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Breach of Promise Trials in Victorian Law and Literature

Randall Craig *

It is relatively unusual for a breach of promise trial to make it into the pages of a Victorian novel — the most famous exception, of course, being *The Pickwick Papers* (1837). In portraying the fictional trial, *Bardell* v. *Pickwick*, Dickens borrowed heavily from an infamous criminal conversation action involving the Prime Minister of England, *Norton* v. *Melbourne* (1836), and from the ingenious, albeit unsuccessful, stratagems of George Norton's attorney, Sir William Follett.[1] Dickens treats the incident comically, revels in the peculiarities of the law and the legal proceedings designed to implement it, and — not insignificantly — rewrites the necessary first step in a divorce case, the successful prosecution for adultery, as an action for breach of the promise to marry.

Just one year prior to her painful initiation into litigation and marriage law and two years before her legal history was immortalized in *Bardell* v. *Pickwick*, Caroline Norton, the indirectly accused adulteress in *Norton* v. *Melbourne*, published her first novel, *Woman's Reward* (1835).[2] Her decision to portray a breach of promise action in this work is, of course, coincidental, but it is also puzzling, since *Woman's Reward*, unlike *The Pickwick Papers*, is neither episodic nor comic and since the case of *Bigley* v. *Dupré* is both tangential to the plot and inconsistent with the generally melodramatic tone of the novel. The questions raised by what appears to be a gratuitous episode are accentuated by an improbable plot turn considerably after the trial, which concludes with the dismissal of the plaintiff's suit on the grounds that her father has tampered with the evidence. Readers are subsequently informed that the plaintiff "is to be married to the gentleman who was employed to defend Mr. Dupré's

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1 For discussions of Dickens' famous case, see Percy Fitzgerald, *Bardell* v. *Pickwick* (London: Elliot Stock, 1902), Jonathan H. Grossman, *The Art of Alibi: English Law Courts and the Novel* (London and Baltimore: Johns Hopkins University Press, 2002), and my own *Promising Language: Betrothal in Victorian Law and Fiction* (Albany, NY: SUNY Press, 2000).

2 *The Wife and Woman's Reward* (London: Saunders and Otley, 1835). All references are to this edition and are cited in the text as *WR*.

case, and who is very much in love with her" (*WR*, p. 296). This casual disclosure is especially puzzling because virtually nothing else is said about either the marriage or the couple.

The unlikely marital alliance between legal antagonists in *Woman's Reward* suggests the topsy-turvy world of W. S. Gilbert, who abandoned a legal for a literary career and whose *Trial by Jury* (1875) farcically treats the judicial proceeding that Dickens satirizes and Norton, apparently, trivializes. The trial in this instance (*Angelina* v. *Edwin*) is primarily a vehicle for Gilbert's mockery of all aspects of breach of promise law. The farcical action blunts the potential for social criticism, and the libretto engages stereotypes without interrogating them, leaving audiences amused but detached from the issues that serve as the pretext for comedy. No verdict is reached in this case either: the absurd proceedings are brought to a chaotic close when the judge leaps off the bench and proposes to the beautiful plaintiff.

Norton's fictional trial may be much less well known than Dickens'— Gilbert's too exaggerated to be taken seriously — yet both raise interesting questions concerning Victorian law and society. These issues include the role of comedy in literary depictions of breach of promise law and the narrative patterns into which these representations tend to fall. One such pattern is a symbolic romantic substitution: lovers who have become litigants are replaced by litigators who become lovers. The symbolic exchange produces a satisfying romantic closure (a "verdict" of marriage) but only by rendering the law either ridiculous or entirely irrelevant. In actuality, the legal system, could not sentence unsuccessful defendants to marriage, but it did regularly impose damages upon them.[3] In these literary reworkings, however, the legal system's solution to broken promises is neither monetary compensation nor punishment but the replacement of the reluctant bridegroom with one of its own. This substitution leads to a second narrative pattern, which I will call promissory supplementarity. Broken promises generate more promises, always with the possibility, now heightened, of their not being kept. The processes intended to police and punish false promisors paradoxically generate more irregular betrothals. The proliferation of illicit promises, that is, of promises by those seemingly in no position to promise marriage, is an inevitable consequence of symbolic substitution but also an inherent counterpoint to it. The "'verdict' of marriage" is

3 Whether the damages were compensatory (for loss of income or for pain and suffering) or punitive was neither clear nor free of controversy. For a discussion of some of these issues see, "Damages for Breach of Promise of Marriage", *The Albany Law Journal*, 10 (1874), pp. 341–343, and W. J. Brockelbank, "The Nature of the Promise to Marry — A Study in Comparative Law", *Illinois Law Review*, 411 (May-June, 1946), pp. 1–26.

always subject to appeal; that is, it is always threatened by the possibility that occasioned the legal action in the first place, broken promises. These curious romantic/juridical economies of substitution and supplementarity function at cross-purposes, leaving an unresolved tension at the end of these works between closure and continuation, between poetic and legal justice.

In discussing the two examples that I have just introduced, I will focus exclusively on the aspects of the trials most closely related to the marriages with which they conclude, starting with the depiction of the legal profession in *Woman's Reward*. Neither of the lawyers in *Bigley* v. *Dupré* escapes Norton's criticism. The plaintiff's attorney constructs a compelling story, featuring a young and innocent girl misled by a treacherous and worldly young man. Clearly, it is a formulaic and familiar tale. When he finishes, it seems "impossible [...] that excessive and enormous damages should not be awarded" (*WR*, p. 263) — "excessive and enormous" making clear what Norton thinks of the proceedings.

Mr. Jennings, counsel for the defendant, "heard, unmoved, the pathetic address of his opponent, and sate *feuilletant* his own brief, in which an equally affecting case was made out for the wronged Lionel" (*WR*, p. 264). Jennings cannot rebut the existence of the engagement, but he will contend that mitigating circumstances dictate that "the damages, if laid at all, should be laid at one farthing" (*WR*, p. 264). The proceedings promise to be perfunctory, with Mr. Jennings' interest in the case extending little beyond his own interests, which, presumably, do not shift from the defendant's purse to the plaintiff's person until she sneaks "unobserved into the court "(*WR*, p. 267) to disclose the evidence tampering.

Prior to this unexpected turn of events, Jennings daydreams throughout the trial, thinking primarily about an upcoming case "in which the fair plaintiff had been more deeply injured than Rosabel, and which excited considerable interest and expectation" (*WR*, p. 265). Specifically, he plans to cross-examine the plaintiff in a manner that will appeal to the jury's sensitivities. His idle thoughts reveal both the low estimate of a woman's ability to withstand irony and the general condescension toward female plaintiffs that make his subsequent proposal to Rosabel all the more inexplicable.

Jennings' reverie is brought to a sudden end by the commotion surrounding Rosabel's revelation. The sensational resolution of the trial causes "several sentimental girls (who were in the habit of coming into court to be amused by the trials of their fellow-creatures, and, perhaps by seeing them condemned to death) [to] burst into tears at this horrid proof" (*WR*, p. 267–268). Norton implies that the whole event has the character of spectacle, of theater — its primary consequence being the

titillation of "romantic [...] listeners" (*WR*, p. 268), some of whom continue to wonder whether Rosabel's entrance had been staged "to shield her false hearted lover" (*WR*, 268).[4] This inference is fortified by the unexpected titillation of the impassive Edward Jennings. Subsequent events prove that he far surpasses the chorus of young women in the role of "romantic listener." His verdict, indicated only by "dark flexible eye-brows [that] rose to the very margin of his white well-fitting barrister's wig" (*WR*, p. 266) at the sight of the plaintiff, ultimately takes the form of a proposal of marriage.

What can we conclude about Edward Jennings' engagement to Rosabel? Norton does not pursue this sub-plot; readers are off-handedly informed of it in a letter to the defendant's sister much after the trial has concluded. If Rosabel represents a kind of integrity seen nowhere else in the courtroom, it is difficult to explain her attraction to one shown to profit from this system, or his attraction to her. Are we to imagine that his "white well-fitting barrister's wig" provides such a contrast to her father's shabby appearance — and behavior — that she cannot resist accepting his offer of marriage? Or that his professional *sangfroid* has been melted by her unprecedented example of integrity and courage? Either explanation, I suppose, is possible; neither seems probable; and Norton provides no means of answering the question.[5] She does, however, reinforce the stereotype of men — whether of the jury, for the litigants, or on the bench — being unable to resist the charms of modern-day Phrynes.

One might more naturally expect this stereotype from W. S. Gilbert, and *Trial by Jury* indeed flaunts this attitude. *Angelina* v. *Edwin* appears forty years after *Bigby* v. *Dupré*, when breach of promise cases are both more common and more readily portrayed in comically pejorative terms. Even "serious" treatments of the issue, such as Charles J. MacColla's, *Breach of Promise: Its History and Social Considerations* (1879), are not immune from comedy.[6] MacColla cannot forego adding to his title, *And a Glance at Many Amusing Cases Since the Reign of Queen Elizabeth*. When humorous factual examples are lacking, he simply creates hypothetical narratives, featuring the likes of Martha

4 It is not just the romantically inclined who are prone to this view. When Rosabel frustrates her father's plan, he turns against her, at first dismissing her story in "a speech about love-sick girls seeking to shield the authors of their ruin" (*WR*, p. 269) and then insinuating that she herself altered the letters "in her first angry moments" of rejection (*WR*, p. 270).

5 We learn nothing more of the couple, except that Rosabel still feels guilt "for the trial and all that" (*WR*, pp. 295–296).

6 Charles J. MacColla, *Breach of Promise: Its History and Social Considerations* (London: Pickering, 1879).

Graball, Volumnia Merrythought, and Robert MacGreedy. MacColla's critical view of his subject is made clear from this elaborate, if contrived, metaphor: "The poetry of love is now wedded to the trammels of the law. The offspring of this union is the action of breach of promise of marriage. So many are the considerations begotten by this singular alliance that volumes might be compiled, christening its strange progeny and recording the mischievous tendencies of these small fry."[7] The trope is a telling one. It speaks of the transmogrification of the natural into the monstrous, of legitimate unions and children into ill-considered mixed marriages and grotesque spawn. The prevalence of this attitude makes it not entirely surprising that this fractious child finds its way into a comic opera by W. S. Gilbert.

The figurative construction of natural and unnatural as applied to love and law has a corollary in *Trial by Jury* in terms of two distinct narrative modes, the personal and the legal.[8] When the litigants are relating their feelings, they seem to speak with considerable candor and naturalness. Indeed, they make a simple appeal to nature and natural urges to justify their behavior. Edwin tells an uncalculated tale of falling in and out of love with Angelina (ll. 57–73); she seems to share his sentiment that feelings naturally change and confesses that, in truth, "I am no unhappy maid!" (l. 214). These "natural" moments, like Rosabel's unscripted entry into court, stand out against the background of legal and, by implication, untruthful speaking.

Edwin's appeals to free love and to the weakness of men's moral character may be unlikely, but they are not entirely unwise, legal strategies, especially when it is remembered that the all-male jury confesses to have themselves once been scamps, rovers, and cads (ll. 75–76). Any hopes that the defendant might entertain, however, are dashed when the Jury, upon first seeing the Plaintiff, forgets their claim to have foresworn philandering. In professing to Angelina, "Just like a father / I wish to be" (ll. 280–281), the Foreman of the Jury exposes the close link between paternalistic explanation and sexual motivation. In the name of the father, he wishes to save and to seduce the daughter, who, at this rate, appears destined to a career resembling Becky Sharp's rather than that of an idealized "Angel(ina) in the House." Even as a knowing appeal to fellow men and "rovers," Edwin's strategy will fail precisely to the degree that its rationale is correct.

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7 MacColla, p. 35.

8 The equivalent of these two modes in *Bigley* v. *Dupré* are the "legal" narratives constructed by the litigants' attorneys and the "natural" narrative supplied by the complicating voice of the narrator.

When faced with the prospect of paying damages to his jilted lover, Edwin offers to marry "this lady to-day, / And I'll marry the other to-morrow!" (ll. 316–317). This seemingly preposterous suggestion is, in fact, consistent with arguments made in actual breach of promise cases. In *Caines* v. *Smith* (1847), for instance, the defendant married another woman after becoming engaged to Caines. Smith's attorney maintained that his client's engagement to the plaintiff was not broken by his marriage to another because the "wife may die before the lapse of the reasonable time, and he may still be able to perform his contract with the plaintiff."[9] This amazing argument was summarily rejected by the court: "Why should we presume that the wife will die before the lapse of a reasonable time, or in the lifetime of her husband? We ought rather to presume the continuance of the present state of things; and while that continues, it is clear that the defendant is disabled from performing his contract."[10] Edwin, it seems, would not have been allowed to marry one today and the other tomorrow.

Despite the overwhelming precedent in case law, the Judge in *Angelina* v. *Edwin* initially endorses the defendant's bigamous proposition. Counsel for the plaintiff quickly counters that "[t]o marry two at once is Burglaree!" (l. 324). One might expect "bigamee" rather than "burglaree" here, especially since neither rhyme nor meter precludes the more obvious and accurate term. Why, then, the substitution, and what, if "burglary" is the correct term, is stolen from whom? One possible gloss is that Edwin proposes taking more than his marital portion; that is, he would deprive some potential husband of a wife. If this is the sense intended by Angelina's attorney, then he has in common with Mr. Jennings a rather low estimate of women as property rightfully owned by — or stolen from — men. Another possible explanation is that the theft is of the damages rightfully owed the plaintiff — and, of course, her attorney, although a sharp lawyer might also see the "burglaree" as generating even more litigation, therefore, additional income.

There is, however, another possible explanation, and it emerges from the Judge's role in the operetta. The most serious larceny in the play is committed by the Judge against his jilted fiancée's father. The object of theft is not the "rich attorney's / Elderly, ugly daughter" (ll. 149–150), whom neither man wants, but her father's legal practice. According to this logic, the "burglaree" committed by jilting defendants is not of a person but of her property, not of damages but of dowries.

9 *Caines* v. *Smith*, 15 *Meeson and Welshby's Exchequer Reports*, 189–190. Also see *Short* v. *Stone* (1846), *Queen's Bench Revised Reports*, pp. 361–372.

10 *Caines* v. *Smith*, *op. cit.*, 190.

The Judge admits that he became engaged solely to further his career.[11] Having grown wealthy from the cases sent to him by his prospective father-in-law, he spurns his fiancée, now described as an "incubus" (l. 148), breaking both the promise to the daughter and the "gentleman's agreement," if such it is, with her father. He laughingly boasts that the "rich attorney my character high / Tried vainly to disparage" (ll. 151–152). "Tried" in this instance must be taken to mean "attempted" (without success) and "sued" (again without success).

Having risen in the profession to the status of judge (in his own words: "my being made a nob / Was effected by a job" [ll. 169–70]), he now hears cases of exactly the kind in which he was once a defendant. Hence the double irony of his description of his judicial accomplishments: "And many a *burglar* I've restored / To his friends and his relations" (ll. 144–145, my emphasis). The Judge apparently dedicates himself to returning the favor initially granted to him. Not only has he escaped punishment for inconstancy and exonerated fellow thieves, *i.e.*, jilts, but he has also positioned himself to use the courtroom "to try" additional "burglarees."

The Judge's initial attempt involves the First Bridesmaid, but his attentions are immediately diverted by the Plaintiff's "exquisitely fair [...] face" (l. 220). He retracts the love note given to the former and passes the very same billet doux to the latter. Although this missive places the Judge, who outdoes even the defendant in the rapidity of his heart swings, in some danger of another breach of promise suit, the abrupt and chaotic conclusion of the trial pre-empts any reference to the First Bridesmaid's becoming a suitor, in the legal sense, when the Judge is no longer her suitor in the romantic sense. His "character high" is finally brought "low," but only comically so, when he leaps from the Bench to propose marriage to Angelina. In one fell swoop, then, he defeats the Foreman of the Jury's amorous designs upon the plaintiff, resolves Edwin's dilemma, dismisses the case against the defendant, and, finally, convicts him of a new charge, snobbery rather than robbery. Edwin is a "snob" for making Angelina the "fob" accepted by the Judge (ll. 413–415 and 418).

Several conclusions are suggested by this these fictional breach of promise trials. One general observation is that these cases expose a clash

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11 The Judge complains that he "soon got tired of third-class journeys / And dinners of bread and water" (ll. 124–125). In this regard, his early career resembles Gilbert's. Sidney Dark and Rowland Grey report that Gilbert practiced law for four years, earning only seventy-five pounds in the first two years and "averaging five clients a year." *W. S. Gilbert: His Life and Letters* (London: Methuen, 1923), pp. 7–8.

of social and legal values so threatening as to be approached only by comic means. The irreconcilable opposition between sentimental and contractual views of love remains comfortably obscured until betrothals fail. Comedy then becomes the means of voicing this vexed contradiction but also of leaving it unresolved. Comic decorum further explains Dickens' "amelioration" of the sexual accusations against Mrs. Norton. He mitigates the alleged adultery (criminal conversation) by dramatizing it as a literal conversation. Broken promises to marry (mere words) can be laughed at as "impalpable trifles," but broken vows of sexual fidelity are not so lightly handled.[12] Although breach of promise trials in point of fact often did involve pre-marital sexual contracts, the rare cases receiving literary treatment do not.[13] Norton, for instance, allows Rosabel Bigley a day in court, but not Annie Morrison, who is seduced and abandoned by Lionel Dupré but not compensated with marriage to an attorney.[14]

The motifs of symbolic exchange and promissory supplementarity convey a mutually reinforcing critique of Victorian breach of promise laws. The first pattern, the substitution of amorous lawyers for unloving defendants, might appear to humanize impersonal agents of the law, but only in the sense of showing them to be as prone to opportunism and self-interest as the next person. Lionel and Edwin are undisguised — and unapologetic — libertines; participants in legal proceedings, such as Jennings, the Judge, and the Jury, are clandestine — and equally unrepentant — suitors, who exploit professional circumstances for

12 Betrothal is also less charged because this contract tends to be viewed as less binding than a marriage contract. Courts typically have a difficult time deciding to define the legal status of a promise to marry. See, for example, *Beachey* v. *Brown* (1860), in which a woman's prior engagement is held not to preclude her marriage to another, since the engagement is "not a previous contract of marriage, but a promise to make such a contract." *Ellis, Blackburn and Ellis' English Queen's Bench Reports*, 804. The adjective most often applied to the action for breach of the promise to marry by legal scholars would seem to be "anomalous." In addition to Brockelbank, cited above, see, Theodore W. Cousens, "The Law of Damages as Applied to Breach of Promise of Marriage," *Cornell Law Quartely* 17, pp. 367–394.

13 A good indication of the changing treatment of pre-marital sexual contracts is found in *Morton* v. *Fenn* (1783) and *Finlay* v. *Chirney and Another* (1888). In the former the arrangement was viewed as "not such a turpis contractus as to prevent the plaintiff from recovering" (3 *Douglas Reports* 212). In the latter, by contrast, it was maintained that "such a contract would be contrary to public policy, morality, and decency, and such a claim could never be allowed" *Queen's Bench Division*, vol. 2, 501–502.

14 Nor would a "respectable" woman allow her private life to become the subject of a public proceeding. Thus in Norton's *Lost and Saved* (1863), Beatrice Brooke, who has been duped into a sham marriage ceremony and subsequently abandoned by Montague Traherne, never considers legal action against her seducer.

romantic purposes. The latter pattern, the proliferation of irregular promises, reveals that legal institutions and practices, at the least, occasion and, at the worst, promote the profligate promising that they are charged with regulating. It is not merely that broken promises cannot be remedied by more promises: the net result is a promissory chain, no link of which is impervious to the inherent weakness of all promises. Beyond that, promises of love gone wrong outside the courtroom cannot be remedied by promises of love inside the courtroom. There may be an attractive romantic logic (and sense of poetic justice) in this idea, but Norton's gratuitous and Gilbert's comic appeals to it expose a cynical view of the law as impotent and ultimately irrelevant to fundamental human concerns.

In closing, let me add a final cynical turn of the screw to this already dark vision of the relationship of law and love. In bringing *Angelina* v. *Edwin* to a close, the Judge sends the attorneys home, telling them: "Put your briefs upon the shelf, / I will marry her myself! (ll. 384–385). It is to be remembered that one of the phrases used during the Victorian period to describe unmarried women was that there were "on the shelf." The obvious implication is that Gilbert, and I would add Norton, feels that the law is an old maid and that lawyers can do more for their clients by marrying them than by representing them. Plaintiffs in breach of promise case are, by definition, candidates for an unmarried life — and were, by popular stereotype and in the courtroom narratives of their attorneys, already virtually spinsters. Their legal status, furthermore, invokes another of the synonyms for an unmarried woman, *femme sole*. By contrast to single women, wives possess no independent legal existence. The doctrine of coverture effectively prevents them from either initiating or being named in a lawsuit. It might be argued, therefore, that by effectively screening ineligible (read "married") women from participation, the legal system functions not so much to protect unmarried women from jilts — although such was surely the case — as to expose them to legal thieves, who remove them, by marriage, from both the romantic and the juridical economies. It is not, therefore, that the law is so much irrelevant to human concerns as it is identical with them. The law is not *like* love, as W. H. Auden has suggested, it *is* love.[15]

15 "Law like Love," in *Chief Modern Poets of Britain and America, Vol. I, Poets of Britain*, ed. by Gerald DeWitt Sanders, John Herbert Nelson, and M. L. Rosental (New York: Macmillan, 1970), pp. 363–365.