

## THE SURVIVAL OF AN ACTION FOR BREACH OF PROMISE AFTER THE DEATH OF ONE OF THE PARTIES

If a contract to marry, or engagement, is still in existence at the time of death of one of the parties to it, the contract will be frustrated by the death of that party and no action can thenceforth arise on it. This was accepted without question by the Supreme Court of Canada in the recent case of *McBride v. Johnson*.<sup>1</sup>

A problem does, however, arise when the contract is broken, and one of the parties dies before an action on that breach is completed or even begun. It is not, by any means, settled in Manitoba whether such an action can be started or even completed if this contingency should arise.

The common law rule was that all actions in contract, with the exception of an action for breach of promise of marriage, survived both for and against the estate of the deceased party. An action for breach of promise of marriage, because of the very personal nature of the contract, was, however, treated like an action in tort to which the maxim *Actio personalis moritur cum persona*<sup>2</sup> applied. Apart from the fact that it was a personal wrong, and similar to tort in that respect, the type of relief available for breach of promise was also similar. Equity would not compel specific performance of a contract to marry, so the only relief in either case would be damages. As regards damages, breach of promise again resembled tort, and differed radically from contract. In contract the general rule was that the plaintiff might recover compensation only for material loss, while in cases involving an action for breach of promise or tort he might also claim exemplary damages.<sup>3</sup> As Phillimore, L. J., explained, although a breach of promise is a breach of contract:

... it is an action of a special character where the measure of damages may be that which is otherwise only applicable in some actions of tort. Exemplary or punitive damages may be given. The misconduct of the defendant can be used for enhancing the damages, though it had no direct bearing upon any question of compensation of the plaintiff.<sup>4</sup>

It is not surprising, therefore, that the judiciary should decide to apply this maxim, and treat an action for breach of promise as an action in tort.

There were *dicta*<sup>5</sup> to the effect, however, that if the plaintiff proved special damages he or she could recover these. Special damages, it appears, consisted in damage to the property and not to the person of the promisee, and had to arise directly and naturally out of the contract, or else to be

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1. [1962] S.C.R. 202.

2. A personal action dies with the person.

3. The situation has recently been altered in England so far as tort is concerned: *Rookes v. Barnard* [1964] 2 W.L.R., 269 (H.L.). The effect of this case on breach of promise actions has not yet been considered.

4. *Quirk v. Thomas* [1916] 1 K.B. 516. (C.A.).

5. *Chamberlain v. Williamson* (1814) 2 M. & S. 408.

*Finlay v. Chirney* (1888) 20 Q.B.D. 494. (C.A.).

*Quirk v. Thomas* [1916] 1 K.B. 516. (C.A.).

within the contemplation of the parties at the date of the promise to marry.<sup>6</sup> There have been no cases decided on this point, in fact there is an opposing *dictum*.<sup>7</sup>

It has not yet been decided in Manitoba whether the common law rules governing an action for breach of promise have been altered by statute. The relevant statute would be the Manitoba Trustee Act, which was first enacted in 1886. The statute, in its original form, allowed actions for or against a deceased person outside the realm of contract, and thereby made an inroad into the maxim, but only in a very restricted area. Section 36 of the Act dealt with actions by the representatives of a deceased person and stated that:

In case of an injury to the real estate of any person committed within six months next prior to his decease, his executors or administrators may maintain an action of trespass or of trespass on the case therefor, according to the nature of the injury, if brought within one year after his decease.

Section 37 dealt with actions against representatives of a deceased person and stated that:

In case any deceased person within six months next previous to his decease, committed a wrong to another person in respect of such other person's real or personal property, the person so wronged may, within six months after the executors or administrators of the person who committed the wrong have taken upon themselves the administration of his estate and effects, maintain an action therefor of trespass or of trespass on the case, according to the nature of the wrong, against such executors or administrators.

These sections do not appear to extend the right of action in the realm of breach of promise. Something similar to the common law idea of special damages had to be shown.

Section 49(1) of the existing statute, first introduced in its present form in 1931, does extend the right of action after the death of one of the parties. It is important to realize that Section 49(1) covers actions both for and against the deceased person's estate. It states that:

*All actions and causes of action in tort, whether to person or property, other than for defamation, malicious prosecution, false imprisonment, or false arrest, in or against any person dying shall continue in or against his personal representative as if the representative were the deceased in life . . .*<sup>8</sup>

It will be seen immediately that the reference in the subsection is to actions in tort. But does this include actions for breach of promise?

In an appeal from Ontario, the Supreme Court of Canada, in the leading case of *Smallman v. Moore*,<sup>9</sup> held that the right of action for damages for breach of a promise to marry survives after the death of the promisor by reason of Section 37(2) of the Ontario Trustee Act. The Ontario

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6. *Shaw v. Shaw* [1954] 2 All E.R. 638, 2 Q.B. 429. (C.A.).  
See also Note 5 *supra*.

7. *Per Swinfen Eady, L. J., Quirk v. Thomas, supra*, at p. 526.

8. R.S.M. (1954), c. 273. My italics.

9. (1948) S.C.R. 295.

statute, however, differs from the Manitoba one. Section 37(2) states that:

Except in cases of libel and slander, if a deceased person *committed a wrong to another in respect of his person or property*, the person wronged may maintain an action against the executor or administrator of the person who committed the wrong.<sup>10</sup>

Kellock, J., in *Smallman v. Moore*<sup>11</sup> did not accept that the words "a wrong to another in respect of his person" included actions for breach of promise, but the remainder of the court held that this was so. Locke, J., explained the reason for their decisions thus:

It is true that the manner in which redress is to be obtained for the injury is by an action for breach of contract but, in considering whether the words, "a wrong to another in respect of his person" in Section 37, ss. 2 of the Trustee Act (Ontario) apply, it is, I think, the nature of the injury rather than the form of the action in which redress may be obtained which is to be determined. That the breach of contract of this nature is a mere personal wrong is, in my opinion, concluded by authority: the injury occasioned is a personal injury to the plaintiff. Such an injury is in my view, a wrong to the plaintiff "in respect of his person" within the meaning of the section, whether it results from a breach of contract or is occasioned by a tort.<sup>12</sup>

The Supreme Court in a recent case from Alberta expressed the opinion that the Alberta Trustee Act, which is of virtually the same form as the Ontario Act, gave the same right of action.

The main difference in the wording of the Manitoba statute and the Ontario and Alberta ones is the use of the word "tort" instead of the word "wrong". It is contended that even if the two words are not synonymous, the intention of the legislature in both cases was the same. The marginal note to Section 37 of the Ontario Trustee Act reads, "Actions against executors and administrators for torts". Although these notes are not considered a part of the statute, it is still interesting to see this reference to torts as though in this particular context the words torts and wrongs are synonymous.

Lord Esher, M.R., went to great lengths in *Finlay v. Chirney*<sup>13</sup> to show that an action for breach of promise of marriage was so like an action in tort that with regard to this maxim it should be treated as an action in tort. "It is true," he said:

. . . that in the old days an action for breach of promise of marriage was in form an action founded on contract, and that even now it is still treated as an action for breach of contract. Formerly an action of tort was almost inevitably a personal action; but it did not follow, necessarily, that an action was not personal because it was founded on a breach of contract. The complaint in an action for breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are

10. R.S.O. 1937, C. 165. Now R.S.O. 1960, C. 408, s. 38(2). (My italics). Only Section 37(2) of the Ontario Trustee Act has been referred to as there are few cases, if any, regarding actions on behalf of deceased persons, i.e., under Section 37(1). The wording of Section 49(1) of the Manitoba Act is such, however, that once it is shown that an action against a deceased person is possible, it automatically follows that the converse will be true. It is not necessary, as is the case of the other provincial acts mentioned to prove each right of action independently.

11. [1948] S.C.R. 295.

12. *Supra*, at p. 298.

13. (1888) 20 Q.B.D. 494.

damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation.<sup>14</sup>

Actions for breach of promise were therefore treated as actions in tort, no right of action surviving the death of either of the parties. Actions in tort after the death of either party became possible by the Manitoba Trustee Act. It would appear to follow logically that this would apply equally to breach of promise suits. If this were not so then these actions would fall between the two stools. They would not be treated, in this respect, as an action in tort or as an action in contract. The Manitoba Legislature, as did the other provincial legislatures, expressly excluded these actions which they did not intend the statute to apply to. They therefore had the opportunity of excluding breach of promise suits. The inference would therefore appear to be that they intended to make all other causes in contract and tort actionable after the death of one of the parties.

The alternative is that suits for breach of promise of marriage will be virtually the only actions left to which the unfortunate maxim *Actio personalis moritur cum persona* still applies. The maxim was originally applied to every form of action, whether arising out of contract or tort.<sup>15</sup> The trend over the years has been to limit the application of this maxim, and in the interest of justice and conformity it should be judicially put out of its misery.

It is hoped that the courts will see fit to hold that actions for breach of promise survive the death of either of the parties, and therefore, lie in either the field of contract or tort, or even a combination of the two, but not in some no man's land between them. If this contention is accepted by the courts it will make the law in Manitoba on this point much clearer than in any other province.

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14. *Ibid.*, at p. 498.

15. *Black's Law Dictionary* (4th ed.) p. 47.

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