this was a case of insult rather than of seduction, so that punitive damages were proper.

<sup>68</sup> *Gauerke v. Kiley*, *supra* note 38; *Drobnich v. Bach*, *supra* note 28.

*Adequacy of Damages*

With all of the varying, indefinite, and often seriously prejudicial elements of compensatory damages, and with the wide leeway given to punitive damages, it is apparent that there is no very definite judicial test as to the propriety of the computation of damages in breach of promise cases. That juries should tend to give very high damages is hardly surprising, nor is it to be wondered at that the courts have been disinclined to review their findings on this point. A few samples of actual results in litigated cases will make this relatively clear.

In *Broyhill v. Norton*,<sup>69</sup> the Supreme Court of Missouri reduced a verdict of \$25,000 to \$12,500, but this does not seem to have been an extraordinary sample of arbitrary judicial action, in view of the fact that the defendant was a railroad mail clerk. It would certainly seem that \$12,500 is all that a railroad mail clerk could reasonably be expected to pay, regardless of how vicious a person he was thought to be. On the other hand, the Supreme Court of Maine<sup>70</sup> declined to reduce a verdict of \$3500 against a country groceryman, stating that the verdict was fairly large but could not be interfered with, especially because of the "meretricious relations" of the parties. The court does not enlighten us as to why the defendant was any more to blame for these relations than the plaintiff. But even \$3500 seems a rather heavy burden upon a country grocer.

In *Sanborn v. Bay*,<sup>71</sup> the Circuit Court of Appeals for the Eighth Circuit declined to reduce a verdict for \$25,000 against a defendant worth not over \$60,000, though he had previously claimed to be worth twice that. It must be conceded that this verdict does not seem to have been excessive in view of the fact that the plaintiff showed an actual loss of at least \$15,000 as a result of giving up her business because of the engagement. On the other hand a \$15,000 verdict was sustained by the Supreme Court of Iowa in *Morgan v. Muench*<sup>72</sup> against a defendant worth

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<sup>69</sup> 175 Mo. 190, 74 S. W. 1024 (1903); *Kolsch v. Jewell*, 21 App. Div. 581, 48 N. Y. Supp. 527 (1899).

<sup>70</sup> *Hickey v. Kimball*, 109 Me. 433, 84 Atl. 943 (1912).

<sup>71</sup> 194 Fed. 351 (C. C. A. 8th, 1912).

<sup>72</sup> *Supra* note 47.

only \$40,000, and without the plaintiff showing any pecuniary damage. In *Bundy v. Dickinson*,<sup>73</sup> the court sustained a verdict of \$30,000 against a defendant worth about three times that amount.

It cannot be denied that courts sometimes do reduce the jury's estimate, but this is not done in any very logical manner. The Michigan Supreme Court, in the case of *Bischoff v. Harris*,<sup>74</sup> reduced a verdict of \$5000 to one-half that amount, although the defendant was worth about \$40,000 and it appeared that he had seduced the plaintiff. The plaintiff seems to have owed this harsh judicial treatment to the fact that she was a woman past thirty-five and the court thought that she was too mature to be entitled to the damages proper in the case of a young and innocent girl. The Nebraska Supreme Court<sup>75</sup> has recently reduced to \$17,000 a verdict of \$22,000, against a defendant worth from \$50,000 to \$75,000, the court stating that the \$22,000 verdict was excessive but was not the result of prejudice.

An important case on this aspect of the subject is *Wolters v. Schultz*,<sup>76</sup> where a verdict of \$25,000 was held to be excessive, even though the defendant was worth nearly \$150,000. The court found no circumstances of aggravation except that the plaintiff was asked by the defendant to be his mistress, and this insult was minimized by the fact that she knew he already had a mistress but did not think him a less eligible swain on that account. The court, with commendable but unusual forbearance, felt unable or unwilling to attempt to compute the damages, but sent the case down for a new trial, cautioning the lower court that the plaintiff's motives were apparently only mercenary and in such case she was entitled to receive only "the actual pecuniary loss or outlay, since disappointed love of defendant's money furnished no ground of legal redress and she could not justly complain that defendant's conception of the contract or his standard

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<sup>73</sup> 108 Wash. 52, 182 Pac. 947 (1919).

<sup>74</sup> 198 Mich. 59, 164 N. W. 389 (1917).

<sup>75</sup> *Fellers v. Howe*, 106 Neb. 495, 184 N. W. 122 (1921).

<sup>76</sup> 1 Misc. 196, 21 N. Y. Supp. 768 (1892); *Campbell v. Arbuckle*, 51 Hun 641, 4 N. Y. Supp. 29 (1889), *aff'd* without opinion, 123 N. Y. 662, 26 N. E. 750 (1890).

of duty was not higher than her own."<sup>77</sup> The court also seemed to think that the only purpose of a breach of promise suit, where the plaintiff's motives are not purely mercenary and where no circumstances of aggravation appear, is to vindicate the plaintiff's character. If this view were to prevail, many of the most seriously objectionable features of breach of promise suits would disappear. It may be that the recent case of *Gaspoli v. Caruso*,<sup>78</sup> where the Rhode Island Supreme Court reduced a verdict of \$2500 to \$500, there being no evidence as to the defendant's pecuniary position, indicates a growing policy of strictness, but this is not yet wholly clear.<sup>79</sup>

It is submitted that no definite rule can be deduced from these and other cases with respect to the adequacy of damages in breach of promise suits. With the wide opportunity that is presented to both sympathy and prejudice, the courts ought to review the jury's action quite closely, but as a practical matter it is impossible for them to do so. As the Georgia Supreme Court said in *Graves v. Rivers*:<sup>80</sup>

"Although the form of action is ex contractu, yet the measure of damages, in a case where the plaintiff is entitled to recover, may include full compensation for the pain, mortification, and wounded feelings suffered by her in consequence of the dishonorable conduct of the defendant; and the amount of the recovery must be left to the enlightened conscience of impartial jurors."

Notwithstanding the large probability that the jurors are neither enlightened nor impartial, the courts are strongly inclined to let the decision of the jury stand, especially where there appear elements which might give a basis for aggravated or punitive damages.<sup>81</sup>

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<sup>77</sup> *Wolters v. Schultz*, *supra* note 76, at 200, 21 N. Y. Supp. at 770.

<sup>78</sup> 119 Atl. 447 (R. I. 1923).

<sup>79</sup> See a note in (1912) 41 L. R. A. (N. S.) 853 for a summary of a large number of cases involving the amount of damages in breach of promise suits.

<sup>80</sup> *Supra* note 47, at 228, 51 S. E. at 320.

<sup>81</sup> *Barry v. DeCosta*, *supra* note 38; *Clark v. Pendleton*, 20 Conn. 495 (1850) (where the court refused to set aside the verdict although admitting that it was for more than the court itself would have found); *Salchert v. Reinig*, *supra* note 34; *Smillie v. DeMendoza*, 68 Colo. 461, 190 Pac. 533 (1920).

Indeed, it is an open question whether the courts do not encourage arbitrary and prejudiced action by the jury. It is true that sometimes a protest is made on this ground. The Wisconsin Supreme Court, in *Kellett v. Robie*,<sup>82</sup> in reducing a verdict of \$6000, states: "The damages are so far excessive as to show passion, if not perversity, on the part of the jury." But the Pennsylvania Supreme Court has said:<sup>83</sup>

"It is true, juries, and sometimes courts, are occasionally carried away by feelings of indignation; but it is an honest prejudice, if prejudice it can be called, and, if carried to excess, it may be corrected by a motion for a new trial."

As already seen, the correction is not a very effective one.

An English court some time ago suggested<sup>84</sup> that the adequacy of damages in a breach of promise suit is to be determined in part by where the case is tried. It stated that London juries give larger verdicts than country juries, and it is probable that this is still the situation. There can be little doubt that the same condition exists in America, and that New York and Chicago verdicts are more likely to be large than those in cases tried in small county seats — another example of the high cost of living in urban communities.

#### DESIRABILITY OF THE ACTION

Having examined how this kind of action works, the question remains as to its desirability. To this question the courts have given substantially only one answer, and that is a distinctly favorable one. It is believed, however, that this is the result of what the courts suppose are controlling precedents rather than of a reasoned examination of the question at the present time. The strongest American authority in favor of this action is undoubt-

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<sup>82</sup> 99 Wis. 303, 306, 74 N. W. 781, 782 (1898).

<sup>83</sup> *Baldy v. Stratton*, *supra* note 31, at 325.

<sup>84</sup> *Smith v. Woodfine*, 1 C. B. (N. S.) 660 (1857).

edly the Massachusetts case of *Wightman v. Coates*,<sup>85</sup> which was decided in 1818. Much of the reasoning of this decision is based on the very large advantage which a woman gains through a marriage, and the consequent loss which she sustains when the anticipated nuptials are not performed. No doubt this argument was essentially valid at that time, but it has become of much less weight at present. The emancipation of woman has progressed far enough so that she may, and not infrequently does, choose not to marry. Indeed, it would seem that an action which can be brought only by women is a gross discrimination, entirely out of harmony with our modern ideas of the equality of the sexes.<sup>86</sup>

But there are far more substantial objections to this action. In the first place, as has been abundantly shown already, damages are indefinite and usually excessive, bearing little if any relation to the actual losses sustained by the plaintiff. Furthermore, there is nothing to prevent the plaintiff from concocting a case out of her own head, and supporting it by unblushing perjury. That this happens rather frequently is undeniable. No corroboration is necessary unless a statute requires it,<sup>87</sup> and even then the necessary corroboration is fairly sketchy. Of course, there is always the question of which party the jury will believe; but the answer is almost invariably the same—that is, the woman. A rather striking example of this is *Leise v. Meyer*,<sup>88</sup> where at the trial the plaintiff, who claimed seduction, was confronted by a letter signed by herself, which practically proved the impossibility of her testimony. She promptly changed her testimony to conform with the letter and was given a verdict of \$10,000 by the jury—the entire amount for which she sued. The upper court found nothing to criticize in this.

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<sup>85</sup> 15 Mass. 1 (1818). Excerpts from this decision were read to the jury in *Stratton v. Dole*, *supra* note 22, in answer to the argument of the defendant's counsel that such actions should be discouraged. It should be noted, however, that there are dicta unfavorable to breach of promise suits in *Lowe v. Peers*, 4 Burr. 2225, 2230 (1768), a decision by Lord Mansfield.

<sup>86</sup> Especially of those persons who are advocating an "Equal Rights" amendment to the Federal Constitution.

<sup>87</sup> *Thompson v. Scott*, 34 N. D. 503, 159 N. W. 21 (1916).

<sup>88</sup> *Supra* note 63.

Furthermore, the plaintiff is, in practically every case, proceeding for purely mercenary reasons.<sup>89</sup> If the heart of the plaintiff is really broken it is impossible to conceive of sordid cash repairing the breach, although it must be confessed that it does have a strikingly remedial effect upon the rather unreal kind of broken heart which this sort of plaintiff seems to experience. The result is that the suit is generally resorted to for the purpose of blackmail, the defendant knowing that if he does not pay up to a figure somewhat comparable with the plaintiff's demands, the result will be a highly unpleasant court proceeding, and with the quite strong probability of having to pay anyway, regardless of how baseless the plaintiff's cause of action really is. The courts seem to encourage all sorts of improper and prejudicial evidence on the part of the plaintiff. For example, in *Geiger v. Payne*<sup>90</sup> the Supreme Court of Iowa declined to reverse a judgment for a large amount against a defendant who had been constantly abused in the most scathing terms by the plaintiff's attorney as a skinflint and a usurer. The court says that the record did *tend* to show that these terms had some basis in fact although they were not proved. In *Watson v. Beam*,<sup>91</sup> the Kentucky Supreme Court permitted a woman to recover substantial damages for her alleged "humiliation and mortification" when the defendant refused to marry her, notwithstanding the fact that she was proved to have an extremely immoral character.

It is not intended to criticize these decisions very severely, as it is recognized that the position of a reviewing court is a difficult and delicate one. The substantial inquiry here made is whether an action of this sort, which seems necessarily to involve so many incongruous features and, what is worse, substantial injustices, should be continued. It seems clear that what has already been

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<sup>89</sup> There is very frank language to this effect in *Ashley v. Dalton*, 119 Miss. 672, 700, 81 So. 488, 489 (1919). And *O'Brien v. Manning*, 101 Misc. 123, 166 N. Y. Supp. 760 (1917), is an extreme example of the same principle. Here a girl of 29 sued a multimillionaire aged 84 for breach of promise. The plaintiff admitted that she cared nothing for the defendant and it further appeared that the latter was a miser and had no social standing. A verdict of \$225,000 was reduced to \$125,000. Also *Wolters v. Schultz*, *supra* note 76.

<sup>90</sup> 102 Iowa 581, 69 N. W. 554 (1896).

<sup>91</sup> 208 Ky. 295, 270 S. W. 801 (1925).

said makes the answer to this question distinctly doubtful. But perhaps all these abuses might well be borne if the action in fact performed the function for which it was instituted. This function is obviously to give redress to unfortunate women who have been betrayed by promises to marry on the part of more experienced but less scrupulous men. That cruel wrongs of this sort are frequently perpetrated, no one could sensibly deny, and if this action does give substantial redress in such cases it may be worth preserving, even at the expense of an occasional injustice. Unfortunately, however, the question whether the action is performing the function just indicated, can be categorically answered in the negative. The plaintiffs who do recover are not the ones who should, and the persons who are wronged in this way practically never bring suit.

An English writer<sup>92</sup> has pointed out that the less attractive a plaintiff is, the less money she recovers. The explanation of this is clear enough; the beautiful woman, particularly if she weeps gracefully, appeals most strongly to the sympathy of the jury. But, as this same writer points out, this is the exact opposite of what should be the case, for it is the unattractive woman who has the most difficulty in becoming engaged again when her one engagement is broken, and who therefore loses the most.

But there is a far more serious objection to the present situation with respect to these suits. It has already been pointed out that such suits are the delight of sensational newspapers and other agencies which live by purveying scandal to the public. It is partly for this reason that a woman of modesty and good breeding will hesitate to bring this action. And, what is far more important, a monetary remedy, however liberal, will be wholly ineffective in remedying such a wrong. Where such an injury has actually been sustained no amount of money will cure or even salve it.

In *Ortiz v. Navarro*,<sup>93</sup> the Texas Court of Civil Appeals, in denying the necessity of the plaintiff making certain allegations, said that, if they were necessary, "no woman who has any respect

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<sup>92</sup> White, *Breach of Promise of Marriage* (1894) 10 L. Q. REV. 135.

<sup>93</sup> *Supra* note 32, at 198, 30 S. W. at 582.

for herself could recover on a breach of promise to marry, for no one would degrade and humiliate herself" by making the allegations. It is unfortunate, but unquestionably true, that the sad result visioned by the court has been actually reached. Not because cruel wrong is not frequently done by a breach of promise to marry (for it is), but because such a suit leads to a scandalous publicity which is intolerable to a woman of modesty and good breeding, and also because the remedy given is one which is wholly unsatisfactory to a woman who has been actually wronged, the suit is never brought by such a person. It is left to the adventuress and the woman of shady character, who has no reputation to be lost, and whose actual needs (or better, wants) can be supplied by coin of the realm. In *Gerlinger v. Frank*,<sup>94</sup> the court suggested that:

"The antithesis between a pure, good and virtuous woman and a blasé demirep is as marked as the difference between the songs of the ransomed and the wail of the damned."

This is undoubtedly true, but, unfortunately, it is only the "demirep" who brings the action.

Although no man ever brings such an action, the present situation is almost as discriminatory against the man of decency and good breeding—in other words, the true gentleman—as against the woman of like character. The publicity of such a suit is terrifying, and this, plus the possibility of losing the suit to a conscienceless and unscrupulous plaintiff who will make full use of her tremendous advantages with the jury,<sup>95</sup> will induce almost any man of this type, who is so unfortunate as to be picked out as a subject for blackmail of this kind, to pay any sum demanded in order to have peace. On the other hand, the man who is actually such a cad as to be guilty of promising to marry a woman and then failing to keep his promise, is very likely to fight the suit, at least with the hope of reducing the amount of recovery. In short, the present situation is that plaintiffs who should not obtain anything actually recover large sums from defendants who should

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<sup>94</sup> *Supra* note 23, at 523, 145 Pac. at 1071.

<sup>95</sup> See the comment on the advantageous position of the plaintiff, in *McPherson v. Ryan*, *supra* note 17, at 39, 26 N. W. at 323.

pay little or nothing; whereas plaintiffs who might well be thought to be entitled to substantial damages recover nothing.

It is submitted that this is an intolerable situation. Courts are maintained at public expense for the ultimate purpose of doing justice in the community. In many, perhaps most, instances they perform this function as well as can reasonably be expected from purely human institutions. But here we have the courts functioning for the purposes of permitting unscrupulous women, often by the liberal use of perjury, to blackmail members of the opposite sex; and in fact giving no remedy whatever to women who are actually in need thereof. That perjury and blackmail are evils which it is difficult to entirely eliminate, is obvious; but that the courts, so far from fighting them, should sanctify these crimes and use their power to enable the criminals to profit from them, is a situation which demands immediate and drastic remedy.

#### POSSIBLE REMEDIES

There are perhaps three possible remedies for the present intolerable situation. It might be suggested that the courts should show increasing strictness as to matters of evidence, elements of damages, especially punitive damages and other matters of this sort. Some courts have turned in this direction<sup>96</sup> and the tendency may increase. One objection to this supposed remedy is that a greater strictness in matters of evidence is contrary to the present trend and is believed to be undesirable; the rules of evidence in Anglo-American law have been, on the whole, too rigid. A more serious objection is that at best this is a very partial remedy. It may to some slight extent diminish the possibility of blackmail and perjury but it will not enable the modest and decent woman to obtain anything through this action, so that the discrimination will still exist.

Another possible remedy is to amend the *Statute of Frauds* so as to clearly provide that bilateral contracts of marriage shall be within its scope. As already shown,<sup>97</sup> such contracts would

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<sup>96</sup> Examine as examples of this tendency toward greater strictness, *Churan v. Sebesta*, 131 Ill. App. 330 (1907); *Wolters v. Schultz*, *supra* note 76. See also *supra* p. 489.

<sup>97</sup> See *supra* p. 477.

seem, in theory, to come under the provisions of the present *Statute of Frauds*, but the courts have decided otherwise. Such an amendment would make it impossible to bring a breach of promise suit unless the contract were in writing. Here again some good would undoubtedly be done by restricting the power of unscrupulous women to bring this suit on faked evidence, but if the defendant has been unwise enough to write any letters, and if the broad rules of implication laid down in the fictional (but hardly exaggerated) case of *Bardell v. Pickwick*<sup>98</sup> are to be applied, this will not furnish any great protection to the unfortunate defendant. A more serious objection is that any attempt to extend the scope of the statute seems extremely unwise. Students of the matter have frequently urged the entire repeal of the *Statute of Frauds*,<sup>99</sup> and whether or not one agrees with this, it will be generally conceded that the statute should be considerably limited, and certainly not extended.

The question remains whether any remedy can be devised which will enable the action to be a real protection to the kind of women who need it. It seems impossible to accomplish this, simply because any action which could be devised would necessarily involve so much publicity as to frighten away any woman not completely hardened to such a situation; and it is not such women who need protection.

This misfortune, however, is not so great as might be thought, when it is remembered that monetary damages cannot, in the nature of things, give effectual remedy to a woman who has actually been injured in this manner, although it undoubtedly does satisfy the woman who has entered (or appeared to enter) into the transaction, for financial reasons only. The difficulty, therefore, is not that no remedy is given to the decent and modest woman, for the law cannot really do anything for her; it is that she is discriminated against with respect to her less modest and scrupulous sister, and that the latter is given a splendid weapon of blackmail against all men of property, whether or not they are likewise

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<sup>98</sup> DICKENS, *THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB* (1837) cs. 12, 26, 31, 34.

<sup>99</sup> Willis, *The Statute of Frauds: A Legal Anachronism* (1928) 3 *IND. L. J.* 427, 528.

men of honesty and high moral sense. This fundamental difficulty can be remedied in only one manner, and that is by the complete abolition of this kind of action, by a statute forbidding any court to entertain a suit with respect to a contract to marry. Such a statute would put an end to the present situation, which is not merely anomalous but is a serious reproach to our judicial system. The action does nothing but harm, since it does not and cannot protect the persons who need protection, and it can and does function as an instrument of blackmail—or, in other words, for the effectuation of robbery and injustice. Its prompt and complete abolition would be a definite and valuable, as it is now a very necessary, legal reform.