THE CASE OF THE UNFAITHFUL LOVER: IS HE GUILTY OF A BREACH OF CONTRACT OR A TORT?

> *"Of all the agonies in life that which is most poignant and harrowing—that which for the time annihilate reason and leaves our whole organization one lacerated, mangled heart—is the conviction that we have been deceived where we placed all the trust of love."*[1]
>
> Bulwer-Lytton

When the Code Commission drafted the new Civil Code, a Chapter on "Promise of Marriage" was included. For the breach of such promise, the plaintiff is entitled to both actual and moral damages.[2] Congress, however, deleted this Chapter because:

> "The history of breach of promise suits in the United States and in England has shown that no other action lends itself more readily to abuse by designing women and unscrupulous men."[3]

---

1 Quoted in Scharringhaus v. Hazen, 107 S.W. 2d 329, 337 (1937).

2 The following provisions were included in the proposed Chapter:

"Art. 56. A mutual promise to marry may be made expressly or impliedly.

"Art. 57. An engagement to be married must be agreed upon directly and personally by the future spouses.

"Art. 58. A contract for a future marriage cannot, without the consent of the parent or guardian, be entered into by a male between the ages of sixteen and twenty years, or by a female between the ages of fourteen and eighteen years. Without such consent of the parent or guardian the engagement to marry cannot be the basis of a civil action for damages in case of breach of the promise.

"Art. 59. A promise to marry, when made by male under the age of sixteen years or by a female under the age of fourteen years is not civilly actionable, even though approved by the parent or guardian.

"Art. 60. In the cases referred to in the preceding articles, the criminal and civil responsibility of a male for seduction shall not be affected.

"Art. 61. No action for specific performance of a mutual promise to marry may be brought.

"Art. 62. An action for breach of promise to marry may be brought by the aggrieved party even though a minor, without the assistance of his or her parent or guardian. Should the minor refuse to bring the suit, the parent or guardian may institute the action.

"Art. 63. Damages for breach of promise to marry shall include not only material and pecuniary losses but also compensation for mental and moral suffering.

"Art. 64. Any person, other than a rival, the parents, guardian, and grandparents, of the affianced parties who causes a marriage engagement to be broken shall be liable for damages, both material and moral, to the engaged person who is rejected.

"Art. 65. In case of breach of promise to marry, the party breaking the engagement shall be obliged to return what he or she has received from the other as a gift on account of the promise of marriage." These provisions are published in 14 LAWYERS JOURNAL 91, 93 (1949).

The Legislative intent to abolish actions for the breach of marriage promise is found only in the records of Congress.[4] The Civil Code does not contain any express or implied prohibition for the bringing of such actions. In the absence of such a prohibition, it is argued, a jilted lover may bring an action for damages. Others deny the existence of such a right.

In this paper, an attempt is made to explain why a right of action should be recognized in favor of a jilted lover. And this is possible under the Civil Code in a new form of action different from the traditional concept of a breach of promise suit.

Origin Of Breach Of Promise Suits

The action for a breach of marriage promise is of ancient origin.[5] "It was, in fact, one that could not fail to arise as soon as men gave up the practice of stealing wives, and sought them by purchase." [6] In the early stages of the Roman Law, a similar action, *actio ex sponsu,* was recognized.[7] This action, however, disappeared before the classical period. Today, in civil law countries such actions are prohibited except for the recovery of actual damages.[8]

The action for a breach of promise based upon contract analogy is an institution of the common law.[9] In England, the first reported case,[10] wherein the nature of such action was discussed at length, is *Holcroft v. Dickenson.*[11] In that case, it was definitely ruled that a breach of the contract to marry is actionable. And this principle, with its train of consequences, was followed in all common law countries. In the United States, the basis of such an action was generally supposed to be a settled principle of common law. In fact, one court asserted that "such action is as old as the principle which gives damages in any case for the breach of a contract".[12]

Nature Of The Promise To Marry

As said above, the action for breach of marriage promise is a common law instittuion. For this reason, the nature of the promise and the action for its breach is here described as understood in common law jurisdictions.

---

[3] Committee Report No. 562, submitted by Special Committee on the Civil Code on May 10, 1949, p. 8.

[4] SENATE DIARIO, No. 73, May 17, 1949, p. 123 and 4 CONGRESSIONAL RECORD 2430 (1949).

[5] "It has its origin in the natural law, and is the foundation of society." Lewis v. Tapman, 45 A. 659, 661 (1900).

[6] HUNTER, ROMAN LAW 525 (4th ed. 1885).

[7] *Ibid.*

[8] Slesinger, *Breach of Marriage Promise,* 2 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 688 (1953).

[9] This is discussed at length in Wright, *The Action For Breach Of The Marriage Promise,* 10 VA. L. REV. 361, 364 *et seq.* (1924).

[10] The first reported case on a breach of promise to marry is that of Strectcher v. Parker, 14 Cor. B.R., 12 Car Rot. 21, Rolle, Abr. (1639).

[11] 124 Eng. Rep. 933 (1672).

[12] Short v. Stotts, 58 Ind. Rep. 29, 35 (1877).

When one promises to marry another, he is considered to have entered into an executory contract to marry. As such, the relations between the contracting parties are subject in the main to principles governing other bilateral contracts.[13] To be valid, therefore, there must be consent, subject matter and consideration.[14] There must be an offer to marry by one party and acceptance by the other.[15] The subject matter is the future marriage. The consideration is said to be the mutual promises of the parties.[16]

The agreement to marry is a special kind of contract. It can only be made between a man and woman. Its objects are totally unlike the purposes to be accomplished by any other kind of contract which can be entered into.[17] The resulting relation of an executed agreement to marry "is not a mere contract but an inviolable social institution." [18]

Nature Of A Breach-Of-Promise Suit

Any conduct by a party to a contract to marry which amounts to a repudiation of the contract, constitutes a breach as entitles the other party to sue the former.[19] Repudiation may be shown by the acts,[20] words,[21] conduct,[22] or deed [23] of the party who repudiates it.[24] Thus, marriage by one of two engaged persons to a third person is a breach of promise.[25] For such a breach, a cause of action is recognized in favor of the other party.

The action for breach of marriage promise is peculiar by itself. As understood, the action is based upon contract.[26] This means that the cause of action arises from the disavowal or the failure to perform what was promised — the celebration of a marriage.[27] The

---

[13] 4 WILLISTON, CONTRACTS 2881 (rev. ed. 1936).

[14] Civil Code, Art. 1318 provides:

"There is no contract unless the following requisites concur:

"(1) Consent of the contracting parties;

"(2) Object certain which is the subject matter of the contract;

"(3) Cause of the obligation which is established."

[15] Yale v. Curtiss, 45 N.E. 1125 (1897); Olmstead v. Hoy, 83 N.W. 1056 (1900); Lanham v. Wright, 142 So. 5 (1932).

[16] Harrison v. Cage and His Wife, King's Bench 1698 5 Modern, 411 reprinted in MCCURDY, CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 1 (4th ed. 1952).

[17] Lewis v. Tapman, *supra* note 5.

[18] The Civil Code, Art. 52 provides thus: "Marriage is not a mere contract but an inviolable social institution. Its nature, consequences and incidents are governed by law and not subject to stipulation, except that the marriage settlements may to a certain extent fix the property relations during the marriage."

[19] Adams v. Byerly, 24 N.E. 130 (1898).

[20] Horman v. Earle, 53 N.Y. 267 (1873).

[21] Nightingale v. Leith, 115 A. 265 (1921).

[22] Bowes v. Sly, 152 P. 17 (1915).

[23] Vogt v. Guidry, 220 S.W. 343 (1920).

[24] Walters v. Stockberger, 50 N.E. 763 (1898).

[25] Bracken v. Denning, 132 S.W. 245 (1910).

[26] *See*, Bukowski v. Kuznia, 186 N.W. 311 (1922).

[27] *See*, Crossett v. Brackett, 165 A. 5, 7 (1918).

general rule as to actions upon contracts is that plaintiff can recover only a compensation for the damage he has sustained by the breach of the defendant.[28] The courts are agreed, however, that an action for breach of marriage promise is an exception to this rule.[29] While the action arises from a breach of contract, "it is in its essence an attempt to recover for a tortious wrong.[30] The reasons for this exception is explained by Bishop in this terms:[31]

> "Most ordinary contracts concern only money values, as represented by lands, goods, and the like. If the breach of such a contract brings mental suffering, it is deemed only a secondary consequence, and is not an element in the damages. But a marriage agreement relates primarily to the affections, to the joys and sorrows, and to the solace of domestic life. A breach of it, therefore, however followed by loss computable in dollars and cents, directly, and not as a mere secondary effect, produces also that unhappiness which cannot be measured by the pecuniary yard stick. Therefore, as to this part of the case, the law requires the party from whom the injury proceeded to compensate the sufferer, not by the exact and prosaic damages which are given for a refusal to pay money, or convey property, or perform services, but by such estimated damages as a jury, looking at all the circumstances of the case, may deem just. And herein the action for a breach of promise becomes analogous, not to that on an ordinary contract, but to the suit for a tort."

Technically, therefore, an action for the breach of marriage promise is on contract.[32] But as far as the matter of damages is concerned, it is to be classed as a tort.[33] This is justified, as Bishop observed, by the consideration that the action does not relate to property interests, but to injuries to the person,[34] "in other words... the substantive cause of action is purely for elements of injury affecting the person."[35]

Some Objections To Breach Of Promise Suits

As observed above, the promise of marriage is in form of a contract. As such, it is governed by the rules on contracts. The application of contract principles to this kind of relationship has led to a lot of anomalous situations.[36]

In that case of *Holcroft v. Dickenson,* defendant objected to the action for the reason that there was "no consideration, except spiritual matter." The majority opinion overruled this defense on the

---

[28] Cachero v. Manila Yellow Taxicab Co., Inc., G.R. No. 8721, May 23, 1957.

[29] *See, e.g.,* Johnson v. Caulkins, 1 Am. Dec. 102, 103 (1799).

[30] *See,* Rieger v. Abrams, 167 Pac. 76, 78 (1917).

[31] BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, Sec. 226, quoted in KEEZER, MARRIAGE AND DIVORCE, 143 n. 44 (Morland ed. 1946).

[32] Drobnich v. Back, 198 N.W. 669 (1924).

[33] *E.g.,* Syfert v. Solomon, 272 P. 810 (1929).

[34] *See,* Flint v. Gilpin, 3 S.E. 33, 35 (1887).

[35] SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES 326 (2d ed. 1909).

[36] Wright, *The Action For Breach Of The Marriage Promise,* 10 VA. L. REV. 361 (1924).

ground that "marriage to a woman especially, is an advancement or preferment... Lots of matrimony is a temporal loss..." [37]

Under present social conventions, it is hard to understand the common law principle which "regards marriage as a 'valuable' consideration; a thing not only possessing value, but whose value may be estimated in money." [38] To treat marriage engagements as business transactions is something repugnant to our present sense of values. Perhaps, the practical common law principle which regards marriage as a "valuable" consideration may be explained by the social set up prevailing at the time the *Holcroft* case was decided.

As observed by one writer on domestic relations, under English feudal law as borrowed from the Roman Law, the contract of betrothal especially among the rich families, was made by the parents. "It was a means of controlling the transfer of real estate through inheritance and was an important feature of the feudal system." The right to contract was valuable. It "could be transferred, sold, or pledged." The affections of the lovers were totally disregarded.[39]

Under such circumstances, there is no doubt that an actual damage is done to one party whenever the other party refuses to go on with the marriage. The plaintiff, by the breach, suffers actual pecuniary loss and not merely wounded feelings which at most is secondary and negligible. This is so, because those most affected by the contract had no part in it since such contracts were usually entered into while they were still between the ages of five and nine.

But our mores have changed. Domestic law has elevated the position of women in society. Marriage is not merely the private affair of the contracting parties. It is a social institution in which the public is deeply interested.[40]

As a consequence of this changed social conditions, courtship and marriage engagements are now the exclusive affair of the lovers. The role played by the parents in such affairs consists merely in giving their consent or advice.[41] Lovers enter into agreements to marry for the simple reason that they love each other. Their immediate aim is to make each other happy. Material matters are almost always left out of consideration. In fact no two lovers who are

[37] *Supra*, note 11, at 934.

[38] See Note, 63 Am. Dec. 532-533 (1855).

[39] Caven, *The Family* reprinted in HARPER, PROBLEMS OF THE FAMILY 149, 150 (1952).

[40] Goitia v. Campos Rueda, 35 Phil. 252 (1916).

[41] Civil Code, Art. 61, par. 2 provides:

"In case either or both of the contracting parties, being neither widowed nor divorced, are less than eighteen years as regards the male and less than eighteen years as regards the female, they shall, in addition to the requirements of the preceding articles, exhibit to the local civil registrar, the consent to their marriage, of their father, mother or guardian, or persons having legal charge of them, in the order mentioned. Such consent shall be in writing, under oath taken with the appearance of the interested parties before the proper local civil registrar or in the form of an affidavit made in the presence of two witnesses and attested before any official authorized by law to administer oaths."

really in love with each other will admit for a moment that he or she is going to marry the other for material advantages. It is true that financial matters are discussed in such affairs but it is only for the security of the family that will soon be established. Lovers never consider the financial advantages that they will acquire because of the marriage.

But courts up to the present time have persisted in invoking the principle that loss of marriage is a financial loss. The established rule is that "the wealth of the defendant is a proper subject for consideration" in actions for breach of marriage promise.[42] Courts have placed on one scale the gentle feelings and sentiments that accompany love affairs and on the other scale Mammon. They have considered agreements to marry on the basis of commercial dealings.

There is something shocking in the idea of giving pecuniary value to the affections of lovers. It is socially repulsive. Surely no one will admit that his love and devotion for one whom he truly loves may be translated in terms of pesos and centavos.[43]

One of the elementary rules on contracts requires that the parties must be of legal age in order to give a valid consent.[44] Let us suppose that Edgardo, 20 years old, promised to marry Petra, an 18-year-old maid. Both know each others' age. On the day set for the marriage, Edgardo eloped with another girl. So now, Petra sues Edgardo on a breach of promise to marry. Under the rules governing contracts, Edgardo can set up the defense that the contract is unenforceable since he and Petra are minors.[45] This is based upon the principle that "a contract to marry, made by an infant, stands upon the same footing as respects his right to repudiate it, as any other executory contract that may be avoided by him. The case comes within the general rule, that the contract of an infant is voidable at his election."[46]

The anomaly becomes apparent when we consider that Edgardo and Petra could have entered into a valid marriage contract.[47] Now, under what principle can it be supposed that a contract to marry is more sacred than a marriage contract that the requirements for the enforceability of the former are more rigid than the latter? Certainly, there is something wrong with a principle that places contracts of betrothal on a superior level to that of contracts of marriage.

---

[42] Hatton v. Stoot, 189 N.W. 850, 852 (1922).

[43] Lawyer, *Are Actions For Breach Of The Marriage Contract Immoral?*, 38 CENT. L. J. 272 (1894).

[44] Under our Civil Code (Arts. 1327 and 402), only persons of 21 years of age or more may give a valid consent to a contract.

[45] Civil Code, Art. 1303(3) provides that contracts entered into by parties who are incapable of giving consent to a contract are unenforceable.

[46] Rush v. Wick, 27 Am. Rep. 523 (1877); Wise v. Schloesser, 82 N.W. 439 (1900).

[47] Civil Code, Art. 54 provides that: "Any male of the age of sixteen years or upwards, and any female of the age of fourteen years or upwards, not under any of the impediments mentioned in articles 80 to 84, may contract marriage." See also note 41, *supra*.

By the weight of authority,[48] the contract of betrothal must be in writing if it is not to be performed within a year after the promise was given. This is a rule under the Statute of Frauds.[49] The experience of the courts, however, is that the strict application of the Statute of Frauds to marriage promises will bar almost all actions for their breach. Lovers do not usually enter into written contracts of betrothal. It was, therefore, necessary for the courts to develop principles to temper the supposed harshness of the Statute of Frauds. Thus, "unless by its terms, it is not possible to carry out the mutual promises to marry within the period of one year, the contract is not within the Statute."[50] All that is necessary is that the promise might have been performed within a year. The fact that the promise was not carried out for several years is of no moment.[51] Another principle used to limit the application of the Statute is the presumption that a promise of marriage, where no time is fixed, is to be performed within a reasonable time. And that reasonable time is less than one year. In that case, the promise is outside the operation of the Statute.[52]

The minority view, on the other hand, regards the promise as a special kind of contract. Time of performance is not regarded as an essential part of the contract. That matter is for future consideration. The minority view is based primarily upon the consideration that a contract of betrothal "is a relation that affects the happiness of the parties for life, and it may be years may elapse, after the engagement is understood, before any day is definitely agreed upon for consummation. Such contracts until a breach is shown that terminates them, may be regarded as continuing contracts by the parties."[53]

Our Supreme Court has adopted the minority view in the case of *Cabague v. Auxilio*.[54] In that case, the Court held that the agreement between the lovers may be proved by parol evidence.[55]

A promise of marriage is an executory contract. As such it is subject to the provisions of the Statute of Frauds, not being expressly excepted. The minority view which takes such contracts out of the scope of the Statute overlooks the fact that the Legislature could have excepted such contracts from its operation. Failing to do so, the clear implication is that such contracts must comply with its

---

48 KEEZER, MARRIAGE AND DIVORCE 122 (Moreland ed. 1946).

49 The Civil Code, Art. 1403 par. 2(a) requires that "an agreement that by its terms is not be performed within a year from the making thereof;" must be in writing to be enforceable.

50 KEEZER, MARRIAGE AND DIVORCE 123 (Morland ed. 1946).

51 Lawrence v. Cooke, 96 Am. Dec. 443 (1868).

52 Corduan v. McCloud, 93 A. 742 (1915).

53 Blackburn v. Mann, 85 Ill. 222, 226 (1877).

54 48 Off. Gaz. 11, 4223 (1952).

55 According to Justice Bengzon, the present case "is different from the situation in Atienza v. Castillo (40 Off. Gaz. p. 2048) wherein the groom litigated against his bride and her parents for breach of matrimonial promise. We held in that case that the promise could not be proved orally because the bride-groom was suing to enforce a contract 'between his parents and those of the bride'." *Ibid*, at 4824, n. 2.

requirements. The fact that it is a special kind of contract is immaterial. It is still a contract. The opportunities for the commission of fraud in these cases are as wide as in any other executory contract.[56] The only valid reason for taking out such agreements from the operation of the Statute is to consider the promise as no contract at all.

The most serious objection to breach-of-promise suits is the manner in which damages are awarded. Ordinarily, an action upon contract entitles the injured party to recover actual damages only. Compensation is limited to the natural consequences of the breach.[57] But common law courts are not contented in awarding that much remedy to the plaintiff in a breach-of-promise suit.[58] They also award exemplary and punitive damages as in actions founded upon a tort.[59] The reason given is that such an action partakes of the nature of an action upon tort.[60] The application of tort rather than contract rules of recovery has given rise to abuses. This is an inevitable consequence from the dual nature of an action upon a breach of promise.

A party suing upon a contract need only prove that the contract has been breached to be entitled to damages.[61] On the other hand, in an action upon a tort, the plaintiff must prove the negligence or fraud of the defendant which caused the damage. The defense of good faith is available to the defendant. This defense is not available in an action upon a contract. From the practical point of view, it is easier to maintain an action upon a contract but the recovery of damages is confined to the actual consequences of the breach. In contrast, an action upon a tort is more difficult to maintain but recoverable damages are greater. Exemplary and moral damages are recoverable.[62]

---

[56] *See, e.g.*, Philippine National Bank v. Philippine Vegetable Oil Co., 49 Phil. 857 (1927).

[57] See note 28 *supra*.

[58] One court stated the prevailing judicial attitude in these terms: "While, under the law, that agreement (promise of marriage) is a civil contract, it is also both much more and much less than the usual contract. It is purely personal; it does not affect property; it is not assignable; rights under it may not be inherited; it concerns one's state of mind, rather than his estate; we never look upon the relationship as one of contract, in the sense that word is generally used. For its breach the measure of damages is entirely different than in cases for the breach of ordinary contract. The damages are not, as usual, limited to the natural consequences of the breach. The character, the chastity and social standing of the plaintiff, the extent of the injury to her personal feelings and pride, the amount of her mental suffering, the age, wealth, and social standing and motives of the defendant, — all these features may be taken into consideration in fixing the compensation. Promise of marriage may be a contract, but it is one forming its own class, and in its essential features greatly differs from all others." Warner v. Benham, 218 P. 260, 260-261 (1923).

[59] *See, e.g.*, Johnson v. Travis, 22 N.W. 624 (1885).

[60] Scharringhaus v. Hazen, 107 S.W. 2d 329 (1937).

[61] *See, e.g.*, De la Cruz v. Seminario de Manila, 18 Phil. 330 (1911).

[62] For an extensive discussion on the differences between an action upon a breach of contract and a tort see Cangco v. Manila Railroad Co., 38 Phil. 816 (1918).

Combine these two advantages in any form of action: the ease with which an action may be maintained and the unlimited amount of damages recoverable and you have flung wide open the door to abuses. These elements are the distinguishing features of a breach-of-promise suit. And the experience in the United States is that this action has been easily abused especially in the award of damages[63] where

> "...the average jury...recognizes only two bases of computation, i.e., the plaintiff's beauty and the defendant's ability to pay."[64]

This anomalous situation has led to the punishment of defendants who, in good faith, have prevented what all domestic laws seek to avoid—unhappy marriages.[65]

Should Breach Of Promise Suits Be Outlawed?

From the foregoing discussions, it is clear that the development of the theory of an action for breach of promise has proceeded upon an erroneous theory. The theory is that such actions are in form based upon contract but in essence based upon tort. Unfortunately, this error has been perpetuated through the ages. Not only this. This erroneous theory is the main reason for the failure of this class of legal actions to meet the social evils it seeks to repress and punish. Instead, it has become the easy tool of designing women and unscrupulous men.

There were weighty reasons for classifying marriage agreements as contracts at the time the courts first took cognizance of such agreements. But the times have changed. People have changed their social conventions. Public policy towards marriage has undergone a great change, too. All these tend to show what Justice Holmes said about the effect of social changes on legal concepts:

> "A common phenomenon and one very familiar to the student of history, is this. The customs, beliefs or needs of a primitive time established a rule or a formula. In the course of centuries the custom, belief, or necessity, disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things and then the rule adapts itself to the new reasons which have been found for it, and enters a new career. The old form receives a new content and in time even the form modifies itself to fit the meaning which it has received."[66]

---

[63] Feisinger, *Legislative Attack on "Heart Balm"*, in SELECTED ESSAYS ON FAMILY LAW 750, 754 (1950).

[64] Wright, *supra* note 36, at 374.

[65] In the award of damages in a breach-of-promise suit, the courts have considered the following factors: "anxiety of mind produced by breach, loss of time and expenses incurred in marriage preparation, advantages which might have accrued to plaintiff, loss of permanent home, employment, or health because of breach, length of engagement, depth of plaintiff's devotion, defendant's conduct and treatment of plaintiff, injury to plaintiff's reputation or future prospect of marriage, plaintiff's social condition in relation to her home and family, and fact that she was living unhappily at time of alleged promise." Scharringhaus v. Hazen, 107 S.W. 2d. 329, 336 (1937).

[66] HOLMES, THE COMMON LAW 5 (4th ed. 1946).

Gauged by present day conditions, the reasons for the traditional concept of a breach-of-promise suit have become obsolete. The tenacious adherence of courts to such obsolete reasons has resulted in the promulgation of decisions which are illogical and unresponsive to social changes. These decisions bear the stigma of being unrealistic. The result is that the action for breach of promise has become a means of blackmail and a tool of scheming plaintiffs.[67]

In spite of all these, abolition of the right of action upon a breach of promise is not the solution.[68] This particular kind of action has been abused, it is true. But this is no reason for denying redress to the innocent victims of the misconduct of others. Undoubtedly, there are instances when the conduct of the defendant in breaking off the engagement causes not only actual damages but also intense mental sufferings on the part of the plaintiff. We may cite, as an example, the case of Miss Havisham in a novel[69] written by Dickens. The story of Miss Havisham is simple:

> "...The marriage day was fixed, the wedding dresses were bought, the wedding tour was planned out, the wedding guests were invited. The day came, but not the bridegroom..."

And what happened to the bride? Pip met her several years later and this is what he saw:

> "...everything in the room had stopped, like the watch and the clock, a long time ago." "I saw that...everything within my view which ought to be white, had been white long ago, and had lost its lustre, and was faded and yellow. I saw that the bride within the bridal dress had withered like the dress, and like the flowers, and had no brightness of her sunken eye. I saw that the dress had been put upon the rounded figure of a round woman, and that the figure upon which it now hung loose, had shrunk to skin and bone...I glance at the dressing table..., and saw that the shoe upon it, once white, now yellow, had never been worn. I glanced down at the foot from which the shoe was absent, and saw that the silk stocking on it, once white, now yellow, had been trodded ragged...."

The conduct of the lover in this case was, indeed, reprehensible. The grievous wrong he caused with its tragic consequences of intense mortification, of wreaked hopes and of a broken spirit is a thing the law cannot be blind of. There is an element of justice in the case of Miss Havisham. This is a fact of life. And there must be a remedy, for:

> *"Ubicunque est injuria, ibi damnum sequitur."*[70]

To deny a right of action in favor of the injured plaintiff, in

---

[67] Wright, *supra* note 36.

[68] The following States have enacted laws prohibiting actions based upon a breach of promise: Alabama, California, Colorado, Florida, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hamshire, New Jersey, New York, Pennsylvania, Tennessee and Wyoming. Notes, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, 52 COL. L. REV. 242, n. 2 (1952).

[69] GREAT EXPECTATIONS.

[70] Wherever there is a wrong, there damage follows.

cases like this, is unreasonable.[71] It will be putting a premium on wrong doing. Plaintiff should be afforded redress in the courts of justice;

> "...otherwise persons may suffer injury by the wrongful acts of others, and the law affords no redress. This would bring the laws of the land into contempt."[72]

There is no doubt that the present form of a breach of promise suit is unsatisfactory and anomalous. A total ban of such suits, is equally unsatisfactory. Some sort of remedy should be afforded deserving plaintiffs.[73] This is so, because:

> It is the policy of the law to encourage matrimony, and society has an interest in contracts of marriage both before and after they are consummated. A man who enters into a contract of marriage with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman, and also, in a more remote sense, to society, and he needs to be punished in the interest of society as well as the man who commits a tort under circumstances showing a bad heart."[74]

And this can be done by considering the right of action as based upon a tort.[75] In this way, the contract element and its train of anomalous consequences will be disregarded in favor of a more logical foundation for such actions.

A Tort Action

The thesis of this paper is that the cause of action by reason of a breach of promise should proceed upon the theory that a tort was committed. To understand how this principle operates, it is essential that the nature of a marriage engagement be first considered.

In a marriage engagement, a man and woman enter into an understanding that at some future time they will get married. In the meantime that the marriage is not celebrated, the lovers are said to be under probation. During such period, they are supposed to observe each others habits, temperaments and tastes which are the factors that affect their leading a happy married life. The lovers seek out their incompatibilities and exert their utmost efforts to reconcile them. If, in spite of all such efforts, it is found that the two could not adjust to each others liking resulting into coldness, suspicion and repugnance, common sense dictates that the engagement be broken off.

Under such circumstances, the right of either party to withdraw from the engagement should be recognized. For;

> "While it is the policy of the law to encourage marriage, it is not the policy of the law to encourage unhappy marriages."[76]

---

[71] In some jurisdictions where Anti-Heartbalm Statutes have been enacted, the plaintiff is without remedy whatsoever. *See, e.g.*, Thibault v. Lahemiere, 60 N.E. 2d 349 (1945).

[72] Pollock v. Sullivan, 38 Am. Rep. 702 (1880).

[73] Even Feisinger, *supra* note 36, at 755, who advocated the abolition of breach-of-promise suits, is of the opinion that the plaintiff should be allowed to recover "actual pecuniary loss or a fixed amount."

[74] Thorn v. Knapp, 42 N.Y. 474, 477-478 (1870).

[75] See, Wright, *supra* note 36, at 381-382.

[76] Goddard v. Westcott, 46 N.W. 242, 244 (1890).

It is for this reason that they law, through inplication, reads into the marriage engagement the right of either party to withdraw from the engagement for justifiable reasons. For the lawful exercise of said right, neither party should be punished unlike in ordinary contracts.[76-a] Thus such a party who takes back his promise, should not be liable for damages; otherwise the law would be punishing him for averting what the law itself seeks to avoid—unhappy marriages.

The right to withdraw from a marriage engagement should, however, be exercised with utmost caution. The law discountenances any act that would undermine the family. A marriage engagement is a relationship that affects the future happiness of the parties. "It involves the profoundest interest of human life transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred."[77] For this reason

> "...an unexecuted marriage contract, which is designed to lead up to and culminate in a marriage contract, should never be lightly entered into and when it is entered into should not be breached by either of the contracting parties, unless for reasons that are sufficient and evident as to be beyond question."[78]

In determining, therefore, whether the conduct of the defendant in breaking off the engagement is tortious or not, regard must be had to his conduct in exercising his right to withdraw from the agreement. If he abused that right, he is guilty of a tort.

Abuse of the right to withdraw from a marriage engagement is manifested in several forms. A typical case is where the defendant promised to marry a girl above eighteen years of age. Because of his promise, he succeeded in seducing the girl.[79] If the girl sues him for damages, the defendant connot complain of the unchastity of the plaintiff since he himself brought about such unchastity.[80] In fact, his refusal to marry the girl he seduced shows that he entered into the engagement without intending to perform it. He entered into it from evil motives and for the gratification of his personal desires. The seduction of a girl, it is needless to point out, is immoral and contrary to public policy under all circumstances. In cases like this, marital privileges are obtained on the faith of a marriage promise. A subsequent refusal to marry the person whose confidence has been thus deceived operates as a fraud.[81] The disavowal of the promise is the last link in a chain of circumstances which stamps the entire conduct of the defendant as fraudulent. It is the overt act that exposes his malicious intent to practice a deceit upon the plaintiff. The repudiation is the final act that consummates the fraud. For such

---

[76a] *See, e.g.*, Joaquin v. Mitsumine, 34 Phil. 858 (1916).

[77] Schouler, *Breach of Promise*, 7 SOU. LAW REV. (N.S.) 57 quoted in Goddard v. Westcott, 46 N.W. 242, 244 (1890).

[78] Spears v. De Clue, 133 S.W. 2d 1044, 1044 (1939).

[79] No crime is commited in this case since the girl is above 18 years of age. The Revised Penal Code, Art. 338 provides: "The seduction of a woman who is single or a widow of good reputation, over twelve but under eighteen years of age, committed by means of deceit shall be punished by *arresto mayor*."

[80] Longmeir v. Ashbey, 172 A 372 (1934).

[81] Stokes v. Mason, 81 A. 162 (1911).

a fraudulent conduct the defendant should be held liable for damages.[82]

The defendant is also guilty of a tort when he breaks the engagement under circumstances of humiliation and degradation to the plaintiff. This happens in a case where the marriage date is fixed and everything has been prepared for the day. On the marriage day, defendant fails to appear either because he eloped with another girl or he simply refused to go on with the wedding. This conduct of the defendant shows his reckless disregard for the feelings of the plaintiff. It may be properly termed as "ruthless and unjustifiable." The fact that he eloped with another girl shows that he had ample time to inform the plaintiff of his intention to take back his promise.

Had she been informed earlier, plaintiff would not have spent her time and money in arrangements and preparations for the marriage with the defendant. She could have informed invited guests of the sudden change of plans or refrained from inviting them to a wedding which will not take place anyway. These are not the only damages done to the plaintiff. It is reasonable to foresee that actual injury has been done to plaintiff's feelings and the wounding of her reputation in the community, by reason of the circumstances attending the breach.[83] The public announcement of the marriage aggravated the damage done. Public ridicule inevitably follows. The damage is similar to that suffered by one who has been slandered or libeled.[84]

Another instance of a tortious conduct is where the defendant misrepresents his capacity to marry. He represents that he is single though he is lawfully married. Under such a ruse, he promises marriage to a girl. From such misrepresentation alone, it is safe to assume that the defendant had no intention of fulfilling his promise.[85] In fact, his act of promising marriage is contrary to public policy.[86] If he carries out his promise, he is guilty of the crime of bigamy.[87] Under such circumstances, the presumption is that he made the promise for an evil motive.[88] Such motive is usually to obtain marital privileges. If the defendant succeeded in seducing the plaintiff, he is liable for damages. His entire conduct is characterized by fraud and deceit.[89] Such a misconduct is punishable as a tort.

---

82 Morris v. Stanford, 199 S.E. 773 (1938).

83 Goldstein v. Young, 23 So. 2d 730 (1945).

84 Thorn v. Knapp, *supra* note 74, at 477.

85 Snyder v. Snyder, 14 N.Y.S. 2d 815 (1939).

86 Littlehead v. Clinton, 60 P. 2d 612 (1936).

87 Revised Penal Code, Art. 349 defines bigamy thus: "The penalty of *prision mayor* shall be imposed upon ay person who shall contract a second or subsequent marriage before the former marriage has been legally dissolved, or before the absent spouse has been declared presumptively dead by means of a judgment rendered in the proper procedings."

88 Revised Penal Code, Art. 178, par. 2, provides: "Any person who conceals his true name and other personal circumstances shall be punished by *arresto menor* or a fine not to exceed 200 pesos." A person who misrepresents his civil status is guilty of the crime punished by this law. And the Rules of Court, Rule 123, Sec. 69(b) establishes the presumption: "That an unlawful act was done with an unlawful intent..."

89 McQuillen v. Evans, 187 N.E. 320 (1933).

In this limited class of cases[90] where a right of action is recognized, the right of the defendant to withdraw from the marriage engagement is upheld. However, the circumstances attending his withdrawal from the engagement show that he had abused this right. It is this abuse of right that is denominated as a tort. The defendant is compelled to repair the damage done resulting from this abuse of right. In other words, the cause of action arises from the misconduct of the defendant which amounts to an abuse of right. No cause of action is recognized for the mere repudiation of the marriage engagement unless the defendant is guilty of fraud. The phrase "action upon a breach of promise" is retained in this paper only for want of a better term for the action recognized.

In these cases, damages are awarded as a reparation for plaintiff's mental suffering and wounded reputation in the community. In short, plaintiff is entitled to claim moral damages.[91] Exemplary damages may also be awarded.[92] Loss of marriage, wealth of defendant and other unconnected matters do not affect the award of damages. These circumstances are wholly unconnected with the tortious conduct of the defendant. The courts should consider only those factors which are the natural and immediate consequences of the tort committed.

An action upon a tort, therefore, places the defendant in equal footing with the plaintiff. Plaintiff may recover damages as in other actions based upon tort. On the other hand, more defenses are available to the defendant as contrasted in an action upon a contract. The right of action is recognized only in those cases where the conduct of the defendant is clearly toritous. If his conduct is characterized by good faith, he is free from any liability.[93] The burden of proof is on the plaintiff. Defendant has in his favor the prima facie presumption of innocence.[94]

Under The Civil Code

When Congress decided to eliminate the proposed Chapter on "Breach of Promise," Justice J.B.L. Reyes suggested[95] the revival of

---

[90] In the case of Garcia v. Del Rosario, 33 Phil. 189 (1916), our Supreme Court held that a man who, by means of a promise of marriage, induces the girl to give up her job, is liable for damages. His liability was predicated upon the theory that a tort was committed.

[91] Civil Code, Art. 2217 provides: "Moral damages include physical suffering, mental anguish, fright, serious anxiety, besmirched reputation wounded feelings, moral shock, social humiliation, and similar injury. Though incapable of pecuniary computation, moral damages may be recovered if they are the proximate result of the defendant's wrongful act or omission."

[92] According to the Civil Code, Art. 2229: "Exemplary or corrective damages are imposed, by way of example or correction for the public good, in addition to the moral, temperate, liquidated or compensatory damages."

[93] 1 TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 58-59 (1953).

[94] 3 MORAN, COMMENTS ON THE RULES OF COURT 504 (Rev. ed. 1952).

[95] J. B. L. Reyes, *Observations On The New Civil Code On Points Not Covered by Amendments Already Proposed,* 15 LAWYERS JOURNAL 448 (1950).

the provisions of the Spanish Civil Code which limited recovery to actual damages.[96] This suggestion was not followed. "Consequently," the Code Commission commented, "the present status of the law would seem to be that the Supreme Court doctrines on the subject remains."[97]

In the case of *De Jesus* et al. v. *Syquia*,[98] the Supreme Court announced "that *the action for breach of promise has no standing in the Civil Law*, apart from the right to recover money or property advanced by the plaintiff upon the faith of such promise."[99] (Emphasis supplied.) The exception recognized under this doctrine is predicated on the principle that no person shall unjustly enrich himself at the expense of another.[100] Defendant should not retain "the fruits of his broken promise." This holding limited the scope of the cases where the Supreme Court held that a complaint for breach of promise states a cause of action.[101] The query is pertinent: Is it correct to say that an action based purely on breach of the contract to marry cannot be maintained under the Civil Code?

This question was squarely decided by our Court of Appeals in the recent Cavite case of *Ambion* et al v. *Malabanan*.[102] In that case, the sweethearts had agreed to marry on a definite date. So preparations were made for the festivities. The bridal dress was bought, guests invited and friends started sending wedding gifts to the bride. On the day set for the marriage, the man failed to show up. Instead, he married another girl. Hence, this action for damages.

The defendant contended that a breach of the promise to marry is not actionable under the Civil Code invoking as a reason the refusal of Congress to give statutory recognition to such actions. The Court dismissed this contention. It expressly ruled that a cause of action exists in favor of the plaintiff under Art. 21 of the Civil Code which provides:

"Any person who wilfully causes loss or injury to another in a man-

---

[96] Spanish Civil Code, Art. 44 provides: "Si la promesa se hubiere hecho en documento público o privado por un mayor de edad o por un menor asistido de la persona cuyo consentimiento sea necesario para la celebracion del matrimonio, o si se hubieren publicado las proclamas, el que rehusarse casarse, sin justa causa, estará obligado a resarcir a la otra parte los gastos que hubiese hecho por razón del matrimonio prometido." (If the promise has been made in a public or private instrument by an adult, or by a minor with the concurrence of the person whose consent is necessary for the celebration of the marriage, or if the banns have been published, the one who without just cause refuses to marry shall be obliged to reimburse the other for the expenses which he or she may have incurred by reason of the promised marriage.)

[97] *Memorandum of the Code Commission*, 18 LAWYERS JOURNAL 111 (1953).

[98] 58 Phil. 866. (1953).

[99] *Ibid*, at 870-871.

[100] Williamson v. Johnson, 20 Atl. 279 (1890); Richmond v. Nye, 85 N.W. 1120 (1901); Lumsden v. Arbaugh, 227 S.W. 868 (1921); Gikas v. Nicholis, 71 A. 2d 785 (1950).

[101] *See, e.g.*, Fernandez v. Barcelo, 15 Phil. 665 (1910); Verzosa v. Abella, 15 Phil. 668 (1910).

[102] (C.A.) 53 Off. Gaz. 16, 5247, (1957).

> ner that is contrary to morals, good customs or public policy shall compensate the latter for the damages."

The plaintiff was awarded actual and moral damages.

This case presents a clear instance of an abuse of right to withdraw from the contract to marry. The fact that the defendant married a few days after the date fixed for the wedding with the plaintiff indicates that he had changed his mind even before that date. It was at least his duty to inform the girl of his intention to break off the engagement. Failing to do so, his conduct was tantamount to a fraud on her.[103]

The essential wrong to the plaintiff is that she spent her time and money in arrangements and preparations for the marriage. Through his inexcusable negligence, defendant allowed her to invite guests to a wedding which he knew was not going to take place. As a consequence, the fact that she was jilted was unduly publicized by the attendance of the guests, exposing her to public ridicule. In short, defendant was wanting in that course of conduct enjoined by the Civil Code:[104]

> "Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith."

The case of *Ambion*, it is interesting to note, was decided upon a tort. The theory that a contract was breached was entirely disregarded. The import of the decision is that a person who breaks a marriage engagement may be guilty of a tort. The opinion of Tolentino is to the same effect:

> "...we believe that if the action for damages is based on tort or quasi-delict, or on article (sic) 19, 21, or 22 of the present Code, there would be a sufficient legal basis or right of action for damages."[105]

The same principle was applied in the case of *Victoriano* et al *v. Nora*.[106] In that case, the defendant represented to the girl he promised marriage that he was single. The truth is that he is married. Because of such promise, the plaintiff consented to have amorous relations with him. They actually lived as husband and wife for sometime. In this action for damages, the defendant set up the defense that the promise was void since the consideration was the sexual relations of the parties.

The Court of Appeals did not believe the defendant. Justice Natividad wisely observed that "no single young girl, unless she be a moral wreck, and there is no showing that she is, would readily yield her body to a man without such promise." The defendant, according to the Court, is guilty of a fraud and for that reason must respond for damages.

The *Victoriano* case deviates from the consistent holding of our

---

[103] *See*, Parks v. Marshall, 14 S.W. 2d 590, 595 (1929).
[104] Civil Code, Art. 19.
[105] 1 TOLENTINO, *op. cit. supra* note 93, at 206.
[106] (C.A.) 52 Off. Gaz. 2, 911 (1956).

Supreme Court to the effect that the plaintiff in a breach of promise suit cannot recover damages for her seduction.[107] The reason is that the sexual relation is "an immoral act" which vitiates the promise of marriage.[108] The fault being common to both parties,[109] no right of action for damages is recognized in favor of either.[110]

All these decisions were predicated upon the theory that the cause of action was based upon a contract which is void for having an illicit consideration. The consideration is said to be the sexual intercourse.[111] The rule on contracts applied is:

> "If the act in which the unlawful or forbidden cause consists does not constitute a criminal offense, the following rules shall be observed:
> "(1) When the fault is on the part of both contracting parties, neither may recover what he has given by virtue of the contract, or demand the performance of the other's undertaking;..."[112]

It is submitted that these rulings of our Supreme Court are now obsolete. In the first place, the rules on contracts as to illegality of consideration and its unenforceability if the fault is on both parties do not apply to actions founded upon tort. In the second place, these decisions are unrealistic. The progressive trend of judicial opinion makes a distinction. Where a valid promise to marry has been made it is not vitiated by the subsequent seduction of the girl.[113] In such a case, the sexual intercourse was not the consideration for the promise, but was a privilege obtained after the contract had been perfected.[114] The consideration for the promise is still the plaintiff's promise in return.[115] And by the weight of authority, the seduction of the plaintiff should be considered as an aggravating circumstance in the award of damages.[116] On the other hand, if the sexual intercourse preceded or accompanied the promise of marriage, then that promise is void.[117] Thus, in a case,[118] the plaintiff testified that the defendant promised to marry her if she sleeps with him first. The clear implication is that if she refused to perform that condition, there was no promise. Clearly, the promise is immoral and illegal and could not be made the basis of recovery of damages in an action for the breach of the promise.

This distinction applies with equal force in actions upon a tort. The tortious conduct of the defendant consists in his taking advantage of the intimate relationship resulting from the promise of marriage. The fact is that the promise made possible the seduction. It

---

107 *See, e.g.*, Batarra v. Marcos, 7 Phil. 156 (1906); Garcia v. Del Rosario, 33 Phil. 189 (1916).

108 Batarra v. Marcos, *ibid*, at 157-158.

109 Inson v. Belzunce, 32 Phil. 342 (1915).

110 Tengco v. Sanz, 11 Phil. 163 (1908).

111 Dalistan *et al.* v. Armas, 32 Phil. 648, 649 (1915).

112 Civil Code, Art. 1412.

113 Welge v. Jenkins, 195 S.W. 272 (1917).

114 Murphy v. Davis, 65 P. 2d 917 (1937).

115 *Ibid.*

116 Welge v. Jenkins, *supra* note 113.

117 Gagush v. Hoeft, 164 N.W. 400 (1917).

118 Olquin v. Apodaca, 228 S.W. 166 (1921).

was the means without which plaintiff would not have submitted to the amorous relations. To a certain degree, plaintiff is also at fault. But this is no ground for defendant to complain.[119] To free him from any responsibility would be countenancing his deceitful conduct. This is not the policy of the law.

On the other hand, where the sexual act took place before any promise of marriage was given, the defendant is guilty of no tort. The sexual intercourse was committed through no deceit of the defendant. He did not take advantage of any intimate relationship. Both parties indulged in it just to satisfy their lustful desires. The subsequent promise of marriage does not alter the situation of the parties. It was merely to rectify a past wrong. Since that mistake was not imputable to any misconduct of the defendant, he is under no obligation to repair it.

The principles enunciated in these two case are steps towards the right direction. The abolition of the contract features of breach-of-promise suits and the substitution of tort principles are the goals.[120] The refusal of Congress to enact a law recognizing breach-of-promise suits and its failure to prohibit such actions made possible for the courts to develop a doctrine based upon tort principles. This is further facilitated by the broadening of the traditional concept of tort in our jurisdiction.[121]

Jose C. Concepcion

---

119 Stokes v. Mason, 81 A. 162 (1911).

120 Under the Spanish Civil Code, the same solution was suggested. Correa, *A Comparative Study Of The Spanish And American Law On Breach Of Promise To Marry*, 15 PHIL. L. J. 291 (1935).

121 1 TOLENTINO, *op. cit. supra* note 93, at 66.

——oOo——