

The Law Commission

(LAW COM. No. 26)

BREACH OF PROMISE OF MARRIAGE

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
14th October 1969*

LONDON
HER MAJESTY'S STATIONERY OFFICE

4s. 0d. [20 p.] net

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

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THE LAW COMMISSION

Item XV(b) of the First Programme

BREACH OF PROMISE OF MARRIAGE

*To the Right Honourable the Lord Gardiner,
the Lord High Chancellor of Great Britain*

A. INTRODUCTION

1. Under the heading of “miscellaneous matters involving anomalies, obsolescent principles or archaic procedures” in our First Programme we singled out a number of matters for examination upon the ground that they seemed to rest upon social assumptions which are no longer valid. Among these was included the action for breach of promise of marriage.

2. In February 1966, we circulated provisional proposals for the simple abolition of the right of action for breach of promise of marriage. On this we consulted the Bar Council, The Law Society, the Family Law Sub-Committee of the Society of Public Teachers of Law and the lay organisations listed in Appendix B. There was widespread support from the lay organisations for the abolition of the right of action. The professional bodies, though they clearly disliked the present law, felt that there was a need for some remedy if injustice were to be avoided: but there was a variety of opinion as to the nature of the remedy required. We accepted the view that the law should in certain circumstances provide a remedy for losses suffered upon the termination of an engagement. Accordingly, in March 1968 we initiated further consultations. This Report and its recommendations are based upon these further consultations.

3. We have borne in mind the solutions to the problems of broken engagements adopted by some other systems of law. A brief discussion of the laws in the United States, and of France, Italy, Western Germany and Switzerland will be found in Appendix C to this Report. However, social attitudes vary widely from country to country on a matter such as this; and the law is no sure guide to these attitudes. In England, for instance, it would be wrong to infer from the existence of the action that people approve of its use—indeed our consultations indicate the contrary. The Latey Committee¹ found that the action was not thought of by young people as a way out of their problems. They made no recommendations on this point but said:

“[We] indulge in the fervent hope that if and by the time any of *our* recommendations are made law there will be no such thing anyway”.

B. PRESENT REMEDIES ON TERMINATION OF AN ENGAGEMENT

(a) The Action for Damages

4. Before the 17th century the promise of marriage was regarded exclusively as an ecclesiastical matter. It is clear that a promise to marry would not be

¹ *Report of the Committee on the Age of Majority*, (1967); Cmnd. 3342, para. 184.

enforced otherwise than by admonition; and damages for breach were not obtainable;² on the other hand, where the parties concerned had gone through a form of marriage ceremony without a church service the ecclesiastical court would decree the formality of a solemnization in the face of the Church, because a marriage *per verba de praesenti* was looked upon as a legal marriage in the eyes of the secular authority.³ In the reign of Charles I breach of a promise to marry became actionable in the temporal courts.⁴ In 1753 Lord Hardwicke's Act to prevent clandestine marriages required all marriages to be solemnized in church after publication of banns, and abolished suits in the ecclesiastical courts to compel the celebration of a marriage in the presence of a priest by reason of a preceding marriage *per verba de praesenti*. In the 18th century Lord Mansfield, in the course of trying an action for breach of promise, commented that "it would be most mischievous to compel parties to marry who can never live happily together".⁵

5. The action for breach of promise, as it has evolved, reflects the refusal of the common law to draw any distinction between commercial and other types of agreement. Hence mutual promises to marry fulfil all the conditions of a legally binding contract and can be enforced in much the same way as, for example, a contract of employment. It would, no doubt, have been open to the courts to hold that an agreement to marry is a purely social or domestic arrangement not intended to have legal consequences, as they have held in the case of simple agreements by husbands to pay allowances to their wives,⁶ but this was not the view they took. If one party, without lawful excuse, refuses to perform the contract by marrying the other, that party is liable to pay damages which may include, in addition to any damages for direct pecuniary loss, general damages for injury to the plaintiff's feelings, reputation and matrimonial prospects.⁷

6. The defences which are common to all actions for breach of contract, such as infancy, illegality or misrepresentation inducing the contract,⁸ may be raised by the defendant. Engagements to marry are not contracts *uberrimae fidei*, i.e., there is no special duty to disclose all material facts which are known to one

² *Holt v. Ward* (1732) 2 Strange 937. On the early history of this branch of the law see the judgments of Bowen L.J. in *Finlay v. Chirney* (1888) 20 Q.B.D. 494, at 502 and of McCaigie J. in *Cohen v. Sellar* [1926] 1 K.B. 536, at 540. See also J. Dundas White, (1894) 10 L.Q.R. 135.

³ In *Cohen v. Sellar* (n. 2 above) at 543 McCaigie J. said, "It is a striking circumstance of the past that until Lord Hardwicke's Act (26 Geo. 2, c.33) was passed in 1753 the Church had the power to order specific performance of a promise to marry". In view of *Holt v. Ward* (n. 2 above) this is a highly questionable proposition. It appears that McCaigie J. may have confused a contract to marry (in the future) with a contract of marriage, which had been entered into without the presence of a priest or deacon. In the latter case either of the parties could enforce the solemnization of the marriage before a person in Holy Orders: *R. v. Millis* (1844) 10 Cl. & Fin. 534.

⁴ However, an action was maintainable at common law as early as 1576, if not earlier, for the return of a gift made in contemplation of marriage: *Young v. Burrell* (1576) Cary 54.

⁵ See *Atchinson v. Baker* (1796) Peake Add. Cas. 103.

⁶ *Balfour v. Balfour* [1919] 2 K.B. 571.

⁷ However, "It cannot be a consequence arising naturally out of a breach of promise of marriage that the woman is to be entitled during the remainder of her life to charge the expenses of her living and maintenance to her faithless lover" *per* Bowen L.J. in *Finlay v. Chirney* (n. 2 above) at 507-508.

⁸ In *Wharton v. Lewis* (1824) 1 C. & P. 529 a defendant who had been induced to promise marriage by the plaintiff's fraudulent misrepresentation of her financial prospects was held to have a good defence. By way of contrast, such facts would not justify annulment of an actual marriage.

party but not to the other. It is very doubtful whether public opinion would tolerate any such burden of disclosure being placed by law upon an engaged couple even if it were practicable to do so. Nevertheless, there are certain defences which are special to actions for breach of promise. Thus where one party suffers from a serious mental, moral or physical infirmity, arising before or after the engagement, the other party is justified in terminating the contract unless when he entered into the engagement, he was fully aware of it. It is unlikely that a court would now hold that a party cannot rely upon his own mental or physical infirmity in order justifiably to terminate the contract. The case of *Hall v. Wright*,⁹ which suggests the contrary, was decided before the modern doctrine of frustration had been properly developed and may no longer be good law.¹⁰

7. A number of peculiarities distinguished the action for breach of promise of marriage from other contractual claims. Thus the Evidence Further Amendment Act 1869, s. 2, made the parties to a promise of marriage competent witnesses in an action for breach of the promise but provided that “no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise”. This provision is striking because, even though the court reaches the conclusion that the plaintiff in the action is honest, truthful and reliable, yet, without independent corroboration, the claim must fail.

8. Except by consent or on transfer from the High Court, the County Courts have no jurisdiction to try actions for breach of promise. Further, either party may demand trial by jury.¹¹ Legal aid is not available either for the plaintiff or the defendant;¹² in this respect it has clearly been the policy of Parliament not to encourage such actions.

9. Where the action was brought against the estate of a deceased promisor, the common law rule was that damages could not be recovered except to the extent of any special damage;¹³ but this rule appears to have been abrogated by s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934. Where action is brought on behalf of the estate of a deceased promisee the damages recoverable against the surviving promisor are limited by s.1(2)(b) of the Act of 1934 to “damage to the estate”.

10. The action can be brought by either the man or the woman; but actions by men are exceedingly rare. It is not possible to tell precisely to what extent actions are begun or threatened at the present day but it is well known that it is uncommon for an action to come to trial.¹⁴ The information we have from the

⁹ (1859) E.B. & E. 746, 765.

¹⁰ In that case Pollock C.B. said, (n. 9 above) at 795, dissenting from the decision of the majority, “I think that a view of the law which puts a contract of marriage on the same footing [as regards justification for withdrawal] as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority”.

¹¹ Administration of Justice (Miscellaneous Provisions) Act 1933, s. 6; County Courts Act 1959, s. 94(3).

¹² Legal Aid and Advice Act 1949, s. 1(2) and Schedule I, Part II, 1(b).

¹³ *Finlay v. Chirney* (n. 2 above); *Quirk v. Thomas* [1916] 1 K.B. 516; *Riley v. Brown* (1929) 98 L.J.K.B. 739.

¹⁴ The Civil Judicial Statistics do not reveal the number of actions brought each year for breach of promise. But even if it were possible to ascertain this number, it would be difficult to assess the significance of the right of action; there must be some instances in which its use is threatened, and a settlement reached before issue of a writ.

legal profession is to the effect that in such cases as do come to court the claim for actual financial loss is usually only a minor item: normally the substantial claim is for general damages.

(b) Recovery of Gifts and Property

11. An engaged couple will nearly always have made gifts to each other and have received gifts from friends and relatives; they may also have acquired property which they intend to use for the purposes of their marriage. The legal rules governing these items may be summarised as follows:—

- (i) Gifts made to the engaged couple, as such, are presumed in the absence of evidence to the contrary, to be conditional on the marriage taking place and must be returned to the donor if the marriage does not take place, for whatever reason.
- (ii) Unconditional gifts between the parties¹⁵ are not recoverable; gifts conditional upon the conclusion of the marriage are recoverable unless the engagement was unjustifiably broken by the donor.¹⁶ There is a presumption that engagement rings are conditional gifts,¹⁷ but in other cases it is a matter of evidence whether a particular gift was intended to be absolute or conditional.
- (iii) The general rule is that where there is no evidence that a gift is intended, money paid or property transferred without consideration by one party to the other may be recoverable on the ground that it is held on trust for the transferor.¹⁸ It is not clear how far this principle applies to transactions between engaged couples. Where the transfer is by the man to the woman it is possible that the presumption of advancement will apply so that he will be presumed to have made a gift unless he proves the contrary. But it is more likely that this presumption will only apply where the parties subsequently intermarry.¹⁹ In the rare cases where the concept of the resulting trust comes into play it is, of course, irrelevant that the party seeking recovery is in breach of the contract of engagement, for the trust is imposed when the transfer is made, not on the failure of the engagement.
- (iv) Where the parties to an engagement make a joint investment in property to be used during their marriage (e.g. a matrimonial home) it seems that their beneficial interests in that property will be determined in accordance with the ordinary rules of the law of property, so that, *prima facie*, they will hold in proportion to their respective contributions to

¹⁵ e.g. Christmas presents.

¹⁶ *Cohen v. Sellar* (n. 2 above). The donor of an engagement ring cannot recover it if he is responsible for the termination of the engagement.

¹⁷ *Jacobs v. Davis* [1917] 2 K.B. 532.

¹⁸ See Lord Upjohn in *Pettitt v. Pettitt* [1968] 2 W.L.R. 966, at 990.

¹⁹ Thus in *Moate v. Moate* [1948] 2 All E.R. 486 (where the presumption of advancement was applied to a gift between parties who subsequently married), Jenkins J. said (at 487): "It seems to me the presumption would be . . . that the intending husband is making a gift . . . by way of wedding present which he intends to take effect in her favour beneficially provided the marriage is duly solemnised."

the purchase price.²⁰ But the position with regard to other contributions, e.g. improvements or repairs to property, is far from clear.

C. SPECIAL APPLICATIONS OF THE ACTION FOR BREACH OF PROMISE

(a) *Shaw v. Shaw*

12. In *Shaw v. Shaw*²¹ the action for breach of promise was invoked in unusual circumstances. The plaintiff entered into a marriage which, unknown to her, was void because her "husband" was already married. When, many years later, her "husband" died and the truth was discovered she sued his estate for damages. She recovered on the grounds that the deceased was in breach of his promise to marry the plaintiff (which could have been lawfully implemented when his lawful wife died some two years before he did) and of his implied warranty that he was in a position to marry her. The claim for breach of promise was not statute barred because it had been concealed by the fraud of Mr. Shaw, and therefore the limitation period did not begin until the plaintiff discovered the truth.²² The implied warranty was a continuing one, and so the claim for its breach did not accrue for the purpose of the limitation period until Mr. Shaw had died. A person in the position of Mrs. Shaw would be adversely affected if the action for breach of promise were abolished; this problem is, therefore, further discussed below in paragraphs 48-53.

(b) Compensation for Pregnancy

13. The action for breach of promise of marriage has provided means whereby a girl who becomes pregnant during the engagement may be able to recover more from the man than she could obtain from affiliation proceedings alone.²³ Indeed some of those whom we consulted felt that the action should be retained so that damages could be recoverable in these circumstances. However, by the Maintenance Orders Act 1968 the former financial limits on the amount of maintenance recoverable under an affiliation order have been removed. The

²⁰ In *Ulrich v. Ulrich and Felton* [1968] 1 W.L.R. 180 the Court of Appeal held that where a married couple pool their savings to buy a house in the husband's name or in their joint names as a family home and meet expenses of upkeep and improvement and of mortgage payment out of the family income to which the wife contributes, the *prima facie* inference from their conduct is that they intend the house to be a family asset in which each is entitled to an equal share, and in that respect moneys contributed *before* marriage are in the same position as moneys contributed *after* marriage. However, Lord Denning M.R. said (at 185): "It might be very different if there was no marriage at all. If the marriage never took place, the whole thing might have to be cancelled. There would probably in the circumstances be a resulting trust in the proportions in which they contributed". In *Pettitt v. Pettitt* (n. 18 above) at 990 Lord Upjohn said it was "trite law" that where "the purchase money has been provided by two or more persons, the property is held for those persons in proportion to the purchase money that they have provided". This presumably applies to fiancés as it does in the case of complete strangers.

²¹ [1954] 2 Q.B. 429.

²² Limitation Act 1939, s. 26. An additional reason for holding that this claim was not barred, according to at least one member of the Court of Appeal, was that the breach took place when the promise could have been lawfully implemented, i.e. two years before the action: see Denning L.J. (n. 21 above) at 441.

²³ As pointed out in *Mayne and McGregor on Damages*, (12th ed. 1961) p. 558, §646, it is anomalous that damages flowing from pregnancy are recoverable in an action for breach of promise. They "are indeed losses which would not have occurred had the contract been performed, but they are not losses which flow from the breach of promise and on general principles of contract would be too remote under the rule in *Hadley v. Baxendale*" (1854) 9 Ex. 341.

expenses incidental to the birth of the child may also be recovered in affiliation proceedings if the court thinks fit.²⁴ While we still do not regard such proceedings as the ideal remedy, we think that in future they will be more suitable than an action for breach of promise of marriage, and, accordingly, we do not propose to discuss this aspect of the breach of promise action any further.

D. PREVIOUS MOVES TOWARDS ABOLITION OF THE ACTION

14. In January 1878 a Bill to abolish the action of breach of promise of marriage was introduced by Mr. Farrer Herschell. He made no progress and withdrew it later that year; but in May 1879 he moved in the Commons:²⁵

“that, in the opinion of this House, the action of Breach of Promise of Marriage ought to be abolished except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss.”

There was a debate on this motion, which was carried by a majority of 41. Despite this success, the Bill was not introduced again that Session.

15. In 1880 Mr. Herschell had become Solicitor-General and Col. Makins asked him if intended to bring in a Bill to abolish actions at law for breach of promise of marriage. In reply he said that the honourable and gallant Gentleman would at once understand that it was not now in his power to introduce a Bill amending the law in this respect unless it be determined upon by Her Majesty's Government; and he was not aware that the subject to which the Question referred had been at all under their consideration. He did not think, with the pressing matters occupying their consideration, any Bill on the subject would be introduced in the Session. However, Bills similar to that of 1878 were introduced in 1883, 1884, 1888 and 1890. None of them made progress; the last Bill did not even get a second reading.

16. Mr. Marcus Lipton, M.P., asked Parliamentary Questions on this subject in March 1955, April 1960, February and November 1962 and December 1964. On the last occasion²⁶ he asked the Minister without Portfolio

“whether he will introduce legislation to abolish actions for breach of promise.”

The Answer he received was

“No, Sir. Legislation on this subject would not be justified in the present state of Parliamentary business.”

E. CURRENT SUGGESTIONS FOR REFORM

17. The two arguments most often advanced for depriving agreements to marry of their legal effect are these. First, the present law gives opportunity for claims of a “gold-digging” nature. We believe this to be true. Secondly, the point is made that the stability of marriages is so important to society that the law should not countenance rights of action the threat of which may push people into marriages which they would not otherwise undertake. In practice, it may be argued,

²⁴ Affiliation Proceedings Act 1957, s. 4(2)(b).

²⁵ *Hansard*, 6th May 1879, Cols. 1867-1887.

²⁶ *Hansard*, 23rd December 1964, Cols. 1209-1210.

this threat is illusory, and engaged parties are not deterred on this ground from terminating engagements which are proving to be unsatisfactory. However, if, as we believe, it is important that parties should be free to terminate an engagement, then it can hardly be thought desirable to retain the contractual effects of an agreement to marry.

18. The consultation with the lay interests mentioned in Appendix B showed that there was substantial demand for the abolition of the right of action for breach of promise. But the professional bodies whom we consulted, while in favour of doing away with or substantially altering the action in its present form, were all agreed in stressing the need for the law to provide a remedy for some of the financial hardships which might result from the ending of an engagement. It was pointed out that the parties to an engagement might otherwise suffer unfairly if they had incurred commitments in reliance on the promises to marry.

19. The Bar Council suggested that the action be retained with a limitation on the nature of the damages which could be recovered. This, it will be remembered, was the course proposed by Mr. Herschell in 1879. Another type of solution put to us was more radical: this would, in essence, jettison the contractual effects of promises to marry and establish a judicial procedure based upon the equitable adjustment of losses (and, perhaps, also of gains) resulting from the engagement. Finally, we received the Report of the Torts and General Law Reform Committee of New Zealand.²⁷ That Committee took the view that the action for breach of promise should be abolished, but that there should be instituted a summary procedure enabling the court to settle disputes between the parties to a terminated engagement relating to the ownership or disposition of property.

20. Thus, five proposals have at some time been canvassed, viz.—

- (i) Abolition of the contract action without any replacement; the parties would have no right to recover either compensation or actual financial loss flowing from breach or termination of the agreement to marry, but would be left with their ordinary property rights under the general law.²⁸
- (ii) Retention of the action, but with a limitation on the damages which may be recovered; the parties would be entitled to a limited recovery of financial loss and would also have their ordinary property rights.
- (iii) Abolition of the action, but replacement by a procedure for adjustment of the gains and losses resulting from reliance on the promises to marry; the parties would also retain their ordinary property rights subject to this adjustment.
- (iv) Abolition of the action, but replacement by a procedure for adjustment of losses incurred upon reliance on the promises to marry; the parties would also have their ordinary property rights, subject to this adjustment.
- (v) Abolition of the action, but replacement by a procedure for settling disputes about the ownership and disposition of property; the parties

²⁷ *Miscellaneous Actions*, see Appendix D.

²⁸ Neither this solution nor any of the alternatives discussed would destroy any other right of action, e.g. in tort, which one party to an engagement might have against the other.

would have no right to recover any financial loss but would be entitled, by way of a summary procedure, to a revision of their property rights in the light of the termination of the engagement.

F. A COMPARISON OF THE SUGGESTIONS MADE

(i) Abolition of the contract action with no new remedy

21. This proposal, which was the one we first favoured, has obvious attractions, for it would remove the disadvantages of the contract action which we have discussed.²⁹ However, there would be no recovery in a case, for example, where a party to an engagement had invested money in property belonging to the other party. Thus, under this solution if a man had bought a house and his fiancée had then spent £500 on improvements, this sum would represent an irrecoverable loss to her. It was this consideration among others which led the professional bodies we consulted to reject it. Provided that a better solution can be found, we are sure that they were right to do so.

(ii) Retention of the action with a limited right to damages

22. It is clear from our consultations that the retention of the action for breach of promise coupled with a limitation on the damages recoverable would command a good deal of professional support. Under this proposal it is often suggested that it would be sufficient to provide that only special, as opposed to general, damages should be recoverable.

23. However, we do not think it is particularly helpful to speak in terms of recovery of "special" damage. This expression has more than one meaning in the law of damages, and if it is here meant to signify damages recoverable as specifically pleaded items some guidance may be drawn from actions before 1934 against estates of deceased promisors. As the law then stood³⁰ only "special damage" was recoverable in such an action and in no reported case did a plaintiff succeed, though claims were made in respect of such matters as the wasted purchase of wedding clothes and giving up of employment in preparation for marriage.³¹ Indeed, it is arguable that the abortive expenditure on, for example, a trousseau is never recoverable in an action for breach of contract since contract damages are intended to put the plaintiff in the position that he or she would have been in had the contract been performed. If the promise to marry had been performed, the expenditure would still have been incurred and the value of the trousseau would be precisely the same. Yet, compensation in respect of the cost of the trousseau is certainly awarded under the present law. We think that if there is to be any right to damages for breach of promise this would be among the items which would occur to public opinion as suitable for compensation, even though it might well be agreed that the plaintiff should not get a sum of money merely for the fact that the defendant has not married her.

24. A suggestion which was put to us by the Bar Council was that the damages recoverable should not exceed a sum equal to the financial loss sustained by the plaintiff attributable to any acts or omissions on his or her part prior to the date of the breach and done or omitted in reliance upon the promise to marry. This

²⁹ See para. 17 above.

³⁰ See para. 9 above.

³¹ *Finlay v. Chirney* (n. 2 above); *Riley v. Brown* (n. 13 above); *Quirk v. Thomas* (n. 13 above); see *Mayne and McGregor on Damages*, (1961) pp. 555-557.

would, of course, remove the possibility of damages for injury to feelings or reputation or for mere loss of the marriage, which no one likes; but in our opinion it still goes too far. It would allow recovery in respect of “lost chances”—e.g., the giving up, in expectation of marriage, of the prospects of highly remunerative employment. Once damages were allowed in respect of loss of prospects of employment it would be difficult to exclude compensation for loss of prospects of marriage—and the law would be once more on its way back to general damages.

25. But the principal objection to this solution is that it would retain the existing contractual effects of an engagement to marry. Losses would be recoverable by only one party on the basis of the other’s fault. We find ourselves in agreement with the New Zealand Torts and General Law Reform Committee when they write:³²

“We do not think there is need for any provision regarding money spent by any person in the purchase of property about which there is no dispute as to ownership, e.g. a house property bought by one party, or household items in the purchaser’s possession, or the woman’s trousseau. In these cases the person concerned will still have the property; and although some loss may be incurred by reason of its no longer being needed at that particular time we do not think this would be sufficient to justify an action which could only be dealt with on the basis of fault . . .”

(iii) Replacement by a procedure for adjustment of gains and losses

26. The advantages of this proposal are that while it would remove engagements from the sphere of contractual relationships, it would relieve possible hardship by ensuring that the gains and losses arising during the course of the engagement would be fairly distributed between the parties. Moreover, recovery would not be dependent on the plaintiff being the “innocent” party.

27. In view of these merits it is necessary to examine this solution more closely. If there were to be an adjustment procedure some guidance would clearly have to be provided by statute as to the way in which the discretion of the court would be exercised, for in the absence of such guidelines the parties and their advisers would be beset by uncertainty. When consulting on this proposal we suggested that those guidelines might take the following form:

- (i) An applicant for relief would have to show that, in furtherance of a mutual intent to marry the position of one or both of the parties had changed, the final result being either an overall loss on the applicant’s side or an overall gain on the other side.
- (ii) The power to adjust losses and gains should be limited to those transactions which would not have taken place had no marriage been in contemplation. However, gifts such as Christmas or birthday presents should be treated as absolute gifts and ignored for the purposes of adjustment.
- (iii) Even though a transaction might fall within the range eligible for adjustment, its financial results should be taken into account only in so far as the nature and size of the transaction were reasonable in all the circumstances.

³² *Miscellaneous Actions*, see Appendix D.

- (iv) So far as possible the court should seek to restore both parties to the position they would have been in if they had not changed their position in furtherance of their intent to marry; but this general rule should be subject to the qualification that if, in consequence of changes of position, an overall gain had accrued to one party, that gain should be shared.
- (v) Although there should generally be an equal sharing of any loss or gain this should not apply where it would be inequitable. For example, where one of an engaged couple was much worse off financially than the other so that it would be unjust to call on the two of them to share equally the losses or gains, the apportionment, if any, should be on such basis as is just. Similarly, although the mere withdrawal from an engagement should not be regarded as a “fault” and penalised, it might be inequitable in some circumstances to overlook the conduct of one party.
- (vi) Subject to situations like the above, the adjustment procedure should operate regardless of why and by whom the engagement was broken off; and similarly the procedure should operate not only where an engagement was broken off, but also where the marriage failed to take place for some reason—e.g., where the engagement was terminated by mutual agreement or where one of the parties died.

28. We were, and still are, impressed with some of the advantages of an adjustment system. However, there might be grave practical objections to its introduction. These may be summarized as follows.

29. First, it might be difficult to dissect the expenditure of the parties during the engagement without a prolonged enquiry. Even then it would be a matter of practical difficulty to decide which items of expenditure should be subject to an adjustment procedure.

30. Secondly, we fear that the introduction of such a system might incur the reproach that the law was using a very large hammer to crack a very small nut. Such a wide system of sharing gains and losses would be comparable with a form of community of property between engaged couples. Whether or not a community regime were to be considered appropriate for married couples,³³ we think it would be unacceptable to impose such a system on the parties to an engagement even in the limited form of an adjustment procedure.

31. Thirdly, and most important, an adjustment procedure might well bring into court more cases than at present. It is argued that an adjustment procedure on termination of an engagement would encourage the parties to an engagement to behave fairly to each other; but so vague is the concept of “fairness” that no satisfactory advice to the parties would be possible. An engagement is ended without resort to the courts and a change in the law would be unacceptable if it would encourage resort to the courts. It is true that in most cases the parties would resolve their differences without legal proceedings, whatever the state of the law. But where there is acrimony and dispute it would clearly be preferable that the law should provide a reasonably certain basis on which the parties may be advised what arrangements are open to them. This should be contrasted with

³³ The whole field of matrimonial property law is being considered under Item XIX of our Programme of Law Reform (Codification of Family Law).

the situation on the dissolution of marriage. A judicial discretion exercisable in such a case is acceptable because the parties are before the courts already.

32. Finally, we think that the whole ethical basis of an adjustment procedure might well be challenged by public opinion. The public might think that the detailed examination of the financial and property elements of a broken engagement leading to an apportionment made in the exercise of a wide judicial discretion would be unacceptable. In very many cases there is not a sufficiently serious loss following upon the termination of an engagement to justify legal proceedings. Where there is such loss, we are very doubtful whether the problem justifies a complicated examination of the "state of accounts" between the parties and the apportionment of the losses and gains according to such imprecise notions as their respective abilities to bear them and the court's opinion of their behaviour. The simple, direct approach of the layman might well be: you have driven out of the law the devil of the action for general damages, only to admit back the several devils of uncertainty, wide discretion and distasteful probes into the unhappiness of broken engagements.

33. The disadvantages enumerated above impressed many of those whom we consulted. Though the majority of the Family Law Sub-Committee of the Society of Public Teachers of Law still supported their original proposals for adjustment of losses only,³⁴ they did not support a procedure of adjustment of gains and losses. Accordingly we are unable to recommend the introduction of a system of adjustment of gains and losses into English law.

(iv) Replacement by a procedure for adjustment of losses

34. This is the solution favoured by the Society of Public Teachers of Law and (initially) by The Law Society. Clearly, therefore, it merits close consideration. It shares with the third solution the advantages that it would abolish the contractual effects of engagements, and that it would distribute losses on a more equitable basis than that provided by the action in contract. However, the objections to the adjustment of gains and losses procedure apply almost as strongly to this proposal. Admittedly, it would be easier for the court to assess the changed financial positions of the parties, since under this proposal only losses would be adjusted. But the practical objections which were discussed in paragraphs 31–32 appear to be equally applicable here. It is, for example, difficult to see on what basis the losses should be adjusted. It might be unfair simply to divide them so that each party bore half; on the other hand, to take into account the conduct of the parties would be to open the door to a prolonged and perhaps embarrassing inquiry. Thus, for the reasons which persuaded us to reject the third proposal, we are led to the conclusion that the introduction of a procedure for adjustment of losses would be an unsatisfactory reform.

(v) Replacement by a procedure for settling property disputes

35. The fifth proposal is to abolish the action for breach of promise and to replace it by a procedure for the determination and enforcement of property

³⁴ The Sub-Committee pointed out that the inclusion of gains within an adjustment procedure was unlikely to command public support—"Accountability for profit lies peculiarly within such fields as trusts and partnership. There seems little justification for extending [this] to gains accruing to engaged couples, at least in the absence of any doctrine of community of property between spouses."

rights between parties to a terminated engagement. This involves both the introduction of a new procedural remedy and a redefinition of the law governing property disputes between such parties.

36. A summary procedure already exists under the Married Women's Property Act 1882, s. 17, for the determination of questions between husband and wife concerning property. The Report of the Torts and General Law Reform Committee of New Zealand³⁵ recommended that where a dispute concerning property arose after termination of an engagement there should be a provision:

“enabling the appropriate Court, on the application of any person affected, to consider any question arising out of the termination of an agreement to marry, and relating to the ownership or disposition of property”.³⁶

For such a procedure to be effective it would be necessary to establish clear and just principles for the guidance of the court in the determination of disputes. We will therefore consider these principles before returning to this proposal.

37. The special relationship between engaged couples may lead them to enter into informal transactions concerning the acquisition or improvement of property, whether owned or purchased by one party or by both, and whether intended for their common use or otherwise. Such transactions will often be very similar in nature to those between married persons. There is a strong case for applying the same principles of law to disputes between ex-fiancés as those which apply to disputes between husband and wife. These principles were recently examined by the House of Lords in *Pettitt v. Pettitt*.³⁷ It was there held that the existence of a summary procedure under section 17 of the Married Women's Property Act 1882 did not affect the principles of law applicable to determine the proprietary rights of husband and wife, and in particular did not give rise to a general discretion “to determine questions with regard to the respective properties of husband and wife otherwise than in accordance with their respective proprietary titles ascertained upon well established principles of law and equity”.³⁸ The court must give effect to existing property rights and cannot disregard such rights. Where, however, the court is satisfied that both parties have a beneficial or proprietary interest, but the extent of their respective interests cannot be determined on the available evidence, there is a discretion to do what is equitable.³⁹

38. One of the principle difficulties in husband and wife cases concerns the extent, if at all, to which a contribution to the acquisition or improvement of property, whether by cash, by work done, or otherwise, confers a proprietary right. The existing law appears to be that whereas a contribution to the purchase price of property will normally confer a beneficial interest in that property on the spouse so contributing, no proprietary interest will arise merely from the fact that one party has spent money or done work to improve the property of the other after its acquisition.⁴⁰ In some cases, however, especially where the

³⁵ See Appendix D.

³⁶ The New Zealand proposal also suggests that parties should be restored as nearly as possible to the position they would have been in, and covers disputes concerning gifts.

³⁷ [1969] 2 W.L.R. 966.

³⁸ *Ibid.*, per Lord Upjohn at 989. See also *National Provincial Bank v. Ainsworth* [1965] A.C. 1175.

³⁹ *National Provincial Bank v. Ainsworth*, (n. 38 above) *Rimmer v. Rimmer* [1953] 1 Q.B. 63. *Cobb v. Cobb* [1955] 1 W.L.R. 731. *Pettitt v. Pettitt* (n. 37 above), per Lord Morris at 980-981.

⁴⁰ *Pettitt v. Pettitt* (n. 37 above).

contribution to the improvements in work or money was substantial, the court may be able to spell out an agreement or common intention of the spouses that the contribution should give rise to an interest in the property.⁴¹ In the absence of such an agreement or common intention the distinction between contributions to the purchase money and contributions by way of improvement of the property will be crucial. This distinction was condemned in *Pettitt v. Pettitt* as entirely unsatisfactory in its application to married couples.⁴² We agree with this view and also with those of their Lordships who drew attention to the need for legislation to define clearly the property rights of husband and wife.⁴³

39. We are at present surveying the whole field of family property under Item XIX of our Programme; as a preliminary measure we have in our *Report on Financial Provision in Matrimonial Proceedings*⁴⁴ recommended that the principles applied in determining property disputes between husband and wife should be clarified so that where one spouse contributes in money or money's worth to the improvement of property vested in the other spouse or in their joint names, the spouse so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them, acquire a beneficial interest by virtue of that contribution. In any dispute as to the extent of that beneficial interest the court should be empowered to make such orders as may be just in all the circumstances.⁴⁵

40. The proposal now under consideration is to apply to property disputes between formerly engaged couples the same principles which apply to husband and wife, including the above recommendation in our *Report on Financial Provision in Matrimonial Proceedings*. The effect of applying these principles to engaged couples would be that where both parties had made contributions to the purchase of property each would acquire a beneficial interest, which, in the absence of contrary evidence, would normally be proportionate to the value of their respective contributions.⁴⁶ If one party put up the purchase money, and the contribution of the other were in the form of work done or money spent on improvements, such a contribution, if substantial, would also give rise, *prima facie*, to a beneficial interest in the property.⁴⁷ As the right to a beneficial interest is implied from the circumstances, it can be displaced by evidence of an agreement or intention of the parties to the contrary. If the parties have not agreed as to the extent of the interest acquired, then the court has a discretion to do what is just.

41. If the principles were clarified in the manner suggested we think that there would be great advantages in a summary procedure for resolving disputes

⁴¹ *Pettitt v. Pettitt* (n. 37 above); *per* Lord Reid at 973–974 and Lord Diplock at 999, 1001; these two Lords seemed to suggest that in certain circumstances such an agreement or common intent could be implied, and this must now be taken to be the basis for the decision in *Jansen v. Jansen* [1965] P. 478, the result of which was approved of by both; Lord Hodson and Lord Upjohn disapproved of *Jansen v. Jansen* and would require an express agreement. The need for clarity in the law was stressed by Lord Diplock at 995.

⁴² *Per* Lord Reid at 972.

⁴³ *Per* Lord Reid at 974; *cf.* Lord Morris at 982 and Lord Hodson at 987.

⁴⁴ Law Com. No. 25 paras. 55–58.

⁴⁵ *Ibid.*, para. 57 and Appendix 1, clause 27.

⁴⁶ See *Ulrich v. Ulrich and Felton* (n. 20 above).

⁴⁷ As to the meaning of “substantial” in the context of husband and wife disputes see *Pettitt v. Pettitt* (n. 37 above) at 974, 983 and *Button v. Button* [1968] 1 W.L.R. 457, at 461 and 462.

between parties to an agreement to marry which has been terminated, analogous to that provided by the Married Women's Property Act 1882, s.17. We emphasise, however, that the guiding principles outlined above would apply not only to cases dealt with by the summary procedure but to any property question between such parties in whatever context it arose.⁴⁸

42. Having set out the basic principles of this proposal, its advantages and disadvantages can now be evaluated and compared with the proposals rejected earlier. The first feature to note is that this proposal, like some of the previous ones, removes the engagement to marry from the sphere of legally enforceable contracts: it follows from this that the enquiry envisaged takes no account of fault in breaking the engagement and is not concerned with general damages. Secondly, as compared with proposals (iii) and (iv) there would be no investigation into the financial loss of either party, nor any adjustment of gains or losses unless these arose in the context of a dispute concerning property. It is true that one party may purchase property (e.g. a house or a trousseau) or incur liabilities in respect of a service (e.g. catering or travel bookings) which in either case is no longer required. Any of these transactions may involve a financial loss, even though there is no dispute as to ownership of property. Nevertheless, as we have have seen, the attempt to deal with these losses fairly as between the parties leads to difficulties concerning the complicated dissection of the parties' expenditure and the uncertain basis upon which losses might be adjusted. These and other reasons led us to reject the two previous proposals. It is of greater importance in our view that the parties should be able to claim a share in any property in which both have an interest. In giving both a procedural remedy and an extension of property rights this proposal will enable at least some adjustments to be made in areas where it is not now possible. Thirdly, as compared with the earlier proposals concerning adjustment of gains and losses, this proposal introduces greater certainty into the law. Whatever difficulties arise in the exercise of judicial discretion, they are considerably less than those which led us to reject the suggested adjustment procedure and are more than offset by the justice of this solution. Finally, the present proposals, linked as they are to the recommendations in our *Report on Financial Provision in Matrimonial Proceedings*, should be seen in their true perspective as a small section of an evolving Family Code.

G. RECOMMENDATIONS

43. In the light of the comparisons made in the previous paragraph we make the following recommendations:

- (a) That the present right of action for breach of promise of marriage should be abolished.

Appendix A, clause 1.

- (b) That a procedure, similar to that provided by the Married Women's Property Act 1882, s. 17, be provided for the determination, on the application of either party, of any dispute concerning the property

⁴⁸ e.g., the summary procedure proposed would only apply during the joint lives of the parties, as in the case of the Married Women's Property Act 1882, s. 17, which does not extend to personal representatives. The principles of law applied would be the same, whatever procedure was followed, whether in a dispute between one party and the personal representatives of the other party or in any other dispute.

of either or both of the parties to an engagement to marry which has terminated. The court should have the necessary power to order a sale, to make an apportionment, or to make any other appropriate order.⁴⁹

Appendix A, clause 2(2).

- (c) That in determining questions relating to the property of either or both of the parties to an agreement to marry which has terminated, the court should apply the same principles as those applied to determine questions concerning the property of husband and wife.

Appendix A, clause 2(1).

Ancillary questions

44. There are certain matters ancillary to the principal recommendations which now fall to be considered. The first question is at what stage in the relationship should the recommended principles come into operation. There may be instances where the parties enter into transactions in mutual contemplation of marriage, but before the engagement. We do not think that the summary procedure or legal principles recommended above should operate unless there is a definite agreement to marry. Where such an agreement is established, however, we think that earlier transactions should also be taken into account in determining property rights. It would be quite impractical and perhaps unfair to apply the new principles concerning contribution only to events after the formal engagement. Transactions between husband and wife before marriage are seen as part of a chain of events, provided marriage ensues, and we believe it would be fair to apply a similar principle to couples who later become engaged.

45. The second question relates to gifts. The property in dispute may have been a gift from one party to the other; if it was a conditional gift, i.e. in contemplation of marriage, the authority referred to earlier⁵⁰ suggests, at least in the case of engagement rings, that the party in breach of the agreement to marry cannot recover the gift. The basis of this rule is that no one should be allowed to benefit from his own wrong. One advantage of the abolition of the action for damages is that there will no longer be any need to enquire into the circumstances leading to the termination of the engagement or to allocate fault in this connection. We think this factor is of overriding importance and therefore recommend that if a party to an agreement to marry makes a conditional gift to the other party, i.e. in contemplation of marriage, he should not be precluded from recovering the gift on termination of the agreement by reason of the fact that he was responsible for the termination.⁵¹

46. The property in dispute may have been a gift from a third party, or may otherwise involve a third party. In this Report we are concerned only with questions between the parties to the engagement and we do not propose to enter into any discussion of the rights of third parties. Their position, whether as donors seeking to recover a conditional gift or otherwise, will not be affected by our recommendations on substantive law or procedure. Where a third party is concerned in a dispute, the summary procedure would not, in our view,

⁴⁹ Cf. Matrimonial Causes (Property and Maintenance) Act 1958, s. 7. See also para. 54 below.

⁵⁰ n. 16 above.

⁵¹ Appendix A, clause 3.

be appropriate. The law relating to the recovery of conditional gifts and the position of third parties in this connection is, like the whole field of law concerning unjust enrichment, far from clear. This difficult subject cannot be dealt with in the present context of Breach of Promise.

47. Finally, we recommend that there should be a limitation period of three years from the termination of the agreement to marry for applications under the summary procedure. This is in conformity with the recommendation in our *Report on Financial Provision in Matrimonial Proceedings*, concerning property disputes between husband and wife after dissolution of marriage.⁵²

H. SUBSIDIARY MATTERS

(a) The Problem of *Shaw v. Shaw*

48. Since we propose abolition of the action for breach of promise, it is necessary to consider whether provisions should be made for the situation which arose in *Shaw v. Shaw*.⁵³ In that case Mrs. Shaw entered into her marriage in good faith; she recovered from the estate damages which were assessed with regard to what she would have been entitled to receive if she had been a widow. Her action was for breach of promise but it was certainly not typical of such actions. In the circumstances the court was able to reach what many would consider a just result. However, a different view of the justice of the solution might have been taken if the first wife had still been alive, perhaps with young children, and the award of damages to the second "wife" had deprived them of any part of their succession rights, or their ability to obtain maintenance from the estate if they made a successful claim as dependants under the Inheritance (Family Provision) Act 1938.

49. The problem of *Shaw v. Shaw* is one which we believe should be looked at not in the context of breach of promise actions, but in the context of succession rights and family provision legislation. It is true that Mr. Shaw had deceived his second "wife", but her position was not materially different from that of any person who, having married in good faith, discovers after the death of the other spouse that the marriage was void, and that he or she has no rights of intestate succession nor any claim as a dependant under the Inheritance (Family Provision) Act 1938. Such marriages may be void for a number of different reasons, which may or may not give the survivor a claim for breach of promise. In finding a remedy for the *Shaw v. Shaw* situation we think it would be just to consider all cases where a party has entered into a void marriage in good faith, and not merely those where there could have been a common law claim for damages. If the matter is discovered during the joint lives of the parties it may be possible, if both are willing, to contract a valid marriage. Alternatively either party could obtain an annulment, in which case the former "wife" would have a right to claim maintenance during the life of the other party and also a right to claim maintenance from the estate after his death.⁵⁴ This relief can be claimed whether or not the original marriage was entered into in good faith, though the court may have regard to this factor in deciding whether to make an award. Our consideration, however, is limited to the case of a party who, in good faith, entered into a void marriage which has not been judicially annulled, since, if it has, the surviving party is already protected.

⁵² Law Com. No. 25, Appendix 1, clause 29; see Appendix A of this Report, clause 2(2).

⁵³ [1954] 2 Q.B. 429; see also para. 12 above.

⁵⁴ Matrimonial Causes Act 1965, ss. 15-19 and 26.

50. We therefore recommend that a person who had in good faith entered into a void marriage with the deceased, which had not been annulled prior to his death, should be brought within the class of dependants entitled to claim maintenance from the estate of the deceased under the Inheritance (Family Provision) Act 1938 as amended.⁵⁵ This will enable the court to deal with the supposed "widow", together with such other dependants as the real widow and any children of the deceased. In deciding whether a claimant had entered into a marriage in good faith we think a subjective test should be applied, and that the court should have regard to whether there was an honest belief in the validity of the marriage.

51. As we have seen, where the marriage has been annulled during the lifetime of the parties the survivor may, under present law, claim maintenance from the estate of the deceased.⁵⁶ This only applies where the decree has been granted in England; a foreign decree of nullity or divorce does not give rise to any right to claim maintenance before the English courts, either during the lifetime or after the death of the other spouse. At first sight, therefore, there would appear to be a case for allowing the survivor of a void marriage which has been annulled by a foreign decree to claim maintenance from the estate of the other party. This would, however, introduce an anomaly, since it would put the surviving party to such a decree in a better position than parties to a foreign divorce, and in a better position after the death of the other party than during his life.⁵⁷ For the present, therefore, we recommend that there should be no right to apply under the Inheritance (Family Provision) Act 1938 by a party to a void marriage if a foreign decree of nullity or dissolution recognised in England has been granted.⁵⁸

52. As the marriages with which we are concerned are void it is open to either party to such a marriage to remarry during the lifetime of the other spouse. We think that remarriage by the applicant should be a bar to the relief we recommend, as the survivor may be fairly said to have treated the marriage with the deceased as at an end. Later remarriage ought also to bring to an end any periodical payments awarded under our recommendations.⁵⁹

53. The implementation of these recommendations in the present framework of family law ought to be considered in relation to the position of children. In a case comparable to Mrs. Shaw's any children conceived while she reasonably believed in the validity of the marriage would be legitimate and would thus have

⁵⁵ Appendix A, clause 4. A former spouse whose marriage with the deceased has been dissolved or annulled will continue to be dealt with under the Matrimonial Causes Act 1965, s. 26. The relationship between the two provisions will be further examined in our study of family property law.

⁵⁶ Matrimonial Causes Act 1965, s. 26; see n. 55 above.

⁵⁷ The question of financial provision after foreign decrees of divorce or nullity will be further considered under Item XIX of our Law Reform Programme.

⁵⁸ If a marriage is void under English law a decree of dissolution could not, in theory, be granted by an English court or be recognised in England if granted by a foreign court. However, the possibility of a decree of dissolution being granted or recognised in error (e.g. where the marriage was bigamous, but this fact was concealed from the court) has to be taken into account. If there has been a decree, whether of dissolution or of nullity, which is not recognised in England, this would not of itself be a bar to relief, but might be taken into account by the court in deciding whether to make an order or in assessing the degree of dependence.

⁵⁹ This is the position with regard to payments to a widow or widower under the 1938 Act, s. 1(2)(a); cf. the recommendation in Law Com. No. 25 para. 47(d).

rights on intestacy and under the Inheritance (Family Provision) Act in the estates of both parties. However, any children conceived thereafter would be illegitimate and would until recently have had no claim at all to either estate unless the mother left no surviving legitimate issue. The implementation of the recommendations of the Russell Committee⁶⁰ by the Family Law Reform Act 1969 has, however, solved these difficulties⁶¹ by giving illegitimate children rights to succeed on the intestacy of either parent and to claim under the Inheritance (Family Provision) Act.

(b) Jurisdiction of the Courts

54. The High Court has exclusive jurisdiction over breach of promise of marriage actions.⁶² We see no reason why this should be so in the case of the summary remedy we suggest for property disputes between formerly engaged parties. In proceedings under section 17 of the Married Women's Property Act 1882, the County Court has jurisdiction whatever the value of the property, but the defendant may remove proceedings as of right into the High Court where the value of the property in dispute exceeds the general jurisdictional maximum imposed on the County Courts.⁶³ The High Court may transfer proceedings to the County Court where the County Court would have jurisdiction.⁶⁴ We think these rules should apply to proceedings for the settlement of property disputes between parties whose engagement has ended.

(c) Legal Aid

55. At the moment legal aid is not available for actions for breach of promise.⁶⁵ We see no reason why it should not be available for claims in respect of property under the proposed procedure.

I. SUMMARY OF RECOMMENDATIONS

56. (i) The present right of action for breach of promise of marriage should be abolished. (paragraphs 17, 42 and 43(a); Appendix A, clause 1).
- (ii) A summary procedure, similar to that provided by the Married Women's Property Act 1882, s.17, should be provided for the determination, on the application of either party, of any dispute concerning the property of either or both of the parties to an engagement to marry which has terminated. The court should have the necessary power to order a sale, to make an apportionment, or to make any other appropriate order. (paragraphs 41 and 43(b); Appendix A, clause 2(2)).
- (iii) In determining questions relating to the property of either or both of the parties to an agreement to marry which has terminated, the court should apply the same principles as those applied to determine questions

⁶⁰ *Report of the Committee on the Law of Succession in Relation to Illegitimate Persons* (1966) Cmnd. 3051.

⁶¹ Ss. 14-18. This part of the Act will come into force on 1 January 1970: S.I. 1969/1140.

⁶² County Courts Act 1959, s. 39(1)(c).

⁶³ This is at present £400 annual rateable value in the case of recovery of land: County Courts Act 1959, s. 48(1), and £500 in the case of actions in contract or tort: s. 39(1). The Administration of Justice Bill 1969 raises the latter limit to £750.

⁶⁴ County Courts Act 1959, s. 54.

⁶⁵ See para. 8 and n. 12 above.

concerning the property of husband and wife.⁶⁶ (paragraphs 40, 42, 43(c) and 44; Appendix A, clause 2(1)).

- (iv) The summary procedure should be subject to a limitation period of three years dating from the termination of the agreement to marry. (paragraph 47; Appendix A, clause 2(2)).
- (v) If a party to an agreement to marry makes a conditional gift to the other party he should not be precluded from recovering the gift on termination of the agreement by reason of the fact that he was responsible for the termination. (paragraph 45; Appendix A, clause 3).
- (vi) The jurisdiction of the High Court and the County Court in respect of property disputes between parties to an agreement to marry which has terminated should be the same as it is for proceedings relating to the property of husband and wife under section 17 of the Married Women's Property Act 1882. (paragraph 54; Appendix A, clause 2(2)).
- (vii) Legal Aid should be available for claims under the procedure for settling property disputes. (paragraph 55).
- (viii) A person who had in good faith entered into a void marriage should be entitled to claim maintenance under the Inheritance (Family Provision) Act 1938 as amended as a dependant of the deceased. This should, however, not apply where the marriage was annulled or dissolved by a decree granted or recognised in England, or the claimant had remarried. (paragraphs 50-52; Appendix A, clause 4).

57. All these proposals except (vii) will require legislation. Draft clauses are attached in Appendix A to this Report. Legal Aid will be available unless it is specifically excluded by regulation.

(Signed) LESLIE SCARMAN, *Chairman*.

L. C. B. GOWER.

NEIL LAWSON.

NORMAN S. MARSH.

ANDREW MARTIN.

J. M. CARTWRIGHT SHARP, *Secretary*
25th August, 1969.

⁶⁶ Including those principles recommended in our *Report on Financial Provision in Matrimonial Proceedings*; see para. 39 above.

APPENDIX A

Draft Law Reform (Breach of Promise) Bill

DRAFT

OF A

BILL

TO

ABOLISH ACTIONS for breach of promise of marriage; to make provision with respect to the property of, and gifts between, persons who have been engaged to marry and the maintenance of survivors of void marriages; and for connected purposes.

BE IT ENACTED BY the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Engagements
to marry not
enforceable
at law.

1.—(1) An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights and no action shall lie in England and Wales for breach of such an agreement, whatever the law applicable to the agreement.

(2) The enactments specified in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) This section shall have effect in relation to agreements entered into before it comes into force, except that it shall not affect any action commenced before it comes into force.

EXPLANATORY NOTES

Clause 1

1. Subsection (1) implements the primary recommendation of the Report (see paragraphs 17, 42 and 43(a)) by abolishing the action for damages for breach of promise of marriage. It removes the agreement to marry from the sphere of legally binding contracts.
2. The first part of subsection (1) affects only agreements to marry which are subject to the law of England and Wales. The second part, however, prevents any action being brought in England and Wales for the breach of any agreement to marry, whatever the law applicable to the agreement.
3. Subsection (2) and the Schedule effect consequential repeals of sections which will become redundant on the abolition of the action for breach of promise.
4. Subsection (3) preserves the present law for actions already commenced before this Bill is brought into operation. After this Bill becomes law no further actions for breach of promise may be commenced whenever the breach occurred.

Property of
engaged
couples.

2.—(1) Where an agreement to marry is terminated, any rule of law relating to the rights of husbands and wives in relation to property in which either or both has or have a beneficial interest, including any such rule as explained by section 27 of the Family Law Reform (No. 2) Act 1969, shall apply in relation to any property in which either or both of the parties to the agreement had a beneficial interest while the agreement was in force as it applies in relation to property in which a husband or wife has a beneficial interest.

(2) Where an agreement to marry is terminated, section 17 of the Married Women's Property Act 1882 and section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958 (which sections confer power on a judge of the High Court or county court to settle disputes between husband and wife about property) shall apply, as if the parties were married, to any dispute between, or claim by one of, them in relation to property in which either or both had a beneficial interest while the agreement was in force, but an application made by virtue of this section to the judge under the said section 17, as originally enacted or as extended by the said section 7, shall be made within three years of the termination of the agreement.

Gifts between
engaged
couples.

3. A party to an agreement to marry who makes a gift of property to the other party to the agreement on the condition (express or implied) that it shall be returned if the agreement is terminated shall not be prevented from recovering the property by reason only of his having terminated the agreement.

EXPLANATORY NOTES

Clause 2

1. Subsection (1) applies to property disputes between formerly engaged couples the same rules of law which are applied to determine property disputes between husband and wife. (See the cases referred to in paragraphs 37-39 of the Report.)
2. The Family Law Reform (No. 2) Bill, clause 27 (accompanying the *Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25) introduces an extension of the present rules by declaring that contributions in money or money's worth to improvements shall give rise to a beneficial interest in property. This new principle is also incorporated in subsection (1) by the reference to clause 27. (See paragraph 40 of the Report.)
3. The rules of law applied by subsection (1) will operate whenever there is a dispute concerning the property of formerly engaged parties, and not only where the dispute is dealt with under the procedure laid down in subsection (2). (See paragraph 41 of the Report.)
4. Property questions between husband and wife may be determined by a summary procedure provided by the Married Women's Property Act 1882, s. 17 as extended by the Matrimonial Causes (Property and Maintenance) Act 1958, s. 7. Jurisdiction under this legislation is exercised by the High Court and the County Court. Subsection (2) adopts the whole of this procedure for property disputes between parties to an agreement to marry which has been terminated. (See paragraphs 41, 43(b) and 54 of the Report.)
5. Subsection (2) also introduces a limitation period of three years from the termination of the agreement for applications under the summary procedure. This is in accordance with the period of limitation provided in clause 29 of the Family Law Reform (No. 2) Bill for disputes between husband and wife after dissolution of marriage. (See paragraph 47 of the Report.)

Clause 3

This clause implements the recommendation in paragraph 45 of the Report, and overrules the case which suggests that the party in breach of an agreement to marry cannot recover a conditional gift made to the other party. The effect of the clause is that in a claim for recovery of a conditional gift the court will disregard the responsibility of either party for terminating the agreement to marry.

Orders for maintenance of surviving party to void marriage from estate of other party.

4.—(1) Where a person domiciled in England and Wales dies after the commencement of this Act and is survived by someone (hereafter referred to as “the survivor”) who, whether before or after the commencement of this Act, had in good faith entered into a void marriage with the deceased, then subject to subsections (2) and (3) below the survivor shall be treated for purposes of the Inheritance (Family Provision) Act 1938 as a dependant of the deceased within the meaning of that Act.

(2) An order shall not be made under the Inheritance (Family Provision) Act 1938 in favour of the survivor unless the court is satisfied that it would have been reasonable for the deceased to make provision for the survivor’s maintenance; and if an order is so made requiring provision for the survivor’s maintenance by way of periodical payments, the order shall provide for their termination not later than the survivor’s death and, if the survivor remarries, not later than the remarriage.

(3) This section shall not apply if the marriage of the deceased and the survivor was dissolved or annulled during the deceased’s lifetime and the dissolution or annulment is recognised by the law of England and Wales, or if the survivor has before the making of the order entered into a later marriage.

(4) In section 26 of the Matrimonial Causes Act 1965 (orders for maintenance from deceased’s estate following dissolution or annulment of a marriage), in the definition of “net estate” and “dependant” in subsection (6) (as amended by subsequent enactments) for the words “and the Family Law Reform Act 1969” there shall be substituted the words “the Family Law Reform Act 1969 and the Law Reform (Breach of Promise) Act 1969”.

5.—(1) This Act may be cited as the Law Reform (Breach of Promise) Act 1969.

(2) This Act shall come into force at the expiration of the period of one month beginning with the date on which this Act is passed.

(3) This Act does not extend to Scotland or Northern Ireland.

Short title, commencement and extent.

EXPLANATORY NOTES

Clause 4

1. This clause implements the recommendation in paragraphs 50–52 of the Report, and overcomes the possible hardship which might result from abolition of the action for breach of promise in a case comparable with *Shaw v. Shaw* [1954] 2 Q.B. 429. (See paragraph 48 of the Report.)
2. Under subsection (1) a person who enters into a void marriage in good faith will be entitled to claim maintenance from the estate of the other party as a dependant under the Inheritance (Family Provision) Act 1938 as amended.
3. Any claim by the new class of dependant for maintenance under the Inheritance (Family Provision) Act 1938 will be subject to all the conditions imposed by that Act (see especially section 1). Subsection (2) of clause 4 also introduces the requirement that “it would have been reasonable for the deceased to make provision for the survivor’s maintenance”. This repeats the wording of s. 26(2)(a) of the Matrimonial Causes Act 1965 (relating to maintenance from the deceased’s estate for a former spouse).
4. An order for periodical payments to a surviving spouse or former spouse must cease on remarriage (Inheritance (Family Provision) Act 1938, s. 1(2)(a); Matrimonial Causes Act 1965, s. 26(3)). Subsection (2) will apply the same rule to the new class of dependant. (See paragraph 52 of the Report.)
5. Subsection (3) implements the recommendations in paragraphs 51 and 52 of the Report. Where the marriage has been annulled in England the survivor may claim maintenance from the estate of the deceased under the Matrimonial Causes Act 1965, s. 26. A foreign decree of annulment or dissolution recognised in England will bring to an end any right to claim maintenance from the estate of the deceased. In theory a void marriage cannot be dissolved, but there is a possibility of this occurring (see n. 58 of the Report). Remarriage will also end the right to claim relief.
6. Subsection (4) effects an amendment to s. 26 of the Matrimonial Causes Act 1965 consequential on the introduction of a new class of “dependant” under subsection (1).

Clause 5

1. Subsection (1) specifies the short title.
2. Subsection (2) provides that the Bill shall come into operation one month after it is passed. No further delay is necessary as existing rules of court will be applied to the matters covered in the Bill.
3. Subsection (3) defines the territorial extent of the Bill and limits it to England and Wales.

SCHEDULE

ENACTMENTS REPEALED

Chapter	Short Title	Extent of Repeal
32 & 33 Vict. c. 68.	The Evidence Further Amendment Act 1869	Section 2.
23 & 24 Geo. 5. c. 36.	The Administration of Justice (Miscellaneous Provisions) Act 1933	In section 6(1)(b), the words "or breach of promise of marriage".
24 & 25 Geo. 5. c. 41.	The Law Reform (Miscellaneous Provisions) Act 1934	Section 1(2)(b).
12, 13 & 14 Geo. 6. c. 51.	The Legal Aid and Advice Act 1949	In Schedule 1, paragraph 1(b) of Part II.
7 & 8 Eliz. 2. c. 22.	The County Courts Act 1959	In section 39(1)(c), and in section 94(3)(b), the words "or breach of promise of marriage".

EXPLANATORY NOTES

see note 3 to Clause 1

APPENDIX B

ORGANISATIONS CONSULTED

General Council of the Bar
The Law Society
Society of Public Teachers of Law
Society of Conservative Lawyers
Society of Labour Lawyers
Board for Social Responsibility
British Council of Churches
Catholic Marriage Advisory Council
Central Council for Health Education
Co-operative Women's Guild
The Fawcett Society
Married Women's Association
National Council of Social Service
National Council for the Unmarried Mother and Her Child
National Council of Women of Great Britain
National Marriage Guidance Council
National Women Citizens' Association

APPENDIX C

THE LAW ON BREACH OF PROMISE IN THE UNITED STATES AND CERTAIN WESTERN EUROPEAN COUNTRIES

A. United States.

1. In 15 States the action for breach of promise of marriage has been abolished by "heart-balm statutes." Among these States are the important jurisdictions of New York, Pennsylvania, Massachusetts, and California. But in the great majority of States the action survives; the notion that in the last three decades there has been a large-scale, successful attack on the common law rules is, therefore, exaggerated.
2. Where the action has been abolished, there is, of course, no recovery for either loss of the bargain, i.e., the social and pecuniary consequences which would have ensued if the marriage had taken place, or the plaintiff's losses incurred in reliance on the promise to marry. Moreover, in some of those States where the common law has not been abolished, there are limitations on the damages which may be recovered. Illinois, for example, has by statute eliminated punitive, exemplary, vindictive and aggravated damages. It also seems from the cases that Missouri has adopted a similar position. In Tennessee, a defendant over 60 years of age at the time of the trial is only liable for the plaintiff's actual financial loss up to the date of the trial. Maryland has only retained the action for cases where a pregnancy has occurred in the course of the engagement.
3. In a number of important States, e.g. Massachusetts, New Hampshire, New Jersey and Pennsylvania, the statutes have not changed the rules relating to the recovery of gifts; and since in the matter of affording relief against unjust enrichment American law is ahead of English law, the surviving cause of action for the recovery of gifts permits of account being taken of the conduct of the parties and of circumstances militating for an overall adjustment of profits and losses. Of the Indiana statute (which, it would appear, was the prototype followed by other States) it has been said that just as it could not destroy the status of betrothal in fact, it did not attempt wholly to destroy it in law; the relationship between the parties is fiduciary and it is on that basis that the courts have developed special rules to govern proprietary and monetary transactions between the parties. In California, the heart-balm statute was enacted with a companion provision affirmatively permitting a donor to recover gifts made in contemplation of marriage if the engagement was broken by the donee or abandoned by mutual consent.
4. Of all the States which enacted heart-balm statutes New York seems to be the one where the recovery of gifts has proved to be really troublesome. In a number of cases the statute was held to prevent the recovery of conditional gifts. This was generally regarded as an unsatisfactory result, and in 1947 the New York Law Revision Commission recommended amending legislation to make express provision for the restitution, at the discretion of the court, of property or money transferred in contemplation of marriage. However, not until 1965 was the amending legislation enacted, and then only in terms somewhat different from the Commission's original recommendation. The new statute expressly allows the recovery of chattels, securities (or their value) or the rescission of a conveyance of real property when the sole consideration for the original transfer was a

contemplated marriage which has not occurred. There is no general provision for equitable adjustment of losses or profits save that the court has a discretion to award the defendant a lien upon the chattel, securities or real property for monies expended in connection therewith or improvements made thereto.

B. Western Europe

(i) *France*

1. Since 1838 it has been held that promises of marriage are not legally binding on the parties. Nevertheless in some cases a remedy for “breach of promise” still survives in France. The French legal principle which enables damages to be recovered in certain circumstances, notwithstanding the extra-legal character of an engagement to marry, is the principle enshrined in Article 1382 whereby:

“Every act which causes damage to another obliges the person whose fault has brought about the damage to make reparation.”

This broad principle imposes a delictual liability. The consequences of its application to breach of promise to marry is that the party in breach will be liable if he broke the engagement¹ without good cause, or maliciously or capriciously.² The courts discourage actions where the damage is insubstantial; where it is substantial, relief will be granted not only for the expenses which the plaintiff has reasonably incurred, but also for the injury caused to his feelings or reputation.

2. Gifts made in contemplation of marriage have to be returned if the marriage does not take place.³

(ii) *Italy*

1. The Italian Civil Code deals with engagements⁴ in Articles 79–81. As in France, no compensation may be claimed merely for the fact that the defendant has not fulfilled his promise of marriage; but relief is claimable for expenditure and liabilities incurred in reliance on the promise of marriage. Expenditure and liabilities alike must have been reasonable in the sense of being in conformity with the standing and circumstances of the parties.

2. The action does not lie if there is just cause for terminating the engagement.⁵ Furthermore, the promises must have been mutual and made in writing (or capable of being implied from a request for the putting up of banns); however those formal requirements are dispensed with when a separate wrong (e.g. seduction under promise of marriage) is complained of. The action lies not only against the party who has withdrawn his promise; it also lies against the party who has so conducted himself as to justify the other’s withdrawal.

¹ “fiancailles”. Although the courts do not treat engagements as legally enforceable contracts the plaintiff must still prove that there was an engagement by the methods of proof required to show a contract.

² “Ce n’est pas la rupture, en elle-même, qui constitue une faute, puisque le fiancé n’est pas tenu de se marier; ce sont les circonstances accompagnant cette rupture qui peuvent être fautives”. Mazeaud, *Leçons de Droit Civil*, Book 1 Vol. 2, 4th Edit. 1967, p. 67.

³ Article 1088 C. civ.

⁴ “sponsali”.

⁵ “Ossia l’arbitrio nel rifiuto” (“In other words, the refusal must be capricious”), Messineo, *Manuale di Diritto Civile e Commerciale*, Vol. 1. 8th Ed. 1952, p. 37.

3. Either party can recover gifts made by reason of the promise of marriage (not gifts made before the promise). It is worthy of note that the same rules apply where the engagement is terminated by death.

4. The limitation period in respect of actions for damage is one year from the date of withdrawal; in the case of proceedings for the return of gifts it is one year from the withdrawal or from the death of the party as the case may be.

(iii) *Western Germany*

1. The contract to marry is in general subject to the law of contract. It is also subject to the rule that compensation by way of damages is only available in respect of injuries to property interests. There are, however, certain special rules applicable only to actions for breach of promise.

2. Of course, the contract to marry cannot be specifically enforced. Compensation for breach is limited, in general, to actual expenses reasonably incurred in contemplation of the marriage whether by the aggrieved party or by the parents of that party or others acting in their place. The aggrieved party may also claim for loss incurred when taking reasonable steps in connection with his property or occupation.

3. There can be no claim for damages if the breach of promise was justified by reason of an impediment to the marriage or on other valid grounds, including the misconduct of the other party. Moreover, if such misconduct is the reason for withdrawal by one party, then it gives rise to a claim for compensation from the other party as if the misconduct were itself a breach of promise, subject to the same rules as to damages.

4. General damages other than actual financial loss may only be claimed where the aggrieved party is a woman of previously unblemished character who has permitted the other party to have sexual intercourse. If the other party then breaks the contract to marry, she may claim damages for loss of virginity. General damage may possibly be claimed on a delictual basis if the breach of promise results in injury to the health of the aggrieved party. Damages are not assignable and are not transmissible on death unless already admitted or proceedings have been started. The limitation period is in all cases two years.

5. The above rules have, apparently, the consequence that actions for breach of promise are rare and awards of damages small.

6. Gifts are recoverable by either party if the marriage does not take place, in accordance with the general principles of unjust enrichment. If the agreement to marry is terminated by death it is presumed in cases of doubt that gifts are not recoverable.

(iv) *Switzerland*

1. The legal consequences of an engagement to marry in Switzerland reach further than anywhere else in Europe. Under Swiss law, the offspring of an engaged couple can be declared legitimate if in the event it becomes impossible for the parents to inter-marry. Similarly, the offspring of an engaged couple can be declared to share in certain personal rights of the father, e.g. bear the father's name; and where such a declaration is made, the child will also have a share in the estate of the father and of the father's relatives.

2. The action for breach of promise covers ground which is even wider than in the three countries we have already discussed. The law draws a distinction between damages and compensation—the first being recoverable for pecuniary loss, the second for non-pecuniary loss. The courts will award damages for all the expenditure that was incurred in contemplation of the marriage *and* for such other losses as the plaintiff incurred, e.g. loss of income. It is important to note that, although the basis of the action is the mutuality of promises of marriage (which can be purely informal), expenses incurred before the exchange of promises are nonetheless recoverable; no more is required than that at the time the expenses were incurred both parties should have intended to inter-marry at a later date. In any case, however, the expenditure must have been reasonable, i.e. in conformity with the standing of the parties. The same rule would seem to apply to other financial dispositions. Judging by the case law, the range of dispositions ranking for the recoupment of losses is wide; it certainly includes withdrawal from employment or the giving up of one job for another which is less well paid; and it is equally certain that losses resulting from a party realising his or her assets in contemplation of the marriage are recoverable. However, in the assessment of damages the conduct of the parties will be closely scrutinised and if the plaintiff's contribution to the breakdown of the engagement was substantial, he or she may recover nothing or next to nothing. Concerning third parties, the position is similar to that in Germany; expenditure incurred by parents or persons *in loco parentis* are recoverable. Moreover, the cause of action is both assignable *inter vivos* and transmissible on death.

3. As for non-pecuniary losses, provided that the injury was serious, the defendant was at fault and the plaintiff was not at fault, the courts will award compensation for all kinds of "moral injury": anger, anxiety, disappointment, frustrated plans, adverse gossip, loss of happiness, health or reputation, and the like; and compensation is always payable if the couple had sexual relations and thereafter the girl is jilted. Normally, compensation will not be awarded if the defendant had serious grounds for breaking off the engagement; but if his or her withdrawal from it took an unnecessarily injurious form, this general rule will not apply. The claim for compensation is not assignable; but it is transmissible on death if liability was admitted or litigation began before the death of the injured party.

4. Gifts are recoverable, regardless of the conduct of the parties; but where the engagement was terminated by death, the gifts can be kept on either side. Where a gift was no longer in the possession of the donee, restitution cannot be claimed unless the plaintiff can make out a case on the grounds of unjust enrichment.

5. All claims based upon a broken engagement become statute-barred after one year.

APPENDIX D

NEW ZEALAND

REPORT OF THE TORTS AND GENERAL LAW REFORM COMMITTEE ON MISCELLANEOUS ACTIONS

(Presented to the Minister of Justice in February 1968. The section extracted in this Appendix is on pages 1-5 of the Report)

The Action for Breach of Promise

The action for breach of promise is open to either party to a proposed marriage in the event of the other person breaking the agreement between them, but it is not customary for men to exercise their rights. The aggrieved person's remedy lies in an action for damages only (specific performance being rightly regarded as inappropriate), but the damages are not confined to compensation for loss, financial or otherwise. They may also be exemplary or punitive in character. (Inglis, *Family Law* (1960), 43.)

Breach of promise actions are only infrequently commenced in New Zealand and still more infrequently do they proceed to trial.* No precise information is available regarding the number of threatened actions which are settled before any proceedings are actually instituted, but inquiries suggest that the number is small.

The reply from the National Council of Churches to the Committee's request for comments indicated that opinion among the various representatives was divided. The Chief Marriage Guidance Adviser of the Department of Justice expressed the view that the existence of a right to claim damages for breach of promise was at best unnecessary and at worst capable of producing much unhappiness, in so far as it encouraged the celebration of a quite unsuitable marriage. He made the point that the retention of the action was wholly inconsistent with the development of marriage guidance facilities and the emphasis placed by workers in the movement on not only the rights but the duty in some circumstances of an engaged person to break the engagement right up to the wedding day if need be. He suggested that the fact that young people today could contemplate a married life of about fifty years made it important to maintain complete freedom of choice before marriage.

The Committee is in agreement with this general viewpoint. It considers that the proposition that an engagement to marry is a binding legal contract which, like other legal contracts, should give rise to a claim for general damages in the event of a breach is not in accord with present-day thinking and is calculated to do more harm than good. It feels too that the interests of the community, which are so badly served by broken homes, require acceptance of the view that it is far better for an engagement to be broken than for a marriage to take place which one of the parties no longer wants. The present law is incompatible with that view. It creates a danger that the man will prefer to go ahead with the marriage and run the risk of unhappiness and possibly eventually a divorce rather than face court proceedings and not inconsiderable financial loss.

* The information before the Committee was that only five such actions had been heard in the four main centres in the ten years prior to September 1966, and there were about twenty-five other actions which were commenced but which were settled or otherwise did not proceed to trial.

No argument could be maintained today that a woman's future chance of marriage might be destroyed by the mere fact of a broken engagement; and further, as Dr. Inglis has pointed out in the work already cited, the action provides an excellent opportunity for the prospective "gold-digger".

Finally it should be noted that there is an anomaly in the fact that a breach of a pre-marriage contract entitles the injured party to claim damages from the other but that the breach of the marriage contract itself, with its infinitely more serious possible consequences, does not.

The Committee therefore takes the view that the action for breach of promise should be abolished. There is however one related question which arose in the course of the Committee's deliberations and which we think requires specific consideration in the context—namely, the need for a procedure enabling settlement of disputes arising out of property transactions entered into in anticipation of a marriage which does not take place. We considered these disputes under three headings.

In the first group we would place all disputes concerning the ownership or disposition of property, whether purchased by one or both the parties to the marriage, or given to either or both of them by a third person. The settlement of these disputes does not necessarily involve consideration of the issue of fault, so that the existence of a right to have them dealt with by a Court would not be inconsistent with the lack of any general action for breach of promise. We think it unquestionable that such a right should be provided if the action is abolished and we suggest that this should be in the form of a provision enabling the appropriate Court, on the application of any person affected, to consider any question arising out of the termination of an agreement to marry, and relating to the ownership or disposition of property, and to make such orders as may be necessary for the purpose of restoring the parties to the contract, and third persons, as nearly as possible to the position they would have been in had there been no such agreement, or such orders as appear just in respect of gifts where no claim is made by the donor.

The second group includes those disputes which concern any money spent by any person from which he has benefited, whether in the form of land, goods or services. We do not think there is need for any provision regarding money spent by any person in the purchase of property about which there is no dispute as to ownership, e.g. a house property bought by one party, or household items in the purchaser's possession, or the woman's trousseau. In these cases the person concerned will still have the property; and although some loss may be incurred by reason of its no longer being needed at that particular time we do not think this would be sufficient to justify an action which could only be dealt with on the basis of fault, and hence would be open to the objections we have found to the existing action.

We think too the same principle should apply in relation to money spent by one party or the other on any consumable item, e.g. a fare to New Zealand, from which that party was the one who benefited. The benefit has been received and we do not think any adjustment on a fault basis should be contemplated. In some such cases, it is true, the benefit would be almost non-existent—wherefor instance the person travelled to New Zealand by air, with no stop-overs, and returned home immediately after arrival in New Zealand. These cases should we think be considered as belonging in the next category.

Under the third head we considered disputes concerning money spent or owing by any person on consumable items from which he himself does not benefit. Into this category would fall such matters as the payment by one party of the other's fare from some place overseas to New Zealand or the obligation of one party or of a parent to pay the cost of wedding invitations already issued, or catering arrangements cancelled at the last moment. In some of these cases, therefore, someone else will have benefited, in others the expenditure will constitute an irrecoverable loss.

In some cases, it would appear that an action for money had and received would lie now and we do not see any reason to disturb this situation, though we think this fact should be made clear by legislation. In cases where the action would not lie however it appears to us that the loss should be allowed to lie where it falls. We appreciate that under the present law a parent who is required to pay for invitations or for catering arrangements for a wedding which does not take place has in theory a chance to recover the cost indirectly if the circumstances are such as to give rise to a breach of promise action. In practice however we do not think the abolition of the action for breach of promise will affect parents in this situation. We reiterate that no right of action could be given without introducing the question of fault and we do not think this is appropriate in respect of the termination of an agreement to marry.

Our recommendation therefore is that the action for breach of promise should be abolished, but that legislation as outlined be enacted to ensure the availability of a means of settling disputes about property transactions where necessary.

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