Law of Damages as Applied to Breach of Promise of Marriage

Theodore W. Cousens
THE LAW OF DAMAGES AS APPLIED TO BREACH OF PROMISE OF MARRIAGE

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The purpose of this study is to ascertain how far the ordinary rules of damages apply to the apparently anomalous situation of breach of promise of marriage.

I. THE NATURE OF THE ACTION—CONTRACT OR TORT?

At the threshold we are met with the question of the nature of the action and of the damages allowed therein. It has been said that the action though contract in form is in substance tort\(^1\) or in the nature of tort,\(^2\) or that as to damages it is classed with torts\(^3\) or is governed by tort principles.\(^4\) These assertions appear to rest entirely upon two propositions: (1) exemplary damages are never allowed except in actions which are in substance tort;\(^5\) (2) exemplary damages may properly be awarded in actions for breach of promise.\(^6\)

Reserving the second proposition for further consideration\(^7\) it is sufficient at this point to show that the first is incorrect. Exemplary damages, like damages for mental suffering,\(^8\) are not usually allowed for breach of contract simply because a breach of contract is rarely the sort of thing which warrants them (if ever they are warranted, a question outside the scope of this study). Exemplary damages, in jurisdictions which permit such damages to be awarded, may only be given in cases where the defendant’s conduct is of a particularly

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\(^1\) One case goes so far as to say that where seduction appears the action is only formally for the breach of promise to marry and is in substance for the seduction alone. Coil v. Wallace, 24 N. J. L. 291 (1854).

\(^2\) Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744 (1887); Osmun v. Winters, 30 Ore. 177, 46 Pac. 780 (1896); Mainz v. Lederer, 24 R. I. 23, 51 Atl. 1044 (1902).

\(^3\) Haymond v. Saucer, 84 Ind. 3 (1882); Thorn v. Knapp, 42 N. Y. 474 (1870); Hale, DAMAGES (2nd ed. 1912) § 167.


\(^6\) Luther v. Shaw, 157 Wis. 231, 147 N. W. 17 (1914); Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308 (1891); Goodall v. Thurman, 1 Head 209 (Tenn. 1858); Coryell v. Colbaugh, 1 N. J. L. 77 (1791).

\(^7\) See infra page 390. \(^8\) See infra page 383.
Thus exemplary damages are permissible in contract cases where fraud or oppression appears, or where the breach of contract displays wanton and reckless disregard of the plaintiff's rights.

a. The General Principle of Contract Damages

That the action for breach of promise and its damages are contract in nature and not tort is, furthermore, evidenced by the application to it of several of the distinctive rules of contract damages. Thus the general principle of contract damages is that the injured party should, as nearly as possible, be placed in the same position as he would have been if the contract had been performed. From this it follows that he cannot recover for anything of which he would equally have been deprived had the contract been performed, such as the consideration for the contract or the amounts expended or advantages given up in preparation for performance. This rule is applied to breach of promise.

b. Causation

Another distinctive rule of contract damages which is applied to breach of promise is that the losses recovered for must be caused, and proximately caused, by breach of the terms of the contract.

*E.g.* conduct in defiance of plaintiff's constitutional rights, Scott v. Donald 165 U. S. 58, 17 Sup. Ct. 265 (1896); conduct extremely violent and insulting toward the plaintiff, Goddard v. Grand Trunk Railway, 57 Me. 202 (1869); negligent conduct in reckless disregard of observable danger to the plaintiff or to his property, Emblen v. Myers, 6 H. & N. 54 (1860).

11Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S. W. 557 (1899).
12Western Union Telegraph Co. v. Gilstrap, 77 Kan. 191, 94 Pac. 122 (1908). See Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003 (1900), dictum that where defendant rented a hearse to plaintiff for the funeral of his child and removed the hearse just before the body was to be placed in it, as a result of which the body had to be taken to the grave in a carriage, exemplary damages were warranted.
13Wertheim v. Chicoutimi Pulp Co., [1911] A. C. 301; Wicker v. Hoppock, 6 Wall. 94 (U. S. 1867); 3 Williston, Contracts (1920) § 1338; (1926) II Cornell Law Quarterly 540.

143 Williston, Contracts § 1338.
153 Williston, Contracts § 1341.
18Giese v. Schultz, 53 Wis. 462, 10 N. W. 598 (1881), 65 Wis. 487, 27 N. W. 353 (1886).
The causation must be traceable not merely to a violation of the defendant’s right, but such violation must also be a breach of some portion of the agreement between the parties. Certain elements of recovery in breach of promise which seem to fall outside this rule will be found to constitute exceptions more apparent than real.

Thus aspersions by defendant subsequent to breach, whether made out of court or in the course of the breach of promise action, either in pleadings or evidence, attacking plaintiff’s character as to chastity or otherwise, unless privileged, may be considered in damages. The explanation is that a contract to marry creates the confidential relationship of betrothal, and all contracts creating

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20Luther v. Shaw, supra note 6; Reed v. Clark, 47 Cal. 194 (1873); Blackburn v. Mann, 85 Ill. 222 (1877).
21Haymon v. Saucer, supra note 3; Davis v. Slagle, 27 Mo. 600 (1859). The distinction made in Leavitt v. Cutler, 37 Wis. 46 (1875), excluding from consideration pleadings withdrawn before trial and affidavits filed in interlocutory proceedings, hardly seems desirable. A better rule is laid down in Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386 (1902), to the effect that any paper filed in the proceedings which tends to humiliate the plaintiff even in the eyes of her own witnesses or counsel ought to be considered.
22Broyhill v. Norton, supra note 4; Berry v. Da Costa, L. R. 1 C. P. 331 (1866); Knifton v. McConnell, 30 N. Y. 285 (1864). Arguments of counsel should follow the same rule but the only decision on the point is contra. Pearce v. Stace, 207 N. Y. 506, 101 N. E. 434 (1913).
23Whether alleging improper conduct with defendant (Broyhill v. Norton, supra note 4; Chesley v. Chesley, supra note 19) or with others. Luther v. Shaw, supra note 6; Osmun v. Winters, supra note 2; Haymon v. Saucer, supra note 3; Blackburn v. Mann; Reed v. Clark, both supra note 20; Leavitt v. Cutler; Davis v. Slagle, both supra note 21; Berry v. Da Costa; Knifton v. McConnell, both supra note 22.
24Broyhill v. Norton, supra note 4; Chesley v. Chesley, supra note 19.
25E. g.: a defence of the action made in good faith is privileged. Pearce v. Stace, supra note 22 [overruling on this point Chellis v. Chapman, supra note 6; Thorn v. Knapp, supra note 3; Southard v. Rexford, 6 Cowen 254 (N. Y. 1826)]; Albertz v. Alberts, 78 Wis. 72, 47 N. W. 95 (1890); Fidler v. McKinley, 21 Ill. 308 (1859). Contra: relying on the now overruled decisions in New York, Osmun v. Winters, supra note 2; Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25 (1897). A defence is presumed to be in good faith, hence the fact of bad faith must be found by the jury to avoid the privilege. Albertz v. Alberts, supra. But if the attack on plaintiff’s character is without reasonable cause (Broyhill v. Norton, supra note 4) or reasonable hope of proof (Luther v. Shaw, supra note 6), or if defendant entirely fails to offer evidence to support the allegations of his pleadings (Davis v. Slagle, supra note 21), bad faith may be inferred.
26Shea’s Appeal, 121 Pa. 302, 15 Atl. 629 (1888); Pierce v. Pierce, 71 N. Y. 154 (1877); Russell v. Russell, 129 Fed. 434 (S. D. N. J. 1904); Taylor v. Taylor, 144 Ill. 436, 33 N. E. 532 (1893); COOLEY, TORTS (2d ed. 1888) 597.
a confidential relationship include an agreement implied in fact that neither party shall act in regard to the subject matter of the contract to the other's detriment even after the relationship has terminated. The most usual breach of this implied agreement is by the disclosure of confidential information obtained by means of the relationship, but it would seem that false statements purporting to be disclosures fall within the same reasoning.

This should be especially true of the contract to marry and the relationship of betrothal involving, as they do, a state of utmost trust and confidence between the parties. Third persons naturally incline to believe statements by either party concerning the other even if made after the contract and relationship haveterminated, simply because of the peculiar opportunity for knowledge which the relationship affords. Accordingly, since the existence of the relation-

ship has placed the defendant in a position where aspersions by him are of great injury to the plaintiff, such aspersions are a clear breach of an implied term of the contract. The breach of this implied term and that of the principal contract to marry are inextricably bound up together, and full justice to the plaintiff can only be done by per-

mitting recovery for both injuries in one action. To allow this is but a slight extension of the principle that entire damages for the breach of a contract should be recovered in one action and of the modern policy in favor of the settlement of all litigation concerning the same transaction or subject in one action. For like reasons, in a case

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27E. g.: relationships of principal and agent, Lamb v. Evans, [1893] 2 Ch. 218; professor and student, Abernethy v. Hutchinson, 3 L. J. Ch. 209 (1825); attorney and client, In re Cowdery, 69 Cal. 32, 10 Pac. 47 (1886); physician and patient AB v. CD, 30 Sc. Sess. Cas. 177 (1851).

28Lamb v. Evans; Abernethy v. Hutchinson; AB v. CD, all supra note 27.

29The statements need not be such as it would be improper to disclose if true. Thus, for example, the defendant on the trial is privileged to show plaintiff's unchastity but if he should assert it falsely and in bad faith it falls within the reasoning above.

30Geiser Thresher Machine Co. v. Farmer, 27 Minn. 428, 8 N. W. 141 (1881); Stevens v. Lockwood, 13 Wend. 644 (N. Y. 1835); Baird v. United States, 96 U. S. 430 (1877).

31Jones v. Steamship Cortez, 17 Cal. 487 (1861); Craft Refrigerating Machine Co. v. Quinipiack Brewing Co., 63 Conn. 551, 29 Atl. 76 (1893); Emerson v. Nash, 124 Wis. 369, 102 N. W. 921 (1905). In the case last cited the court, at 386, 102 N. W. at 927, said in discussing what constituted one transaction within the meaning of the policy above mentioned: "However numerous may be the minor transactions, each constituting a primary right enforceable by the proper remedy, so long as they all reach back to the point of union as the parent cause thereof,—the connection between such point of unity and the various results enforceable as separate grounds of complaint being sufficiently close that the
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where the plaintiff has made her engagement known to friends, if defendant after breaking it denies that it ever existed, his denial should be considered in damages, since under the circumstances such denial amounts to an aspersion on the plaintiff's character. The same reasons apply to give damages where after breach the defendant utters insults (not amounting to aspersions on character) or concerning the plaintiff.

Seduction also is a breach of the agreement implied in the contract. It presents, it is true, the seeming anomaly of a breach of

former may clearly be seen to be the proximate cause, so to speak, of the latter,—they all grow or arise out of one transaction.” This the court, at 388, 102 N. W. at 928, illustrated as follows: “A enters into a contract with B. Out of that circumstance grows the right of each against the other to the performance of the contract. That right is the first essential or step to the creation of a cause of action. It necessarily must precede the existence of such cause. Subsequently, that right is violated. In that we have the final essential or step to the creation of a cause of action. There may be several such rights and several such violations, hence, necessarily, several such causes of action...each set thereof reaching back to the major transaction in which they unite and from which they arise in the regular course of events. Going back from one completed cause of action to the point of unity and thence to another such cause we discover the proximate relation between them. The cause or circumstance upon which all depend is the transaction.” (Italics mine.) It is impossible not to feel that this reasoning applies strongly to breach of promise especially where aspersions on the plaintiff's character are in question. The connection, furthermore, between the violation of fiduciary duty and the breach of the principal term of the contract, the promise to marry, is so close that to consider either alone is to take too limited a view of the situation to permit of thorough justice. One is inclined to say with the Supreme Court of Indiana that in such cases “there is no good reason why one verdict may not accomplish a complete adjustment of all matters within the proper scope of the investigation.” Haymond v. Saucer, supra note 3, at 10.

Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936 (1883).

E. g. obscene language, Osmun v. Winters, supra note 2, contra: Greenleaf v. McCollery, 14 N. H. 303 (1843); loud and public talk about the case and proposals to conceal the breach by pretense of marriage, Baldy v. Stratton, II Pa. 316 (1849).


Baldy v. Stratton, supra note 33.

[S]eduction...brought about in reliance upon the contract,...is in itself in no very indirect way a breach of its implied conditions. Such an engagement brings the parties necessarily into very intimate and confidential relations, and the advantage taken of these relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee, or guardian, or confidential adviser, who cheats a confiding ward, or beneficiary, or client, into a losing bargain. It only differs from ordinary breaches of trust in being more heinous.” Sheahan v. Barry, 27 Mich. 217, 219 (1873); 4 SUTHERLAND, DAMAGES (4th ed. 1916) § 984; COOLEY, TORTS (2nd ed. 1888) 597. See Wells v. Padgett, 8 Barb. 323 (N. Y. 1850).
contract to which the injured party has assented, but mere assent of the injured party to a transaction is not conclusive against his recovery where a fiduciary relation exists. The very existence of a confidential relation makes it possible for one of the parties to possess such influence over the other party thereto that all transactions between them will be jealously scanned and, if found to be inconsistent with the utmost good faith, will form a basis for recovery by the injured party. If this be true of ordinary confidential relationships and the influence ordinarily arising from them, much more should it be true of the relation of betrothal and the overwhelming power of affection between man and woman. In spite of all modern theorizing about the equality of the sexes and the freedom of woman, in the relation of betrothal there is not and cannot be equality. Once having given the man the full love and confidence which the relation implies the woman has in very large measure entrusted herself to his honor. She is in the highest sense of the word cestui qui trust. While perhaps it is too much to say with the Supreme Court of Tennessee that seduction naturally follows if the man is base enough, yet it is clear that the parties are not on an equality; the woman is the weaker, the victim of the act. While it seems inaccurate to denounce it as a fraud or cheat as some courts do, still the breach of fiduciary duty is plain.

It is argued that to say that seduction is a breach of the contract

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37 For this reason some courts have denied recovery for seduction in breach of promise actions. Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401 (1906); Weaver v. Bachert, 2 Pa. 80 (1845); Burks v. Shain, supra note 17. The overwhelming weight of authority, however, favors such recovery. Luther v. Shaw, supra note 6; Davis v. Pryor, 3 Ind. Terr. 396, 58 S. W. 660 (1900); Liese v. Meyer, 143 Mo. 547, 45 S. W. 282 (1897); Osmun v. Winters, supra note 2; Schmidt v. Durnham, 46 Mich. 227, 49 N. W. 126 (1891); Bird v. Thompson, 96 Mo. 424, 9 S. W. 788 (1888); Bennett v. Beam, 42 Mich. 346, 4 N. W. 8 (1580); Wilbur v. Johnson, 58 Mo. 600 (1875); Kelley v. Riley, 106 Mass. 339 (1871); Matthews v. Cribbett, 11 Ohio St. 330 (1860); Goodall v. Thurman, supra note 6; Coil v. Wallace, supra note 1; King v. Kersey, 2 Ind. 402 (1859); Green v. Spencer, 3 Mo. 318 (1834); Hill v. Maupin, 3 Mo. 323 (1834); Whalen v. Layman, 2 Blackf. 94 (Ind. 1828); Coryell v. Colbaugh, supra note 6; Berry v. Da Costa, supra note 22.

38 Allcard v. Skinner, 36 Ch. D. 145 (1887); Nichols v. McCarthy, 53 Conn. 299, 23 Atl. 93 (1885); Wicksieer v. Cook, 85 Ill. 68 (1877).

39 And note that a ward may sue her guardian for seduction in breach of his fiduciary duty. Welsund v. Schueler, 98 Minn. 475, 108 N. W. 483 (1906).

40 In Conn v. Wilson, 2 Overton 233 (Tenn. 1813).

41 Wells v. Padgett, supra note 36.

42 Tubbs v. Van Kleek, 12 Ill. 446 (1851); Perry v. Orr, 35 N. J. L. 295 (1871); Stokes v. Mason, 85 Vt. 164, 81 Atl. 162 (1911).

43 Wells v. Padgett, supra note 36; Morton v. Fenn, 3 Douglas 211 (1873).
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involves the absurdity of supposing that the woman could sue the
man therefor even though he was always ready and willing to marry.
Clearly no such action would lie. But this is not because there is no
cause of action, but because public policy requires that in this situ-
ation marriage shall if possible take place and to this end decrees
that the willingness of the man to marry shall pass the sponge of
oblivion over all causes of action, criminal44 as well as civil,45 which
might by causing dissension between the parties make their marriage
less probable. The only possible solution, therefore, is to defer the
cause of action for the breach of this implied term of the contract
until the breach of the main provision, the promise to marry, and
then to treat the seduction, as indeed it is,46 as in aggravation of the
principal breach.47

44State v. Otis, 135 Ind. 267, 34 N. E. 954 (1893); People v. Gould, 70 Mich.
240, 38 N. W. 232 (1888).
45Except where the rights of third parties are involved. Eichar v. Kistler, 14
Pa. 282 (1850); Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462 (1896).
46Seduction aggravates the damage from the breach of the principal contract in
that it leaves the plaintiff in a much worse situation after the breach of the en-
gagement. Osmun v. Winters, supra note 2; Kelley v. Riley, supra note 37;
Coryell v. Colbaugh, supra note 6. Breach of the principal term of the contract
might also be considered as in aggravation of the breach involved in the seduc-
tion since marriage would prevent many of the evil consequences therefrom. Tubbs
v. Van Kleek, supra note 42.
47Luther v. Shaw, supra note 6; Stokes v. Mason, supra note 42; Davis v.
Pryor, Wilbur v. Johnson, both supra note 37; Coil v. Wallace, supra note 1;
Maupin, all supra note 37. That a breach of the man's fiduciary duty in respect
of the woman's virtue, though pardoned at the time, yet subsists as a cause of
action to aggravate damages in case of eventual breach of the principal contract,
is well illustrated by the case of Kaufman v. Fye, supra note 25, where an attempt
to seduce the plaintiff, made, repulsed, and pardoned long before the breach of
the engagement, was permitted to aggravate damages. (The extension of the
rule to such a case is questionable, however.) It is sometimes said [e. g. in Tyler v.
Salley, 82 Me. 128, 19 Atl. 107 (1889)] that seduction, while in aggravation of
damages, is not an element of damages and that juries should be instructed to
that effect. This seems to require of jurors a transcendental degree of meta-
physical discrimination. The truth would seem to be that seduction is both an
element of damage in itself [Haymond v. Saucer, supra note 3; Wilbur v. Johnson,
supra note 37] and an aggravation of other elements of damages. See note
46, supra. The failure to recognize seduction except as an aggravation of damages
has unfortunate results which will be later considered. Seduction before promise
made cannot, of course, be considered in damages in any way. Salchert v. Reinig,
135 Wis. 194, 115 N. W. 132 (1908); Espy v. Jones, 37 Ala. 379 (1861); Burks v.
Shain, supra note 17. Bishop's argument to the contrary (1 Bishop, Marriage,
Divorce, and Separation (1891) §§ 232 and 233) overlooks the public policy
against permitting recovery for mere sexual intercourse, a very different thing
from seduction under promise of marriage. Stokes v. Mason, supra note 42.
Since seduction is a breach of a subsidiary term of the main contract and a cause of action in itself, it must be alleged in the pleadings in order to be recovered for in damages.\textsuperscript{48} Certain other elements of damage must be specially alleged in the pleadings because of the general rule that, in order to prevent surprise, damages which the law does not imply from the cause of action itself,\textsuperscript{50} \textit{i.e.} damages which do not necessarily arise from the facts stated in the cause of action,\textsuperscript{61} must be specially pleaded. This rule is clearly recognized in breach of promise cases.\textsuperscript{52} Thus pregnancy,\textsuperscript{53} the birth of a child,\textsuperscript{54} loss of health,\textsuperscript{58} and abortion and attempted abortion\textsuperscript{56} are elements of damage only recovered for if pleaded\textsuperscript{57} as special damages.

The term special damages is also used in another sense. It has been laid down that an action for breach of promise will not survive the death of either the plaintiff\textsuperscript{58} or the defendant\textsuperscript{59} in the absence of special survival statutes.\textsuperscript{50} This is in accordance with the common-law maxim, \textit{Actio personalis moritur cum persona}, which as applied to contracts requires that all damages arising from contracts purely

A detailed consideration of the damages recoverable for seduction will be made \textit{infra} in connection with elements of damage.

\textsuperscript{48}Hendry v. Ellis, 61 Fla. 277, 54 So. 797 (1911); Cates v. McKenney, 48 Ind. 562 (1874). \textit{Contra:} Poehlmann v. Kertz, 204 Ill. 418, 68 N. E. 467 (1903); Jennette v. Sullivan, 63 Hun 361 (N. Y. 1892).

\textsuperscript{49}Teagarden v. Hetfield, 11 Ind. 522 (1858).

\textsuperscript{50}Adams v. Barry, 10 Gray 361 (Mass. 1858).

\textsuperscript{51}Moses v. Antuono, 56 Fla. 499, 47 So. 794 (1908).

\textsuperscript{52}Tyler v. Salley, \textit{supra} note 47; Ferguson v. Moore, 98 Tenn. 342, 39 S. W. 341 (1896); Hendry v. Ellis, \textit{supra} note 48; Bedell v. Powell, 13 Barb. 183 (N. Y. 1852); Glasscock v. Shell, 57 Tex. 215 (1882).

\textsuperscript{53}Tyler v. Salley, \textit{supra} note 47.

\textsuperscript{54}Tyler v. Salley, \textit{supra} note 47; Hendry v. Ellis, \textit{supra} note 48.

\textsuperscript{55}Tyler v. Salley, \textit{supra} note 47; Bedell v. Powell, \textit{supra} note 52.

\textsuperscript{56}Ferguson v. Moore, \textit{supra} note 52.

\textsuperscript{57}One court requires malice to be alleged in order for exemplary damages to be recovered. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213 (1913). No other such holding has been found and it is believed to be entirely exceptional.

\textsuperscript{58}Chamberlain v. Williamson, 2 M. & S. 408 (1814); Hovey v. Page, 55 Me. 142 (1867); Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787 (1885).

\textsuperscript{59}Finlay v. Chirney, 20 Q. B. D. 494 (1887); Grubb's Administrator v. Sult, 32 Grattan 203 (Va. 1879); Chase v. Fitz, 132 Mass. 359 (1882).

\textsuperscript{60}For cases under statutes held to cause the action to survive, see Stewart v. Lee, 70 N. H. 181, 46 Atl. 31 (1899); Allen v. Baker, 86 N. C. 91 (1882). Louisiana appears to have a peculiar rule that the action survives if the defendant is put in default by a demand made upon him to fulfill the engagement. Johnson v. Levy, 118 La. 447, 43 So. 46 (1907). See generally (1916) 2 \textit{CORNELL LAW QUARTERLY} 42.
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personal,61 that is to say contracts involving no injury to property,62 do not survive the death of either party thereto. The reason of this rule would require that if property damage were specially alleged it might be recovered for, and this has been repeatedly intimated.63 As no breach of promise case has yet arisen in which such damages have been held to have been caused, it has been suggested that these intimations were merely thrown out ex maiore cautela to provide against the chance of a highly improbable case,64 and that it is to be expected that no such damages will ever be awarded.65 It is conceded, however,66 that if, for example, one party should have acquired valuable property from the other by means of the betrothal relationship, in case of breach a right on the contract to recover an amount equal to the value of such property will survive the death of either party.67

c. The Rule in Hadley v. Baxendale

Yet another rule of contract damages which applies to the action for breach of promise of marriage is the rule in Hadley v. Baxendale.68 Liability extends to all the natural results of the breach. Thus, where the breach of the marriage promise is accompanied by a breach of the implied term of the contract against seduction,69 resulting

63See Finlay v. Chirney, supra note 59; Quirk v. Thomas, supra note 4; Hovey v. Page, supra note 58; Grubb's Administrator v. Sult; Chase v. Fitz, both supra note 59; 3 WILLISTON, CONTRACTS § 1945.
64Chase v. Fitz, supra note 59.
65See (1915) 28 HARV. L. REV. 70.
66Chase v. Fitz, supra note 59.
67In such a case the injured party might also have quantum valebant for goods sold and delivered. For an interesting case where relief in the above situation was so obtained, see Frazer v. Boss, 66 Ind. 1, (1879).
688 Exch. 341, 354 (1854): "Where two parties have made a contract which one of them has broken, the damage which the party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." See (1926) 11 CORNELL LAW QUARTERLY 540.
pregnancy and birth of a child are to be considered in damages. The branch of the rule relating to the contemplation of the parties is illustrated by a case where liability was imposed for physical injury to the plaintiff which might reasonably have been anticipated by the defendant because of his special knowledge as a physician.

**d. Mitigation of Damages**

No case on the duty to mitigate damages in breach of promise has been discovered. It is believed that the duty is not applicable because of the peculiar nature of the damages involved. No class of them admits of mitigation. A duty cannot be placed upon the plaintiff to use her best efforts to secure another mate of wealth, character, and pleasing qualities as near as may be to defendant’s in order to mitigate the loss of the value of the marriage. Marriage, the nexus of all human relationships, is of too great importance to be entered upon merely to relieve a wrongdoer from liability. Injuries to health, nerves, feelings, mental suffering, all the intangible yet very real injuries which so characterize breach of promise of marriage cannot be mitigated through any effort of the plaintiff. Even if they may, the defendant can hardly be permitted to say, “Your love for me was too great, you should not have permitted it to affect you so gravely, it unduly enhanced my damages.”

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71 Infection with venereal disease should follow the same rule, but the few decisions on the point are to the contrary. Bowes v. Sly, *supra* note 69; Churan v. Sebesta, 131 Ill. App. 330 (1907). But an English court has refused to strike out an allegation of such infection from the declaration. The motion was on the ground that the pleading was scandalous but both court and counsel assumed that, although there might be doubt as to whether the infection could be pleaded, there was none that it could be shown and considered in damages. Millington v. Loring, 6 Q. B. D. 190 (1880).

72 Duff v. Judson, 160 Mich. 386, 125 N. W. 371 (1910). The principle appears, however, to have been pushed too far in the case cited. To hold defendant for physical injuries arising merely because a breach of contract compelled plaintiff to perform injurious manual labor seems quite unjustifiable. As well permit an action of damage for death if, in consequence of a discharge by his employer in breach of his contract, being unable to obtain other work, a laborer starved to death.

73 It is submitted that “contemplation of the parties” actually means contemplation of the defendant.

For discussion of the rule in Hadley v. Baxendale as applied to breach of promise of marriage, see Quirk v. Thomas, *supra* note 17; Finlay v. Chirney, *supra* note 59.

74 Though where she actually does so it has been held to be in mitigation. Ableman v. Holman, *supra* note 16.
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e. Certainty of Damages

The rule as to certainty of damages is also without application to breach of promise, or rather all the elements of damage therein are such as not to fall within it. But neither is it applicable to other contracts in certain circumstances. "When, from the nature of the case," says the Supreme Court of Michigan,75 "the amount of the damages cannot be estimated with certainty...we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." This is always the case in breach of promise. The so-called pecuniary value of the prospective marriage76 cannot be reckoned with any certainty, though the method of designating it might cause that impression. It is not a claim for damages for the loss of an opportunity to obtain an amount, a dower interest in the defendant's estate for example.77 It is rather for the loss of such non-pecuniary things as the prospect of a permanent home78 and an advantageous establishment79 and that very non-monetary element, the condition in life80 or social position81 which the plaintiff would have attained by the marriage, which is compensated under this head. It is in fact compensation for the loss of a greater opportunity for enjoying life. It is true that the pecuniary circumstances82 of the defendant are considered83 but only to show the probability of such loss.84 His pecuniary ability

72The term "value of the marriage" first appears in Coolidge v. Neat, 129 Mass. 146 (1880), a case containing a detailed analysis of the elements of damage in breach of promise which has been widely followed.
74Harrison v. Swift, 13 Allen 144 (Mass. 1866).
75Coolidge v. Neat, supra note 76.
76Stratton v. Dole, 45 Neb. 472, 63 N. W. 875 (1895).
77Berry v. Da Costa, supra note 22; Perkins v. Hersey, 1 R. I. 493 (1851).
78These are generally proved by general reputation (Chellis v. Chapman, supra note 6) but modern cases display a tendency to permit the details of defendant's property to be shown, Clark v. Hodges, 65 Vt. 273, 26 Atl. 726 (1893). This, however, is a question of the law of evidence rather than that of damages.
79Ableman v. Holman, supra note 16; Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533 (1920); Stratton v. Dole, supra note 80; Chellis v. Chapman, supra note 6; Allen v. Baker, supra note 60; Coolidge v. Neat, supra note 76; Bennett v. Beam, supra note 37; Douglas v. Gausman, 68 Ill. 170 (1875); Berry v. Da Costa; Kniffen v. McConnell, both supra note 22. The rule is the same in the unusual case where the woman is defendant. Harrison v. Cage, Carthew 467 (1699).
80This is well indicated by the summary of reasons for considering the defendant's property, given in Bennett v. Beam, supra note 37, at 350: "%W]hat
is not the measure of damages. It would seem that a showing of a
given amount of wealth should not be the sole determinative of the
value of the marriage. It should be permissible to show whether
the defendant is of a miserly or of a free-handed nature, whether he
is of retiring habits or is accustomed to go much into society, as indi-
cating whether the union would have afforded the plaintiff the hap-
piness value which the amount of wealth in question would prima
facie indicate.

Much less are damages from mental suffering and injuries to
health, nerves, feelings, and affections capable of certain measure-
ment in money. Yet one is not for that reason to be deprived of all
redress for such inflictions.

f. Entirety of Damages

The rule as to entirety of recovery applies to actions for breach of
promise with the utmost strictness. This is so clear that no question
has ever been raised concerning it and it would be difficult for the

loss is it that the plaintiff has sustained by a breach of the contract? To de-
determine this we must look at the surroundings and see what it was to which the
defendant invited her. If it was to a home of poverty and a life of probable
hardship and misery, the loss would apparently be small; but if it was to a home
 possessed of and surrounded by all the comforts and even the luxuries of life, and
where her social position in the circles in which she would move by right of the
marriage would be the very best, the case would be exactly the opposite, because
in such case there would be abundant promise of social and domestic happiness.
But beyond this the very marriage confers certain rights in the husband's real and
personal estate of which she cannot afterwards be deprived except by her own
consent, and she would naturally and justly look to them as her security against
becoming dependent through the accidents and misfortunes of life.” The passages
italicized clearly show that it is solely as evidence of the plaintiff's prospective
happiness that the property of defendant is considered.

86Goodall v. Thurman, supra note 6.
87Goodhart v. Pennsylvania Railroad Co., 177 Pa. 1, 35 Atl. 191 (1896); Ransom
v. New York & Erie Railroad Co., 15 N. Y. 415 (1857); Southern Cotton Oil
Co. v. Skipper, 125 Ga. 368, 54 S. E. 110 (1906); cases of physical pain. Head v.
Georgia Pacific Railway Co., 79 Ga. 358, 7 S. E. 217 (1887); Young v. Western
Union Telegraph Co., 107 N. C. 70, 12 S. E. 45 (1890); Ballou v. Farnum, 11
Allen 73 (Mass. 1865); cases of mental suffering. But see criticism of Southern
States’ decisions on mental suffering in (1926) 4 Tex. L. Rev. 270 and in (1925)
23 Mich. L. Rev. 311.
88Lucas v. Plinii, 35 Iowa 1 (1872); Wadsworth v. Western Union Telegraph
Co., 86 Tenn. 695, 8 S. W. 574 (1888); The Little Silver, 189 Fed. 980 (D. N. J.
1911) aff’d, sub nom. New York & Long Branch Steamboat Co. v. Johnson, 195
Burgess, 114 Ala. 587, 22 So. 169 (1896). But see law review notes cited supra
note 86.
most speculative mind to conjecture a situation in which serious doubt could arise as to its application. The contract to marry is indivisible. All damages for breach of the promise to marry, though some of them, such as the loss of the value of the marriage, bear reference to the whole future life of the plaintiff, are incurred at one time of breach. Even breaches of subsidiary terms of the contract, such as we have considered in the ease of seduction, and shall consider in the case of abortion, are deferred because of public policy until the principal breach. It is true, that breach of a subsidiary term of the contract by way of insult or defamation may be made not only subsequent to breach but even on the very trial of the action. Yet it is inconceivable that any separate action for this qua breach of contract could be maintained. As before said the breach of such implied term and that of the principal contract are so inextricably bound up together that full justice to both parties requires that all circumstances of both breaches should be considered in one action. This is not to say that a separate action will not lie qua tort for wrongs inflicted in breach of a contract to marry. The usual rule, that where a wrong is both a tort and a breach of contract, suit may be brought on either breach of duty, applies. Thus it has been held that where a married man promises marriage to a woman who believes him unmarried she may have an action in tort for deceit against him. It would seem that similarly such an action should lie for concealment of other facts rendering valid marriage impossible, such as impotency and consanguinity, if a case can be imagined wherein the latter impediment would be peculiarly within the knowledge of the defendant. And it is submitted that concealment of facts rendering the prospective marriage voidable at the will of the defendant should base an action for deceit equally with concealment of facts rendering it void, for the plaintiff relies on representations that defendant is in a position to marry in a manner that will bind him. She expects a regular, not a companionate, marriage.

It would seem clear also that where a breach of a subsidiary term of the contract is also a tort the appropriate tort action will lie.

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88 supra page 371. 89 infra page 388.
90 As we have seen supra page 369 et seq.
91 Dean v. McLean, 48 Vt. 412 (1875); Kinlyside v. Thornton, 2 W. Bl. 1111 (1776); Brown v. Boorman, 11 Cl. & Fin. 1 (1844); see Addison, Torts (8th ed. 1906) 16.
93 The rule that deceit does not lie where both parties have equal means for knowing the truth would, of course, apply. Boulden v. Stilwell, 100 Md. 543, 60 Atl. 609 (1905); Vernon v. Keys, 12 East 632 (1810); Slaughter's Administrator v. Gerson, 13 Wall. 379 (U. S. 1871).
Thus for aspersions on the other party to the contract slander or libel may be had, for abortion—trespass for battery, for seduction and for insults—special statutory actions in the states which permit them. So clear is it that such actions will lie that the only question is whether they will bar further recovery in an action on the contract to marry. It has been decided that a recovery in a statutory action for seduction does not bar a later action for breach of marriage promise. This seems eminently just for seduction is but one element of the damage suffered. The plaintiff should not, however, enjoy a double recovery for the seduction by having it again considered in damages in the latter action. It would be absurd to insist on this elementary statement were it not for strong dicta to the effect that in the analogous case of recovery for aspersions on plaintiff's character in the action for breach of promise a later recovery in slander or libel is not barred. This absurdity is directly caused by the error of considering the injuries arising from breaches of the implicit fiduciary terms of the contract as being in aggravation of damages but not an element thereof. On the high degree of discrimination which such a rule requires of the jury we have previously remarked. On the injustice that might result from it no more need be said. It is to be hoped that courts will not persist in a line of reasoning which is both illogical and pernicious.

94See White v. Murtland, 71 Ill. 250 (1874); Miller v. Bayer, 94 Wis. 123, 68 N. W. 869 (1896).
95Seduction has been made a statutory tort in the following American jurisdictions: Alabama, California, Idaho, Indiana, Iowa, Mississippi, Oregon, South Dakota, Tennessee, Utah, and Washington. A like result has been obtained in Michigan and North Carolina by strained construction. See Watson v. Watson, 49 Mich. 540, 14 N. W. 489 (1883); Weiher v. Meyersahm, 50 Mich. 602, 16 N. W. 160 (1883); Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397 (1892).
96Several states, e. g. Virginia, West Virginia, and Mississippi, have established a special statutory action for insulting language. See VA. CODE ANN. (1924) § 5781; W. VA. CODE ANN. (Barnes, 1923) c. 103, § 2; MISS. ANN. CODE (Hemingway, 1927) § 1.
97In Ireland v. Emmerson, 93 Ind. 1 (1883).
98In Roberts v. Druillard, 123 Mich. 286, 82 N. W. 49 (1900), and Spencer v. Simmons, 160 Mich. 292, 125 N. W. 9 (1910).
99This distinction is best explained in Hickey v. Kimball, 109 Me. 433, 84 Atl. 943 (1912).
A like result is produced in actions for the breach of other contracts where defamatory matter is proved in aggravation of damages. See a remark of Baron Parke's in Coppin v. Braithwaite, 8 Jurist 875, 876 (1844).
100Note 47, supra. For a sound suggestion as to the limits of the discrimination which should be expected of jurors, see Craker v. Chicago & Northwestern Railway Co., 36 Wis. 657, 678 (1875).
II. The Elements of Compensatory Damage in Breach of Promise

a. The Value of the Marriage

So far we have considered the elements of damage in breach of promise only incidentally. We shall now consider them in detail to determine how far they are similar to the elements of damage which arise from other breaches of contract. First as to the value of the marriage, so-called. We have seen\(^{101}\) that this is but compensation for the loss of a greater opportunity of enjoying life, \(i.e.\) for the difference between the circumstances in which the marriage would probably have placed the plaintiff and those in which her life is likely to be passed because of defendant's breach. Such an element of damage might at first glance seem peculiar to the contract to marry. But further investigation shows this to be untrue. The contract most closely resembling the promise to marry would seem to be what is commonly designated as the contract for support. The similarity is striking. Except for the duties peculiarly connubial there seems a complete identity between a contract to receive another into one's household as a member thereof and to care for him as such, and the contract to marry. Now the measure of damages for the breach of a contract of this analogous class is the difference between the care and treatment, \(i.e.\) the circumstances, to which the person would probably have been subjected as a result of the performance, and those to which he is subjected as a result of the breach.\(^{102}\) The analogy is complete.

b. Loss of Other Opportunity to Marry

Several items of damage usually considered as pecuniary have been treated by the courts with exceedingly little discrimination. One of these is loss of other opportunity to marry. The main error here has been failure to note that the situation is totally different where only the promise to marry is broken and where the subsidiary term against seduction is broken also. Instructions that probable loss of other opportunity for marriage is to be considered in damages are approved in both cases.\(^{103}\) But such consideration is plainly

\(^{101}\) Supra page 377 et seg.


\(^{103}\) For typical cases, cf. Coolidge v. Neat, supra note 76, with Berry v. Da Costa, supra note 22. For a case in which the fact that plaintiff did not lose any other opportunity to marry was considered, see Ableman v. Holman, supra note 16.
wrong in the first type of case. If, by being betrothed to the defendant, plaintiff has lost marriage opportunities, either directly by refusing herself to, or avoiding the company of, other eligible suitors, or indirectly, as in long engagements where the bloom of youth and the prospects of being wooed fade with the passing years, these are things given up either in preparation for, or in consideration of, the promised marriage.\footnote{10} We have seen that on no sound principle can recovery for such things be allowed.\footnote{105} The wholly different situation where a violation of the duty against seduction appears, permits of rightful recovery. The fiduciary who injures his cestui's vendibility in the marriage market\footnote{106} by destroying her chastity differs only in greater enormity from the fiduciary who damages the marketability of her chattels. Each deprives one toward whom he is under the highest duties of conscience and honor of a valuable asset\footnote{107} for which compensation must be made.

c. Length of the Engagement

Wrongful recovery for loss of other opportunity to marry is often concealed under an instruction that the length of the engagement may be considered in damages. This again is a case where the courts

\footnote{104}It is most commonly the indirect loss for which recovery is allowed. In fact but two dicta have been found in which the exclusion of other suitors during the engagement has been approved as an item of damages. Olmstead v. Hoy, 112 Iowa 349, 83 N. W. 1056 (1900); Hively v. Golnick, supra note 57. It is impossible to deny, however, that the logic, or lack of logic, of the cases leads to its allowance as such. Of course plaintiff cannot recover for the loss of a suitor whom she jilted in breach of engagement in order to become engaged to defendant, for she cannot recover for her own wrongful act. Trammell v. Vaughan, supra note 6.

\footnote{105}See supra page 368. Plaintiff's decreased marriageability might indeed be considered as evidence of the value of the marriage, i.e. as indicating the difference in value between the marriage with the defendant and any probable marriage by the plaintiff, on the analogy of damages for breach of a contract to buy goods, the difference between the contract price and market value at the time and place of failure to perform. McKnight v. Dunlop, 5 N. Y. 537 (1851); Bonney v. Blaisdell, 105 Me. 121, 73 Atl. 811 (1909); Williams v. De Sota Oil Co., 213 Fed. 194 (C. C. A. 8th, 1914). But this is not the theory of the courts.

\footnote{106}For an interesting early case (unfortunately quoted without citation) in which damages were allowed for injury to a man's marriageability by a battery to his person, see MacColla, BREACH OF PROMISE (1879) 4.

\footnote{107}Cf. note 36, supra. The above statement is none the less true because of its cold-blooded appearance. The most atrocious acts have their aspect of material damage and to determine this accurately they must be dispassionately considered. This is not to say that such material damage is the only damage resulting from them. The non-pecuniary damages from seduction will be later considered.
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are lacking in discrimination. Put in this broad way it is inevitably understood by the jury to allow a recovery for the pecuniary detriment to plaintiff's condition and prospects, marital and otherwise, arising from the length of time she was pledged to the defendant. Any such detriment was suffered either in preparation for, or in consideration of, the prospective marriage. As far as pecuniary compensation is possible she will be compensated if she recovers the value of the marriage. She suffered this detriment considering that the marriage was worth it. She has lost the marriage, the jury gives her its value, it should not also give her the value she gave up for it. She is not entitled to a double recovery, she cannot eat her cake and have it too.

But the plaintiff has suffered higher and non-pecuniary detriments, on which the length of the engagement throws considerable light. Injury to her affections is an element of damage. The depth of those affections is therefore in question, and this may well be affected by the length of the engagement. Shame and mortification, mental suffering generally, arising from defendant's repudiation is also an element; clearly a lengthy engagement would increase this. In various ways in regard to these elements the length of the engagement may be of decisive effect.

d. Mental Suffering

It is a common statement that breach of promise is an exception to the ordinary rule that mental suffering cannot be recovered for in an action for breach of contract. This statement, while in a sense true, gives a false impression. The rule is not violated but illustrated, for the rule is that where mental suffering is the natural and proximate result of a breach of contract or is in the contemplation

108 And courts so explain the instruction in justifying it. See Grant v. Willey, 101 Mass. 356 (1869).
109 See supra page 368.
110 The Maine Court is presumably inadvertent in referring to "loss of affection" as an element of damage in Gerber v. Schwartz, 124 Me. 441, 127 Atl. 903 (1925).
111 But note that the very existence of affection on the part of the plaintiff is not essential to enable her to recover the so-called pecuniary elements of damage. Harrison v. Swift, 13 Allen 144 (Mass. 1866). Contra: Parks v. Marshall, 14 S. W. (2d) 590 (Mo. 1929).
112 And note the action of the courts of Maine and Wisconsin in finding damages to be excessive, the latter partially, the former wholly, on the basis of the brevity of the engagement. Densmore v. Thurston, 114 Me. 554, 96 Atl. 1068 (1916); Ableman v. Holman, supra note 16.
113 WILLISTON, CONTRACTS § 1340, n. 15; HALE, op. cit. supra note 3, § 41, n. 160; MACCOLLA, op. cit. supra note 106, at 28.
of the parties as a probable consequence of breach, recovery for it may be had.\textsuperscript{114} It is true that this rarely occurs, comparatively speaking, yet the cases are sufficiently numerous to demonstrate the rule to be as above stated. Where circumstances have been shown indicating mental suffering within it, damages therefore have been generally allowed.\textsuperscript{115}

\textsuperscript{114} Sedgwick, \textit{op. cit. supra} note 75; Bauer, \textit{Damages} (1919) \$ 79; Willis, \textit{Damages} (1910) \$ 22.

\textsuperscript{115} Thus breach of a contract to furnish dresses, whereby a bride's trousseau is deficient, will admit of such damages, Lewis v. Holmes, 109 La. 1039, 34 So. 66 (1903); as will breach of a contract to furnish a coffin, J. E. Dunn & Co. v. Smith, 74 S. W. 576 (Tex. Civ. App. 1903), (not elsewhere reported); breach of a contract to transport a corpse, Hale v. Bonner, 82 Tex. 33, 17 S. W. 605 (1891); breach of a contract for transportation whereby the plaintiff is ejected from the vehicle in an insulting manner, Coppin v. Braithwaite, \textit{supra} note 99 (Court of Exchequer, 1844); Chicago & Alton Railroad Co. v. Flagg, 43 Ill. 364 (1867); Allen v. Camden and Philadelphia Steamboat Ferry Co., 46 N. J. L. 198 (1884); breach of a contract to transmit a telegram, whereby plaintiff fails to learn of the illness of his wife in time to reach her bedside before her death, Beasley v. Western Union Telegraph Co., 35 Fed. 181 (C. C. W. D. Tex. 1889); or where the telegram contains a request for money of which defendant is notified plaintiff is in urgent need, Barnes v. Western Union Telegraph Co. 27 Nev. 438, 76 Pac. 931 (1904); Western Union Telegraph Co. v. Simpson, 73 Tex. 422, 11 S. W. 385 (1889) (money to transport husband's body for burial); breach of a contract to transport a bridegroom and party to the place of wedding, Browning v. Fies, 4 Ala. App. 580, 58 So. 931 (1912); breach of a contract to transport a bride and groom on their honeymoon trip, Central of Georgia Railway Co. v. Knight, 3 Ala. App. 436, 57 So. 252 (1911); breach of a contract for admission to a place of amusement, Aaron v. Ward, 203 N. Y. 351, 96 N. E. 736 (1911); breach of a contract to transport, by use of insulting language toward the transportee, particularly if a woman, Gillespie v. Brooklyn Heights Railroad Co., 178 N. Y. 347, 90 N. E. 857 (1904); Palmer v. Manhattan Railway Co., 133 N. Y. 261, 30 N. E. 1001 (1892); Chamberlain v. Chandler, Fed. Cas. No. 2,575 (C. C. D. Mass. 1823) (per Story, J.); Miller v. King, 84 Hun 308, 32 N. Y. Supp. 332 (1895); Cole v. Atlanta & West Point Railroad Co. 102 Ga. 474, 31 S. E. 107 (1897); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S. W. 557 (1899); or by the use of obscene language or conduct or immodest or libidinous approach toward, or assault upon, such woman, Chamberlain v. Chandler, \textit{supra}; Knoxville Traction Co. v. Lane, \textit{supra}; Craker v. Chicago & Northwestern Railway Co., \textit{supra} note 100; see remarks of Mr. Justice Clifford in Nieto v. Clark, Fed. Cas. No. 10,262 (C. C. D. Mass. 1858); or by permitting the same, Craker v. Chicago & Northwestern Railway Co., \textit{supra}; breach in like ways of the contract between innkeeper and guest, De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527 (1908). It is notable that perhaps the majority of the foregoing cases are either of contracts related to one of the great vital facts death and marriage; or are cases in which the plaintiff is a woman, and most frequently a woman complaining of a breach of contract which is either induced by, or more injurious because of, the fact of her sex. This is but natural, since marriage and death both create special circumstances making it highly probable that breach of any contract connected with either will cause mental
Mental suffering is a thing of infinite varieties, both in actuality and in possibility of phrasing. We shall not inquire how far the various forms of it for which compensation is given in breach of promise are distinguishable in fact and how far they represent mere differences in expression. Injury to plaintiff's affections is one form,\(^8\) as is distress of mind, disappointment of plaintiff's reasonable expectations,\(^117\) public disgrace,\(^118\) the general effect of the breach on plaintiff's mind and feelings,\(^119\) the injury to plaintiffs' feelings,\(^120\) humiliation,\(^121\) mortification,\(^122\) suffering from shame,\(^123\) wounded pride,\(^124\) wounded spirit,\(^125\) and anxiety of mind.\(^126\)

And as it is infinite in its varieties so is it infinite also in the variety of circumstances which may affect it and which are hence to be considered in computing the resulting damages. Any circumstance which might tend either to increase\(^127\) or lessen\(^128\) the mental suffering of the plaintiff is to be considered. Thus the abruptness of the breach, the causelessness of the breach, the fact that the breach is by marriage with another,\(^129\) the knowledge of the engagement by the plaintiff's friends\(^130\) or by the public\(^131\) generally, denial by defendant

anguish, and since womanhood is a continuing circumstance tending both to induce certain wrongs (whether as breaches of contract or as torts) causing mental anguish, and to increase the probability and degree of mental suffering from any wrong. It is notable that all these considerations unite to support recovery for mental anguish resulting from breach of promise of marriage.

It has been asserted that recovery for mental anguish as an element of contract damages is peculiar to decisions of Southern States. See note 86, supra. It is submitted that the Northern and Western authorities in the foregoing note disprove this assertion.

\(^{114}\) Wilbur v. Johnson; Bird v. Thompson, both supra note 37. And see note 110, supra.  
\(^{115}\) Coolidge v. Neat, supra note 76.  
\(^{116}\) Vanderpool v. Richardson, supra note 32; Coolidge v. Neat supra note 76.  
\(^{117}\) Bennett v. Beam, supra note 37.  
\(^{120}\) Coolidge v. Neat, supra note 76; Vanderpool v. Richardson, supra note 32; Thrush v. Fullhart, supra note 120; Watson v. Bean, supra note 121.  
\(^{121}\) Broyhill v. Norton, supra note 4; Gerber v. Schwartz, supra note 110.  
\(^{122}\) Wilbur v. Johnson, Bird v. Thompson, both supra note 37; Berry v. Da Costa, supra note 22; Thrush v. Fullhart, supra note 120.  
\(^{123}\) Coolidge v. Neat, supra note 76.  
\(^{124}\) Thrush v. Fullhart, supra note 120.  
\(^{125}\) Sherman v. Rawson, 102 Mass. 395 (1869).  
\(^{126}\) Johnson v. Jenkins, 24 N. Y. 252 (1862); Leeds v. Cook, 4 Esp. 256 (1803).  
\(^{127}\) Vanderpool v. Richardson, supra note 32.  
\(^{128}\) Vanderpool v. Richardson, supra note 32; Reed v. Clark, 47 Cal. 194 (1873).  
\(^{129}\) Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098 (1901).
of the existence of the engagement, heartless, insulting, or outrageous behaviour, and malice are all to be considered as increasing plaintiff's mental suffering. On the other hand evidence that defendant's breach arose from good motives and was without malice or want of appreciation of his contract duty, that plaintiff was incapable of true appreciation of defendant's society, or was not of a refined nature generally, are all receivable in mitigation of damages. All circumstances and acts of both parties, whether occurring within the presence or immediate knowledge of each other or not, are to be considered. And circumstances and probable results of the breach which are considered as evidence or elements of so-called pecuniary damages, such as the length of the engagement or the probable non-marriage of the plaintiff, may be considered also as increasing the plaintiff's mental suffering. Damages for mental suffering may be recovered, although none are specifically proved, since they are implied by the breach itself.

e. Injury to Health

Coming to injury to health as an element of damage we find again that it is an error to consider breach of promise as exceptional to the ordinary rule of contracts. Again it is a mere question of the application of the rule in Hadley v. Baxendale; where loss of health is the natural result of the breach of a contract, and where such loss was in the contemplation of the parties as a probable result of breach, recovery is allowed. Thus where in the dead of winter a liveryman contracted to transport a lady, who had recently been operated upon for appendicitis, from the hospital to her home, a breach of the contract whereby she was compelled to walk a part of the distance bases a recovery for resulting injury to her health. So also gener-

132Vanderpool v. Richardson, supra note 32.
134Baldy v. Stratton, supra note 33.
136Johnson v. Jenkins, supra note 128.
137Leeds v. Cook, supra note 128.
138Ableman v. Holman, supra note 16.
139Johnson v. Jenkins, supra note 128; Sherman v. Rawson, supra note 127.
140Baldy v. Stratton, supra note 33; Kelly v. Highfield, supra note 2.
141Baldy v. Stratton, supra note 33.
142Coolidge v. Neat, supra note 76. And see supra page 383.
143Watson v. Bean, supra note 121.
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ally where the breach of a contract for transportation or shelter results in an exposure of man or beast to the injury of the health of either. And so also for breach of a contract of lease whereby the tenant is evicted damages for injury to health can be had.

f. Seduction and its Consequences

It is not often that simple breach of the promise to marry produces injury to health, though such cases do occur. Much more commonly such injury results from breach of the duty against seduction. But the whole question of damages for seduction is in a state of the utmost confusion. This is principally due to the failure of courts to realize seduction as in itself a breach of the contract as well as an aggravation of damages from the principal breach. But in the first place there is a doubt as to what is meant by seduction. One court has attempted to limit it to the first act of intercourse and to exclude all subsequent acts from consideration in damages. A much more reasonable rule is applied by the Supreme Court of Tennessee to the effect that seduction is a continuing act, continuing as long as intercourse is obtained under promise of marriage. This is the result to which the fundamental conception of seduction as a breach of the fiduciary duty of the contract leads, since every act of intercourse is a fresh breach of such duty.

The failure to treat seduction as a breach of the contract leads some courts into peculiar restrictions on the resulting damages. Certain injuries are barred from consideration as not being caused by the mere breach of the promise to marry. Of course this reasoning is not logically followed out for if it were no damages for seduction could be recovered, for the seduction itself is not caused by the refusal to marry. But the results are curious. While nervous illness resulting directly from the seduction is clearly allowable in damages, in some jurisdictions it would seem that pregnancy, illness re-


147Moyer v. Gordon, 113 Ind. 282, 14 N. E. 476 (1887).

148Usually as a result of mental suffering. E. g. Yale v. Curtiss, supra note 16. For an interesting case of injury to health otherwise resulting from the breach, see Duff v. Judson, supra note 72. But as there stated, this case clearly goes too far and is quite irreconcilable with the rule in Hadley v. Baxendale.

149See Dalrymple v. Green, supra note 69.

150In Heggie v. Hayes, 141 Tenn. 219, 208 S. W. 605 (1918).

151Schmidt v. Durnham, 46 Minn. 227, 49 N. W. 126 (1891).
sulting therefrom, and the birth of a child is not. There are, however, courts which hold the contrary, and it is particularly gratifying to note that two decisions in Wisconsin which went so far as also to deny recovery for the increased injury to reputation because of pregnancy, are explained away by a dictum in a later case in the same state.

g. Abortion

Abortion presents a special problem. It does not result proximately either from the breach of the principal contract to marry or from that of the subsidiary duty against seduction. If caused without the man's solicitation it would seem clear that he should not be liable. On the other hand if he induces the woman to submit to it to her injury his action seems a clear breach of fiduciary duty, the more so as the woman's pregnant condition makes her more than ever dependent upon him.

h. Miscarriage

Miscarriage also should be considered in damages if it is shown to be caused by defendant's breach, e. g., if it results from the grief or anxiety thereby produced. But if the view be taken that pregnancy is not admissible in damages, miscarriage, of course, can never be considered.

i. Injury to Reputation

Injury to reputation is a permissible element of damage. It follows that plaintiff's bad reputation is in mitigation of damages, and this whether it is bad for lewdness or for other vice. So also

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128 Dalrymple v. Green, supra note 69; Tyler v. Salley, supra note 47.
130 Gies v. Schultz (two cases of this name), supra note 18.
132 Courts which refuse to consider pregnancy in damages of course apply the same rule to abortion in all cases. Nolan v. Glynn, 163 Iowa 146, 142 N. W. 1029 (1913); Gauerke v. Kiley, supra note 69.
133 Dalrymple v. Green; Bowes v. Sly, both supra note 69. As to venereal disease see note 71, supra.
134 Vanderpool v. Richardson, supra note 32; Coolidge v. Neat, supra note 76.
135 Burnett v. Simpkins, 24 Ill. 264 (1860); Johnston v. Caulkins, 1 Johns. Cas. 116 (N. Y. 1793); Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925 (1886); Baddeley v. Mortlock, Holt's N. P. 151 (1816).
136 Burnett v. Simpkins; Baddeley v. Mortlock, both supra note 159.
plaintiff's bad conduct prior to the breach (although known to the defendant) whether amounting to unchastity or to mere indecorous conduct is in mitigation of damages as indicating that she had little reputation to lose. Loss of reputation or bad conduct of the plaintiff subsequent to breach should not be considered in damages, particularly where seduction appears, for this might enable defendant to gain by the result of his own wrong. Derogatory reports in circulation against the plaintiff, if shown to have basis in fact, are in mitigation of damages, and the fact that when the plaintiff's attention is called to the reports by the defendant no explanation of them is made may be sufficient to warrant the jury in considering them as well-founded.

j. Elements in Mitigation of Damages

We have already seen that a wide variety of circumstances may be in mitigation of damages and have considered many of them. It would be useless to attempt to enumerate all possibilities in this field but it may be worth while to mention a few more of the most striking situations which the cases show.

Under the rule that a showing of good motives is in mitigation of damages the fact that breach was caused by the objections of defendant's parents is in mitigation if defendant is a youth, and if defendant is an elderly widower the objections of his children by the former marriage should be given equal weight. Disease of the plaintiff unknown to the defendant should likewise be in mitigation of damages.

It has been held on the other hand that the shooting of defendant by plaintiff after breach was not in mitigation. This result seems

161Denslow v. Van Horn, 16 Iowa 476 (1864); Bench v. Merrick, 1 Carr & K. 463 (1844); Williams v. Hollingsworth, 6 Baxter 12 (Tenn. 1873). Contra: Butler v. Eschleman, 18 Ill. 44 (1856).
162Palmer v. Andrews, 7 Wend. 142 (N. Y. 1831); Willard v. Stone, 7 Cowen 22 (N. Y. 1827); Johnston v. Caukins, supra note 159.
165Baddeley v. Mortlock, supra note 159.
166Supra page 386.
169Goddard v. Westcott, supra note 168.
170Schmidt v. Durnham, supra note 151.
regrettable and also unnecessary in view of the broad modern policy in favor of the settlement of all litigation concerning the same transaction or subject matter in one action.\textsuperscript{121} The fact that plaintiff's father has recovered\textsuperscript{122} or may recover\textsuperscript{123} in an action in the nature of trespass quare servitium amisit cannot, of course, mitigate plaintiff's damages for breach of the duty against seduction.\textsuperscript{124} It is plain also that an offer of marriage made subsequently to breach cannot be in mitigation, for the trust and confidence incident to the betrothal relation once having been destroyed cannot be renewed by the mere desire of the defendant.\textsuperscript{125}

Such are the principles of compensatory damages in breach of promise. The next question to be faced is that of exemplary damages.

\textbf{III. Exemplary Damages}

It seems clear that in the jurisdictions which permit of exemplary damages in any case such damages will be given in breach of promise.\textsuperscript{126} In accordance, however, with the general principle that exemplary damages are only to be given for wrongs of a particularly outrageous character\textsuperscript{127} a simple breach of the contract to marry will not base exemplary damages,\textsuperscript{128} and it has been held that where the breach is occasioned by good motives they cannot be had.\textsuperscript{129} Where on the other hand circumstances of aggravation appear\textsuperscript{130} indicating a

\begin{footnotesize}
\begin{enumerate}
\item See note 31, \textit{supra}. And observe that in Johnson v. Levy, \textit{supra} note 60, suit against the personal representatives of a contract breaker who apparently met his end upon refusing a demand of marriage made gun in hand by the plaintiff's father acting as her legal agent, the idea that shooting is in mitigation of damages was not even suggested.
\item Coryell v. Colbaugh, \textit{supra} note 6.
\item Goodall v. Thurman, \textit{supra} note 6.
\item For a recent instance in which both father and daughter recovered full damages see Luther v. Shaw, \textit{supra} note 6, and Luther v. Shaw, 157 Wis. 234, 147 N. W. 18 (1914).
\item Bennett v. Beam, \textit{supra} note 37; Holloway v. Griffith, 32 Iowa 409 (1871).
\item Luther v. Shaw, Chellis v. Chapman, Goodall v. Thurman, Coryell v. Colbaugh, all \textit{supra} note 6. Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79 (1900), often cited to the contrary, is a decision that exemplary damages are not permissible in any action. The jurisdictions which do not permit of exemplary damages in any case are enumerated in 1 Sedgwick, \textit{op. cit. supra} note 75, §§ 358, 359; 2 Sutherland, \textit{op. cit. supra} note 4, §§ 395-400.
\item \textit{Supra} page 367.
\item Baunle v. Verde, 33 Okla. 243, 124 Pac. 1083 (1912); Goddard v. Westcott, \textit{supra} note 168; Dupont v. McDow, \textit{supra} note 159.
\item Johnson v. Jenkins, \textit{supra} note 128; Goddard v. Westcott, \textit{supra} note 168.
\item Luther v. Shaw, \textit{supra} note 6.
\end{enumerate}
\end{footnotesize}
DAMAGES FOR BREACH OF PROMISE

disregard of the plaintiff's feelings and rights, especially if including seduction, exemplary damages are permissible and defendant's poverty is no ground for preventing them.

IV. LIQUIDATED DAMAGES

No case of liquidated damages for breach of promise has ever been decided but it has been incidentally discussed in three cases. In *Box v. Day*, defendant, a woman, had given a bond for £1200, conditioned to be void if she married the plaintiff. She had married another and the court doubted whether on the peculiar wording of the bond it was payable now or at a future time. "The court inclined to give judgment for the plaintiff," says the reporter, "the parties agreed before another argument, ut audivi." Clearly no doubt of the possibility of liquidated damages in such case presented itself to the court's mind.

In *Lowe v. Peers*, a covenant in the sum of £1000 "that I will not marry with any person besides herself" being in suit, it was held void as in restraint of marriage, Lord Mansfield and three concurring judges pointing out specifically that no promise to marry appeared. The implication that if such promise appeared the covenant would have been held valid seems strong here.

Finally in *Abrams v. Kounts*, a bond in the sum of a thousand dollars conditioned "for the true performance of a marriage contract" failed to base a recovery because the stipulated amount was designated as a "penalty" in the instrument.

From these cases it seems clear that none of the courts before which they came doubted that liquidated damages for breach of promise might be had. No objection in point of reason appears against this view. On the other hand, it would seem an excellent device, well designed to give certainty of remedy in case of breach without the ordeal of reading of love letters, detailing of the intimate conduct of the parties, etc., which characterize the ordinary breach of promise trial.

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182 Coryell v. Colbaugh, *supra* note 6. One case, Goodall v. Thurman, *supra* note 6, seems to condition this upon the contract being made with intent to seduce. The necessity for this distinction is not perceived.
183 Coryell v. Colbaugh, *supra* note 6. And note as of especial interest a case where the man recovered £100 exemplary damages for the woman's "particularly heartless" conduct. Smit v. Jacobs, *supra* note 133.
184 Wils. K. B. 59 (1744).
1854 Burr. 2225 (1768).
186 Ohio 214 (1829).
V. AMOUNT OF DAMAGES

As to amount of damages as in all cases where mental and physical suffering are to be considered, since there is no method of definite computation of damages, reliance must be placed in the sound discretion of the jury. And as it is so little possible to apply any definite standard the verdict will not be reversed as excessive unless it is so large as to indicate undue motives, (that is to say, passion, prejudice, corruption, partiality, bias, or other unworthy reason) on the part of the jury. This standard for reversal seems as indefinite as the jury standard it is meant to support. But it seems likely that no better or more definite standard is possible. There can be no standard for reversal except obviously outrageous excess and naturally such excess is not often found. But a review of the cases leaves one with the impression that the courts have pushed

187Horn v. Boise City Canal Co., 7 Idaho 640, 65 Pac. 145 (1901); Alabama Great Southern Railroad Co. v. Flinn, 199 Ala. 177, 74 So. 246 (1917); Flinn v. Fredrickson, 89 Neb. 563, 131 N. W. 934 (1911).
188Osmun v. Winters, supra note 2; Chellis v. Chapman, supra note 6; Wilbur v. Johnson, supra note 37; Perkins v. Hersey, supra note 81; Southard v. Rexford, supra note 25.
189Olsen v. Solveson, 71 Wis. 663, 38 N. W. 329 (1888).
190Smillie v. Mendoza, supra note 83.
191Goodall v. Thurman, supra note 6.
192Giese v. Schultz, 69 Wis. 521, 34 N. W. 913 (1887); Liese v. Meyer, supra note 37.

Such an indefinite rule may perhaps warrant illustration by a number of concrete instances taken at random from the reports. In each case either all the circumstances, or all that the court considered significant, are stated with comments on the relevance of some of them.

A. American Cases: (1) Engagement lasted five months, plaintiff continued at her vocation during that time, plaintiff after breach sold the engagement ring for $275, two years later plaintiff married another man. At the trial plaintiff testified that defendant always acted toward her as a perfect gentleman, that she lost no other offer of marriage through the engagement, that her husband was a far better man than defendant, and that her present home life was happy. Defendant testified that he had no property. Held that a verdict for $10,000 compensatory, and $5,000 punitive damages should be reduced to $4,000. Ableman v. Holman, supra note 16. Several of the circumstances considered by the court seem of doubtful admissibility.

(2) Verdict for $15,000. New trial granted for newly discovered evidence. On the second trial it appeared that defendant was worth from $40,000 to $100,000 and had an annual income of $7,500. Verdict for $20,000 reduced by the lower court to $6,500. Held that the latter sum was not excessive. Papanasopoulos v. Zissis, 234 Mich. 195, 207 N. W. 807 (1926). The case seems wrong in considering the amount of the previous verdict at a trial where some of defendant’s present evidence was not before the court.
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the difficulty of finding excess too far.\(194\) It may be that a reaction


(4) The engagement lasted only twenty-nine days. *Held* a verdict for $3,000 is excessive. Densmore v. Thurston, *supra* note 112.

(5) Seduction appeared, both parties were laborers, and defendant had no property. Held a verdict of $1,500 compensatory, and $500 punitive damages is not excessive. Luther v. Shaw, *supra* note 6.

(6) Seduction was not alleged but defendant's evidence implied it had occurred. Plaintiff denied it. Defendant was a working man whose only property was a house not wholly paid for. Verdict for $25,000 reduced to $12,500. Boyhill v. Norton, *supra* note 4.

(7) Defendant had property to the value of $50,000 to $60,000. *Held* a verdict of $5,310 is not excessive. Smith v. Hall, *supra* note 4.

(8) Seduction, the birth of a child, and an attack on plaintiff's character for chastity in defendant's answer. *Held* a verdict for $10,000 is not excessive. Liese v. Meyer, *supra* note 37.

(9) Two previous verdicts, one of $1,050, the other of $3,500, had been reversed because of the inclusion of inadmissible elements of damage. Seduction appeared. Verdict for $2,144. Much larger verdicts had been given in this class of cases. *Held* the verdict was not excessive. Giese v. Schultz, *supra* note 192. This seems even worse than (2) *supra*.


(12) Defendant was worth $25,000. *Held* a verdict for $3,600 was not excessive. Douglas v. Gausman, *supra* note 83.

B. English cases: (1) Defendant seduced plaintiff, kept her for a long period, took her abroad under pretence of marriage there, finally discarded her to marry another, and at the trial attacked her character for chastity. Defendant had considerable property, large expectations, and great superiority of social position over the plaintiff. *Held* a verdict for £2,500 was not excessive. Berry v. Da Costa, *supra* note 22. This seems wrong in considering defendant's expectations of property. *Cf.* (2), *infra*.

(2) Plaintiff was a clergyman's daughter and defendant was the son and assistant of a silversmith. No imputations were made against plaintiff's character. Verdict for £150 which it did not appear that defendant could not pay. *Held* the verdict was not excessive. Gough v. Farr, 1 Y. & J. 477 (1827).

(3) Defendant, a woman "was worth £3000 when plaintiff courted her and afterwards £6000 by the death of her brother." *Held* a verdict for £400 was not excessive. Harrison v. Cage, *supra* note 83. This seems possibly to be subject to the same criticism as (1), *supra*.

\(194\) It seems as if many of the courts were tacitly acting on the rule laid down by Mansfield, C. J., in Hewlett v. Cruchley, 5 Taunt. 277, 282 (1813), for all cases involving mental anguish. "Could anyone say," says the learned judge, "that any rational man of character would for 2000 l. put himself in this situation? If not, the damages are not excessive." This is a standard calculated to prevent reversal in well nigh every case.
has set in, however, as all the cases found of reversal and reduction for excess fall within the last thirty years. The rule of the sound discretion of the jury also prevents reversal for inadequacy of damages when the verdict does not indicate undue motives on the jury's part.

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185Ableman v. Holman, supra note 16; Papanasopoulos v. Zissis, supra note 193; Densmore v. Thurston, supra note 112; Broyhill v. Norton, supra note 4. For details of these cases see note 193, supra. Another modern tendency not as desirable as this is toward a practice of considering verdicts in other cases (Giese v. Schultz, supra note 192) or previous verdicts in the same case (Papanasopoulos v. Zissis, supra note 193) as standards for comparison as to excess. This seems improper since every case in breach of promise is extremely individual in its facts. And see further comment on this practice in note 193, supra.

186Hooker v. Phillippe, 26 Ind. App. 501, 60 N. E. 167 (1901). (Verdict for damages of one cent sustained.)

It may have been noted that a tacit assumption has been made throughout, by the use of the feminine personal pronoun and otherwise, that the woman was the party plaintiff. This practice of convenience is justified by the cases, for damages recovered by the man are indeed rare. A list of the cases of such recovery found may be of interest:

1. Harrison v. Cage, supra note 83: £400 compensatory damages.