THE LAW REFORM COMMISSION

THE LAW RELATING TO BREACH OF PROMISE OF MARRIAGE

CHAPTER 1 A THE PRESENT LAW

There can be no action for breach of promise unless a contract to marry has been made. There are no formal requirements regarding the contract. It need not be evidenced by writing and the law prescribes no particular form of words. A promise by one person to marry another is not binding unless and until that other also promises to marry the first person. Mutual promises to marry may be implied from the conduct of the parties. A declaration of intention to marry another made to a third person will not constitute a promise unless communicated to the other person on the authority of the person making the declaration. While it is not necessary that the mutual promises should be concurrent, both should be made within a reasonable time of one another. An action for breach of promise to marry may be taken by a man as well as a woman. In modern times there have been instances of successful actions by men.

Promises to marry made by minors are voidable at the option of the minor. A minor may sue on such a promise but may not be sued, even if he or she has ratified the promise after coming of age. On reaching majority a new and independent promise to marry the other person will be binding. This distinction has been thought to be difficult to apply in actual cases and has been variously described as "perplexing" and "somewhat subtle", leading to "some extreme refinements".

Section 2 of the Evidence Further Amendment Act 1869 requires that the evidence of the plaintiff in a breach of promise action "shall be corroborated by some other material evidence in support of such promise".

A promise by a married man or woman to marry another person is actionable where the plaintiff had no knowledge of the defendant's married state. Where, however, the other person is aware of the defendant's position, a promise by the defendant to marry that person after the death of his or her spouse will be unenforceable on the grounds of public policy. Similarly, a promise by the defendant to marry the other person after he or she has obtained an annulment of a voidable marriage will be unenforceable. On the other hand a promise to marry made by a party to a void marriage would be enforceable. (A marriage that is void may be so treated by any person and does not require a decree of annulment.) A promise to marry conditional upon obtaining a divorce a vinculis outside the jurisdiction would presumably be unenforceable on the ground of public policy, but in England, in 1937, the House of Lords held that this did not apply in a case where the promise was made after a decree nisi had been been pronounced. (Fender v. St. John-Mildmay [1938] A.C. 1.) The fact that the defendant is already engaged to another person will not relieve him of liability.

A promise to marry must be fulfilled within the stipulated time, or, where no time has been stipulated, within a reasonable time. A conditional promise to marry may be sued upon when the condition has been fulfilled. If, however, the defendant before then absolutely refuses to honour the contract, an action will lie immediately. Similarly, an action will lie where the defendant marries another before the time for the fulfilment of the condition has passed (or where no condition arises, if he or she does

so before the time at which he or she has agreed to marry the plaintiff).

There are a number of defences to the action for breach of promise.

A defendant is not bound by his promise where he establishes a false representation, or fraudulent concealment in material particulars, of the pecuniary circumstances or previous life of the plaintiff. The bad character of the plaintiff will also excuse the defendant from performance of the contract, unless he or she was aware of the plaintiff's character before making the promise.

Physical or mental incapacity may give rise to a right to terminate the engagement in limited circumstances. No disease or infirmity short of absolute incapacity on the part of the defendant will avail him or her, however, even if it is proved that the performance of marital duties would endanger his or her life. Previous confinement in a mental hospital does not per se render the agreement to marry void but supervening insanity will afford a defence.

The fact that the defendant honestly and reasonably believed the plaintiff to be unfit to marry is no defence if the plaintiff was in fact fit.

Finally, it is a defence to an action for breach of promise that the plaintiff has released or discharged the defendant from performance before any breach of the contract occurs. The release may be express or implied.

The damages in an action for breach of promise are not measured by any fixed standard and are almost entirely a matter in the discretion of the judge. (In Ireland jury

trials have been rare in such cases.) Exemplary damages may be awarded, and damages may be aggravated or mitigated according to the behaviour of the parties.

It is an implied condition where the woman breaks off the engagement or where the engagement is terminated by mutual consent that she return all presents of significant value (including the engagement ring) unless they were given to her unconditionally. Where the man unjustifiably refuses to perform his promise he may not lawfully demand the return of the ring.

Gifts given by third persons are retrievable by the donor in the event of the marriage not taking place.

B NORTHERN IRELAND

The law in Northern Ireland is the same as in this jurisdiction but it is understood that it is currently being examined to see if reforms are desirable.

CHAPTER 2 THE LAW IN OTHER LEGAL SYSTEMS

(a) England and Wales

In the late 19th century, several Bills were introduced by Private Members in the House of Commons, seeking to abolish the action for breach of promise, but they did not become law. The subject was examined by the English Law Commission, which published its Report, entitled Breach of Promise of Marriage, in 1969. The Law Commission considered that the present law gives opportunity for claims of a "gold-digging" nature. (This is the reason why legal aid was never made available for such actions.) The Commission also referred to the argument 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".

The Commission, whilst conceding that this threat might not be a major factor in practice, stated:

> "/I/f, 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".

The Commission examined five proposals for reform that had been canvassed.

The first was to abolish the action and provide no new remedy. This was rejected on the ground that it would result in injustices in regard to property questions.

The second was to retain the action but to limit it to the recovery of special damages.

This was rejected on account, inter alia, of the difficulty of defining "special" damages so as to exclude compensation for such matters as loss of prospects of marriage.

The third proposal was to abolish the action and to create a new procedure for adjustment of gains and losses limited to those transactions that would not have taken place had no marriage been in contemplation, if the nature and size of the transaction resulting in gain or loss were "reasonable in all the circumstances".

The general aim of the Court should be, so far as possible, to restore the parties to the position they would have been in had they not become engaged, except where a party had made an overall gain, in which case the gain should be shared. The adjustment scheme should be subject to a general provision that it should not apply where it would be inequitable. In this regard the English Commission considered that

> "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".

The Commission had earlier suggested that the adjustment scheme should apply in all cases where an intended marriage failed to take place, such as where the engagement was terminated by mutual agreement or where one of the parties died.

The Commission in its Report rejected the adjustment scheme for four reasons:

(a) It would involve accounting difficulties unless prolonged enquiries into the parties' expenditure were made.

(b) The introduction of such a scheme would actually "be using a very large hammer to crack a very small nut". Even if community of property were to be proposed later by the Law Commission for married persons, it would be inappropriate and unacceptable to impose it upon engaged couples.

(c) The scheme "might well bring into court more cases than at present", the concept of fairness being so vague. Since acrimony surrounded some terminations of engagements, it would be better for the law to provide "a reasonably certain basis on which the parties may be advised what arrangements are open to them".

(d) Public opinion might oppose such a detailed examination of private affairs.

The fourth proposal considered by the English Law Commission was a modification of the third, namely, to replace the action for breach of promise by a system of adjustment of losses only. It rejected this proposal for substantially the same reasons as it rejected the third proposal.

The fifth proposal was to abolish the action for breach of promise, replacing it by a procedure for settling property disputes between the parties. This proposal was accepted by the Commission.

The Commission stated:

> "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".

The Commission accordingly recommended that the procedure under section 17 of the Married Women's Property Act 1882* for resolving property disputes between spouses should be extended to engaged couples.

The Commission referred to its recommendation in regard to spouses that where one spouse contributed money or money's worth to the improvement of the other's property (or the property of them both) and the contribution was of a substantial nature, he or she could (subject to their agreeing otherwise) acquire a beneficial interest in the property. It considered that this recommendation - which was implemented by section 37 of the Matrimonial Proceedings and Property Act 1970 - should apply equally to engaged couples; and this is now provided for in section 2 of the English Law Reform (Miscellaneous Provisions) Act 1970.

The Law Reform Commission considers that provisions as to the property of engaged couples similar to those contained in the sections of the English 1970 Acts referred to should be introduced into Irish law.

A number of ancillary questions were considered by the English Law Commission.

Firstly, it stated that the proceedings that it recommended in regard to engaged persons should not be capable of being taken unless there was a definite agreement to marry. Once such an agreement existed, however, the conduct of the parties before the engagement would be relevant.

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* Section 12 of the Married Women's Status Act 1957

With regard to conditional gifts made by one party to another - the engagement ring being the most obvious example - the Commission recommended that the donor

> "should not be precluded from recovering /a/ gift on termination of the agreement by reason of the fact that he was responsible for the termination".

The Commission made no recommendation with regard to gifts from third persons on the basis that it was outside the scope of the Report. It noted that the law in this connection

> "is, like the whole field of law concerning unjust enrichment, far from clear".

The Commission recommended a limitation period of three years for the proceedings that it proposed with regard to property disputes between the parties.

With regard to the problem raised by fact situations similar to that which arose in Shaw v. Shaw[1] the Commission recommended that a person who had in good faith entered into a void marriage should be entitled to claim maintenance against the estate of her supposed husband under the Inheritance (Family Provision) Act 1938 as a dependent of the deceased except in cases where the marriage had been annulled or dissolved or where the claimant had remarried.

The recommendations of the English Law Commission in its Report No. 26 regarding breach of promise were given substantial legislative effect by the Law Reform (Miscellaneous Provisions) Act 1970.

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[1] /1954/ 2 Q.B. 429. An innocent plaintiff successfully claimed for breach of promise against the estate of a man she had "married" when he had a wife living at the time; and she received damages amounting to more than half the estate. As to this case see further p. 46 infra.

Section 1(1) of the Act provides that

> "/a/n 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 be brought in England and Wales for breach of such an agreement, whatever the law applicable to such an agreement".

With regard to gifts between engaged couples, section 3 provides as follows:

> "(1) 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.
>
> (2) The gift of an engagement ring shall be presumed to be an absolute gift; this presumption may be rebutted by proving that the ring was given on the condition, express or implied, that it should be returned if the marriage did not take place for any reason".

This section has given rise to some controversy. The Law Commission, in its draft Bill at the end of its Report No. 26, had proposed a clause exactly similar to what became section 3(1) of the 1970 Act - quoted supra. In its comment on the clause, the Commission stated:

> "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."

Thus, the Law Commission made no specific recommendation in regard to engagement rings.

The first criticism which has been made of section 3 of the 1970 Act relates to subsection (1). Stephen Cretney in his Principles of Family Law (2nd ed. 1976) has observed that, in regard to conditional gifts,

> "it may be doubted whether the Act [although it follows the Law Commission's draft] fully implements the proposal that the right to recover should no longer depend on the absence of fault: it provides that a donor 'shall not be prevented from recovering the property by reason only of his having terminated the agreement'. But under the old law it was not termination alone, but termination without good cause which prevented recovery. A donor may therefore still be debarred from recovery if he has not himself terminated the agreement but behaved in such a way as to justify his fiancée in repudiating it."

Furthermore, it might be argued more generally that the section as drafted does not remove other considerations of fault. Section 3(1) merely provides that a party shall not be prevented from recovering property "by reason only of his having terminated the agreement". This still seems to leave it open to the Court to hold a party disentitled to recover on the basis of general fault, perhaps associated with the termination of the engagement, perhaps associated with other matters. The section simply provides that causal responsibility for the termination shall not, per se, prevent a party from recovering. It does not apparently prevent the Court from holding that a donor of property should be prevented from recovering it because, for example, he maltreated the other party by acts of violence or because he acted fraudulently towards her, his misconduct not being the cause, as it happens, of the termination of the engagement.

The second major criticism which has been made in regard to section 3 of the English Act relates to the presumption (in section 3(2)) that engagement rings are intended as absolute gifts. The Law Commission had no responsibility for this provision. It was inserted by Parliament in the belief that a ring should generally be regarded as "a love token, and not.... as a returnable deposit placed on a woman" and on the basis that a wronged woman should have the right to throw the ring into the river rather than return it to her former fiance. Professor Bromley, commenting on the provision, has stated that "/o/ne would have thought that by current social convention an engagement ring was still regarded as a pledge and that the presumption ought to have been the other way".[2]

As mentioned supra at pp. 7-8, the other matter dealt with by the 1970 Act relates to property questions other than those in regard to gifts. Section 2 carries out the recommendations of the Law Commission on these questions. It entitles formerly engaged parties to avail themselves of the procedure in section 17 of the Married Women's Property Act 1882 within three years of the termination of the engagement. Moreover, it extends section 37 of the Matrimonial Proceedings and Property Act 1970 to engaged couples. This section gave effect to the Law Commission's recommendation in Report No. 25 that contributions by a spouse in money or money's worth to the improvement of the property of the other spouse should entitle the first spouse to a beneficial interest in the property.

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[2] P. Bromley, Family Law, p. 18 (5th ed. 1976).

It is to be noted that the English Law Reform (Miscellaneous Provisions) Act 1970 does not change the law in regard to gifts from third persons.

Finally, section 6 of the Act gives effect to the Law Commission's recommendation in regard to maintenance of a surviving innocent party to a void marriage from the estate of the other party. (See the references to Shaw v. Shaw, at pp. 9, 45 and 46 of this Paper.)

(b) Scotland

In early times Scots law allowed damages for breach of contract only to the extent that there had been pecuniary loss. However, in Hogg v. Gow (May 27, 1812, F.C.) the Court followed the trend in other countries by holding that damages could extend to solatium for "the unutterable anguish the pursuer must have suffered by the violation of such a contract as this".

The action for breach of promise is now seldom taken. Legal aid is not available. The rules regarding formation and proof of the engagement and in relation to promises subject to terms and conditions are generally similar to those in Ireland. There are few Scottish decisions in these areas.

The action for breach of promise may be taken by either sex, although actions by men have historically been rare.

Damages, but not specific implement, may be decreed. Breach of contract may result from an express refusal to proceed with the marriage or it may be inferred from words or conduct "indicative of a settled intention to get rid of the marriage" (Stoole v. McLeish (1870) 8 M. 613, per Lord Benholme at p. 614).

Four defences appear to have been recognised to the action:

(a) No engagement

Either a contention that there never was an engagement or that it has been lawfully terminated.

(b) No breach

A contention that the parties are already married (of importance in Scotland, where there may still be irregular non-ceremonial marriages) or, more usually, that the defender is willing to marry the pursuer but that either the pursuer has broken off the engagement or that a postponement is reasonable.

(c) Justification

Liability for breach of promise will arise only where the defendant wrongfully failed to implement his promise. What amounts to justification is a question of fact in each case. The following have been held to be sufficient justification for the defender not to fulfil his promise:

(i) the discovery that his fiancée had given birth eleven years previously to an illegitimate child;

(ii) the discovery that his fiancée was pregnant by another;

(iii) the discovery of ill health on the part of the defender that made him unable to fulfil the engagement without danger to his life or serious risk to his mental or physical health.

(d) Mora (delay) and acquiescence

There are dicta to the effect that an action for breach of promise must be brought within a reasonable time. There was some doubt as to what extent (if any) the law of

limitation of actions and prescription applied, but this aspect appears now to be covered by Part I of the Prescription and Limitation (Scotland) Act 1973.

On the question of damages, as has been mentioned, solatium as well as actual pecuniary loss may be covered. Claims for loss of other matrimonial opportunities have also been recognised. The defender's position in life may be taken into consideration. Breach of promise actions are generally decided by a jury. Diligence (discovery) may be granted. The action expires with the defender but (it would appear) not with the pursuer. No damages for solatium, however, may be recovered where the pursuer dies.

An agreement to marry in Scots law may be terminated by mutual consent, or by impossibility of performance.

Property questions are decided on principles that pay very little heed to the engagement relationship as such. There is a presumption against donation and proof of trust is limited to writ or oath. As regards gifts made by one party to the other, the rule is that an outright unconditional gift, such as a birthday or Christmas present, need not be returned, but a gift expressly or impliedly conditional on the marriage taking place must be given back.

The position regarding engagement rings is discussed in the leading treatise in a fashion that merits quotation, not only in relation to Scots law but also for the purpose of clarifying the issues regarding possible legislation in this country.

"Engagement rings give rise to special difficulties. There could conceivably be evidence of the parties express intentions, but this would be unusual. It would be unromantic, even for a Scotsman, to lay down in advance the circumstances in which the ring should be returned. In the absence of express or implied intention, at least three views are possible.

(1) Engagement rings are given unconditionally, so that they remain the property of the donee if the engagement is broken or terminated. This view was taken in one sheriff court case and a presumption to this effect has now been adopted by statute in England.
(2) Engagement rings are given on the implied condition that they are returnable if the marriage does not take place for any reason other than breach of promise on the part of the donor. This was the view taken in another, and later, sheriff court case and it was the view taken in England before the law was changed by statute.
(3) Engagement rings are given on the implied condition that they are returnable if, for any reason, the marriage does not take place.

It is difficult to see by what method, short of social survey, a court could arrive at the 'right' choice from among these alternatives."

(E.M. Clive and J. Wilson, The Law of Husband and Wife in Scotland, p. 30 (1974))

Wedding presents given by third persons are returnable if the engagement is terminated or broken off, on the general principle of restitution where the event in respect of which something is given does not take place. (See p. 37 infra in regard to the similar Roman law rule.)

(c) France

French jurisprudence has drawn from Article 180 of the Civil Code, which requires that consent to marriage be free, the conclusion that a party faced with an action for breach of promise would not be a completely free agent and that thus an engagement should not be regarded as a legally binding contract and that no action should be taken for the termination of an engagement as such.

A delictual action (founded on Article 1382) may, however, be taken, not only by an engaged person but also by anyone else, where he or she has suffered loss by reason of the fault of an engaged person in terminating the engagement, or in behaving in such a manner that it was terminated with just cause by the other party.

Presents given by one engaged person to another must be returned if the engagement is terminated for whatever reason, except that a fiancée may retain the ring unless the engagement has been terminated by reason of her fault. The damages that may be claimed in the delictual action extend to expenses that the injured party may have paid. They also include dommages morals for such matters as psychological injury or damage to reputation. But since the action is not one for breach of contract, damages may not be recovered for "loss of bargain" in failing to marry a rich person.

Whilst there may appear to be some inconsistency in theory in the French Courts' requirement of some written corroboration of the engagement (as would be appropriate to a contract rather than a delict), this may be explained by the fear of the Courts that the allegation might otherwise be made too freely.

(d) Federal Republic of Germany

Actions arising from breach of promise to marry "are infrequent in German courts and never attract any public attention". "This is due to the fact that the Civil Code (section 1298) provides that compensation in the case of non-fulfilment of a promise to marry is in general confined to damage caused by the actual expenses incurred in expectation of the marriage." No action may be brought on the grounds of an engagement to marry and any promise of payment of a penalty for failure to marry is void. As Dr C.H. Wang points out in his celebrated translation of the German Civil Code (p. 288, London 1907) betrothal "creates only a moral obligation to fulfill the promise of marriage". Where an engaged person withdraws from the engagement, he must compensate the other person and the parents of that other person (or persons who have acted in loco parentis) for any losses caused by expenses incurred or by obligations undertaken in expectation of marriage. Compensation must also be paid to the other engaged person for the losses he or she may have suffered by having taken other steps affecting his or her property or source of income in expectation of the marriage. Losses may be compensated only to such extent as the expenses, the undertaking of the obligations and the other steps were reasonable in the circumstances. The duty to pay compensation does not arise if there is a grave reason for withdrawal from the engagement. Moreover, if an engaged person, by any fault that constitutes a grave reason for withdrawal, causes the withdrawal by the other person, he or she will be liable to pay compensation.

If a betrothed woman who was previously of unblemished character has allowed her fiancé to cohabit with her, she may demand reasonable compensation in money for the loss of

her virginity. The relevant section (1300) in the Civil Code has withstood challenge in the Courts despite the principle of equality of the sexes laid down in Article 3(2) of the Basic Law (i.e. the Constitution).

Where a marriage fails to take place, each engaged person may demand from the other the return of items of property that he or she gave to the other as a gift or as a token of engagement according to the provisions of the Code governing unjustified benefits. In case of doubt, it is presumed that when the engagement is dissolved because of the death of one of the engaged persons, the claim for return is barred.

The limitation period for actions in respect of breach of promise is two years from the termination of the engagement. As to the law in the Federal Republic regarding breach of promise to marry, see sections 1297 to 1302 of the Civil Code and E.J. Cohn's Manual of German Law, vol. I, pp. 222-223 (2nd ed. 1968).

(e) Italy

The law relating to breach of promise of marriage is largely contained in Articles 79 to 81 of the Civil Code.

Article 79 establishes the general principle that a promise of marriage

> "does not bind the promisor to contract it or to perform what may have been agreed upon in the event of non-fulfilment of the promise".

Thus, for example, a "penalty clause" in an engagement is unenforceable.

Article 80, which is concerned with gifts, provides that, in the event of the marriage not taking place, either party to the engagement may demand restitution of the gifts he or she has made to the other party "by reason of said promise". Fault does not enter into consideration in this regard. A limitation period of one year is specified in the Article.

Article 81 provides as follows:

> "A promise of marriage, when mutually made by public act or private writing by persons who have attained majority, or by a minor authorised by those who must give assent to the celebration of the marriage, or implied by the request for the publication, binds the promisor who without justifiable reason refuses to perform it to compensate the other party for the damage resulting from the expenditures made and the obligations contracted on the basis of that promise. Compensatory damages are limited to expenditures and obligations that correspond to the condition of the parties...."

The Article also provides that the same compensation is due from the person making the promise of marriage who, by his fault, "provided just cause for the refusal of the other party." There is a limitation period of one year.

A number of aspects of this Article require further consideration. A "public act" is an instrument drawn with the required formalities by a notary or other public official.

The Code contains a number of provisions regarding "private writing". An article of major significance in this context is Article 2702, which establishes a rebuttable presumption that "a private writing constitutes full proof of the origin of the declarations set forth therein in the person who signed such writing", if he or she recognises the signature or is legally deemed to have done so.

The general minimum age for contracting a valid marriage in Italy is 16 years for a man and 14 years for a woman. A minor may not validly marry without the consent of his or her parent or guardian. When consent is withheld, the marriage may nevertheless be authorised "for serious reasons" by the Chief Prosecutor of the Court of Appeals.

(f) Spain

The Spanish Codego Civil deals only briefly with breach of promise of marriage.

Article 43 provides that an engagement does not constitute a legally binding contract and that no order may be made by the Court requiring a party to perform such an agreement.

Article 44 provides that, where a promise to marry has been made in writing, either by an adult or by a minor with the assistance of the person whose consent to the marriage is required, or where the banns have been published and he (or she) fails to get married "without just cause", he or she is obliged to compensate the other party for the costs that that party has expended on account of the intended marriage.

A limitation period of one year is provided for in the Article.

(g) Australia

The law in Australia regarding breach of promise is similar to that in this country. Although doubts have been expressed about the relevance of the action in contemporary

Australian society, the Family Law Act 1975 (No. 53), which by section 120 abolished the actions for criminal conversation, adultery and enticement of a party to a marriage, did not change the law relating to breach of promise.

A number of points about the present law may be noted:

(a) The rule regarding corroboration exists in all States except Victoria.

(b) In all States, when the plaintiff dies, the action may proceed, but only damages limited to the loss sustained by the estate flowing from the breach of promise may be recovered.

(c) The judicial approach towards the quantum of damages is one of moderation.

(d) The action for breach of promise has been abolished in South Australia.

(h) New Zealand

The law in regard to breach of promise in New Zealand is substantially similar to that in this country.

Some specific points may be noted:

(a) The plaintiff's testimony must be corroborated by some material evidence.

(b) The rule that a promise to marry made by a married person is void is strictly applied.

(c) On the question of gifts between the parties to an intended marriage, the decision of Stone v. Scaife

> (No. 2)[3] means that, where a man has given an engagement ring to his fiancée and it transpires that there are good grounds for her to terminate the engagement, then he is entitled to recover the ring if she does in fact terminate the engagement, on the basis that it is not he, but his fiancée, who has frustrated the possibility of the marriage taking place.

In 1968, the Torts and General Law Reform Committee on Miscellaneous Actions published a Report relating (inter alia) to breach of promise actions.

The Committee stated that breach of promise actions were rare in New Zealand. It referred to conflicting views among the numbers of the National Council of Churches as to whether the action should be abolished. The opinion of the Chief Marriage Guidance Adviser of the Department of Justice that the action should be abolished was emphasised and supported by the Committee. The Committee also referred to the fears of "gold-digging" actions, and it expressed the view that "[n]o argument could be maintained today that a woman's future chance of marriage might be destroyed by the mere fact of a broken engagement...." It also pointed to the

> "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".

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[3] [1944] N.Z.L.R. 144. Assuming that fault is to be considered relevant to the determination of the question of recovery of gifts, this decision would appear to attach more importance to the question of who broke off the engagement rather than to the question of who was responsible for its termination.

Accordingly, the Committee recommended that the action for breach of promise be abolished.

Turning to questions of property, the Committee recommended, in regard to "all disputes concerning the ownership of property, whether purchased by one or both the parties to the marriage (sic) or given to either or both of them by a third person", that the Court,

> "on the application of any person affected, /should have power/ 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".

However, in regard to "disputes which concern any money spent by any person from which he has benefitted, whether in the form of land, goods or services", the Committee recommended that no action against the other party should lie.

In regard to cases of money being spent by one party (or his or her parents) where the benefit was "almost non-existent" (as, for instance, the case of a futile air journey to New Zealand), the Committee recommended that there should, in general, be no recovery. However, the Committee stated that

> "/i/n 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."

There has been no legislative response to the Committee's recommendations and breach of promise actions continue to be reported.

(i) Canada

(a) Common Law Provinces

The law relating to breach of promise in the Common Law Provinces is similar to that in this country. Thus, for example, a contract to marry may be sued upon by an infant, but he himself is not liable. Moreover, on reaching majority, the infant will not be bound in regard to an undertaking given during minority unless he subsequently ratifies it within a reasonable time of reaching majority.[4]

The rules regarding conditional contracts are the same as in this country. Specific performance will not be granted to enforce the contract. Breach of the contract is established either by conduct inconsistent with the contract (most obviously, by marrying another person) or by a specific refusal to go through with the marriage.

The evidence of the plaintiff in the action must be corroborated. As in this country, it is sufficient if the evidence supports the plaintiff's allegation that the promise was made. The defences to the action are those which generally apply in contract cases, save to the extent that misrepresentation as to personal character or position may justify a person in terminating the engagement.

The measures of damages extends beyond economic loss to injury to the feelings of the plaintiff.

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[4] See, for example, Haynes v. Evans [1941-46] Nfld. L.R. 416 (Sup. Ct.). In Ireland it appears that a new and independent contract to marry is necessary - page 1 supra.

The rules regarding property questions are largely similar but authorities are scanty. The Ontario Law Commission, which investigated this area of the law recommended that the action for breach of promise be abolished. It was influenced by the experience of the United States, and by the fact that the abolition of the action had also been recommended in England and elsewhere. Of relevance is the statement by the Commission that it recognised

> "that a concern with the distribution of property donated or acquired in contemplation of marriage is an appropriate ancillary matter .... However, this should not be used as an argument for retaining the breach of promise action, which did not efficiently adjust such matters in any event."

With regard to questions of property, the Commission made the following recommendations:

(a) Gifts between the parties

The Commission argued that the absence of a significant amount of case law

> "indicates that the dimensions of the problem of gifts between engaged persons have not been very great in the past".

The Commission's further comments on this question merit extended quotation:

> "However, the possibility of the exchange of heirlooms and securities and other items of considerable value in contemplation of marriage is very real. The Commission feels that it would be anomalous to retain the idea of contractual fault as a bar to the recovery of a conditional gift, if the contractual foundation of the engagement itself is not present. A second consideration is that where the value of the conditional gift is substantial, the significance of the donor's contractual fault may be grossly disproportionate to the loss he or she sustains. Since some legal requirements govern the property

> rights in question, the ordinary law relating to conditional gifts should apply, with no weight being attached to considerations of whether or not the donor was responsible for the termination of the engagement, or whether or not such termination was legally justified under the recognized categories heretofore developed under the law relating to breach of promise of marriage."

(b) Gifts from third persons

The Commission considered that "common sense seems to be the only guide" on this question and recommended that "/i/f the marriage does not take place, regardless of the reason, gifts given by third parties in contemplation of marriage should be returned". Moreover, the Commission considered that, where the marriage did take place, any interest of a third person in a conditional gift should thereupon cease.

It is to be noted that the Ontario Law Reform Commission made no recommendation on how other property questions were to be resolved - as, for instance, where one party has made mortgage payments for property belonging to the other.

The Newfoundland Family Law Study, which examined the law relating to breach of promise, recommended that the right of action for breach of promise be abolished but that an action for restitution or deceit should lie in appropriate cases.

(b) Quebec

In Quebec, which is a Civil Law Province, the decisions are divided on the question whether or not a right of action exists in respect of breach of promise of marriage.

In 1974, the Committee on the Law on Persons and on the Family[5] made a number of recommendations on this question.

It proposed firstly that no obligation to contract marriage should arise from any engagement or reciprocal promises of marriage.

It argued briefly in justification of this proposal that in order to protect the total freedom of consent to marriage, no broken engagement should in itself allow recourse for damages. However, the Committee recommended that an action should lie where the promise to marry was broken by the fault of one of the parties. Article 2 of the Committee's draft Code is as follows:

> "Breach of a promise of marriage entails the obligation to repair the damage caused where there is fault.
>
> However, no indemnity is payable for the loss of any benefits which the marriage might have procured for the plaintiff."

This proposal gave effect to a rule which was already adopted by jurisprudence in Quebec. It would appear that out-of-pocket expenses, as well as the shame and upset of being jilted, would be compensatable under the Article, but that no recovery could be claimed on the basis of "loss of bargain", as where the party at fault might be a "good catch".

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[5] Civil Code Revision Office: Committee on the Law on Persons and on the Family, Report on the Family, Part 1, vol. 24 (Montreal 1974).

The Committee proposed that any promise that a lump sum indemnity would be paid in the event of a broken promise of marriage should be without legal effect. This represents a change in the existing law. The Committee considered it

> "advisable to leave to the court the appreciation of the damages unfairly suffered by an intended consort rather than to allow the parties themselves to determine beforehand what the indemnity will be."

With regard to gifts the Committee proposed that, with the exception of "traditional gifts" (which would appear to include engagement rings),

> "/a/ny gift made to intended consorts in contemplation of their marriage may be reclaimed if such marriage does not take place."

The Committee defended this approach on the basis that

> "/i/t seemed fair to allow the donor to request restitution of the goods given, since, if the marriage does not occur, the consideration which motivated the gift no longer exists."

Fault considerations would apparently play no part in this context. It should be noted that the proposal extends to gifts from third persons as well as from the engaged parties.

Finally, the Committee proposed a general limitation period of one year for all "the recourses provided for" in the Articles that it had drafted on the subject. It appeared desirable to the Committee

> "in the interest of the intended consort to ensure swift settlement of any disputes which may arise when an engagement is broken."

No legislation has yet been enacted giving effect to the Committee's proposals.

(j) United States of America

The action for breach of promise would appear to have been recognised from the earliest times in the United States. The policy grounding the action was expressed in a Massachusetts decision of 1818:

> "when the female is the injured party, there is generally more reason for a resort to the laws, than when the man is the sufferer.... A deserted female, whose prospects in life may be materially affected by the treachery of the man, to whom she has plighted her vows, will always receive from a jury the attention which her situation requires.... It is also for the public interest that conduct tending to consign a virtuous woman to celibacy should meet with that punishment which may prevent it from becoming common."[6]

As regards the determination of what constitutes a promise to marry and what evidence supports it, the case law is unsatisfactory. Considerable deference is paid to jury findings on the question. In some cases evidence of sexual relations between the parties has been held admissible to prove the engagement. The plaintiff's testimony need not as a matter of law be corroborated, although some States[7] have enacted legislation requiring corroboration. In Tennessee statute requires either a written corroboration or proof of the contract by at least two disinterested witnesses.

Although ordinarily categorised as an action for breach of contract, there has been some tendency to treat the action for breach of promise as a tort for the purpose of limitation of actions and damages.

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[6] Wightman v. Coates 15 Mass. 1, at 3 (per Pather, C.J.).

[7] e.g. Maryland and Tennessee.

Defences to the action include fraudulent representations or concealment by the other party, insanity at the time of the engagement or the subsequent development of serious illness or disability.

Over forty years ago, fourteen States[8] abolished the action for breach of promise. The reasons for abolition included the following:

(a) The power to award punitive damages had, in the view of many commentators, been used by juries excessively;

(b) The unsavoury publicity, coupled with the likelihood of very high damages if the action went to trial, "induced many prospective defendants, however innocent of the wrongs charged, to settle out of court. The action consequently often took on the aspect of a blackmail operation sanctioned by law."[9]

The constitutionality of the abolition statutes was challenged in a number of States on the ground that they deprived parties of a legal remedy for injuries and wrongs to their person, property, or reputation. The statutes were upheld in Alabama, California, Florida, New Jersey and New York but were declared unconstitutional in Illinois.

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[8] Alabama, California, Colorado, Florida, Illinois, Indiana, Maine, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, Wisconsin and Wyoming.

[9] See Paulsen, Wadlington and Goebel, Domestic Relations: Cases and Materials (2nd ed. 1974) at pp. 46-47. However, Kane in "Heart Balm and Public Policy", 5 Fordham Law Review 63 (1936), argues that there was no evidence of blackmail being practised in this area of the law.

The Illinois legislature responded by restricting the scope of the action by reducing the limitation period to one year. It also provided that no punitive damages could be awarded. The legislation withstood constitutional challenge.

In 1949, Tennessee - possibly in response to the Illinois experience - enacted a statute which requires the jury to consider the age and the experience of the parties. If the plaintiff has been married already, this must be considered in mitigation of damages. If the defendant is over sixty years of age, proof of damages is limited to actual financial loss and punitive damages may not be awarded. Strict rules apply regarding corroboration of the plaintiff's evidence.

In Missouri, no punitive damages may be awarded. In Maryland, the action may be taken only where pregnancy has occurred in the course of the engagement.

In most of the States that have abolished the action for breach of promise, it is not permissible to bring an action for assault based on fraud regarding matrimonial intentions.

As regards property questions, the criterion of unjust enrichment is generally applied, whether or not the action for breach of promise has been abolished. The unjust enrichment criterion permits account being taken of the conduct of the parties and of the circumstances so as to allow for an overall adjustment of gains and losses.

In California, section 159C of the Civil Code provides as follows:

> "Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all the circumstances of the case, be found by a court or jury to be just."

In contrast Article 1740 of the Louisiana Revised Code (1940) provides that "/e/very donation made in favour of marriage falls, if the marriage does not take place". In other words, recovery of all gifts is possible regardless of who is at fault in terminating the engagement.

In New York, after the abolition of the action for breach of promise in 1936, a number of decisions held that there could be no recovery of conditional gifts. The New York Law Revision Commission recommended amending legislation to make express provision, at the discretion of the Court, for property or money transferred in contemplation of marriage. There was no legislative response until 1965 when it was enacted that there should be a right of action

> "for the recovery of a chattel, the return of money or securities, the value thereof at the time of such transfer, or the recision of a deed to real property when the sole consideration for the transfer of the chattel, money or securities or real property was a contemplated marriage which has not occurred...."

The legislation further provided that

> "the Court may, in its discretion, if justice so requires,
>
> (1) award the defendant a lien upon the chattel, securities or real property for monies expended in connection therewith or improvements made thereto,

> (2) deny judgment for the recovery of the chattel or securities or for recision of the deed and award money damages in lieu thereof".[10]

Finally, it should be mentioned that in the background to the question of breach of promise in the United States is the still widespread retention of seduction legislation, whereby such conduct may be punishable as an offence except in certain cases, some of which relate to marriage or even the promise of marriage:

> "Of the numerous jurisdictions which consider seduction a crime, a substantial majority recognize marriage (or sometimes simply a renewed offer to marry) as a defense. There are widely varying rules as to whether the marriage or offer to marry which will serve as a defense to a seduction prosecution must occur before arraignment or pleading, before trial, before the jury is sworn, before the jury verdict, or before judgment, or whether it will be sufficient if it takes place after conviction. In all cases the basic purpose seems to be the same; the question at issue is, in diplomatic terms, the amount of 'brinkmanship' in which the accused is allowed to indulge."[11]

(k) South Africa

The law relating to breach of promise in South Africa bears some similarity to that in this country, but there are some striking differences.

The following are the main principles of the law in South Africa:

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[10] New York Civil Rights Law, Article 8, section 80-b.

[11] Paulsen, Wadlington and Goebel, Domestic Relations, p. 60. (See supra fn. 9.)

No formalities are necessary to make a contract to marry. In general, capacity to enter into a contract of engagement coincides with capacity to marry. Thus, persons within the prohibited degrees of relationship may not sue or be sued for breach of promise.

The rules regarding promises of marriage made by married persons are strict: even if the marriage is an "empty shell", a decree nisi for divorce having been made, the promise will be unenforceable. (See H. Hahlo, The South African Law of Husband and Wife, p. 47 (4th ed. 1975).)

A minor of marriageable age must obtain the consent of his or her parents or guardians before a contract to marry will bind him or her, and "even where the contract is binding on the minor, the courts are disinclined to award damages for breach of promise to a major against a minor" - Hahlo, op. cit., p. 48.

Insanity, intoxication, force, intimidation, mistake, fraud and misrepresentation will all constitute good defences to a breach of promise action. Under the general heading of "any other good reason" (alia justa causa), the discovery of impotence, sterility, alcoholism or serious criminality will entitle a person to terminate an engagement.

Prior to the Marriage Order in Council of the Cape Colony of 1838, a contract to marry could be enforced by an order for specific performance. Since then, damages have been the only remedy. The action is available for both sexes but the "courts are somewhat reluctant to award substantial damages to a man" - Hahlo, op. cit., p. 55.

Where the defendant has seduced the plaintiff under promise of marriage, she can claim damages for seduction as well as for breach of promise. Whilst damages for breach of promise may be awarded against the estate of a deceased person, recovery will be limited to the plaintiff's actual pecuniary loss.

Corroboration of the plaintiff's evidence "is not indispensable but the courts will generally insist on it" - Hahlo, op. cit., p. 59. A presumption exists in favour of moral propriety between the couple which might, in times of changing moral standards, conceivably result in injustice to the defendant. Where the evidence is equally compatible with an engagement and an illicit liaison, "the presumption against immoral conduct may tip the scales in favour of an engagement" - Hahlo, op. cit., p. 59.

The limitation period for breach of promise actions is three years - Prescription Act, 68 of 1969, s. 11(d). Penalty clauses in engagement contracts are against public policy.

The law relating to gifts between engaged persons is somewhat complex. Gifts may be divided into three categories. The first consists of arrhae sponsalitiae, which are tokens or earnests of the donor's sincerity, with the understanding that they are to be forfeited by the donor if he breaks his promise.

Engagement rings fall into this category and are "the most important, if not the only, example in modern law" - Hahlo, op. cit., p. 60.

The second category consists of gifts made in contemplation of marriage. Any permanent gifts of value, such as a house or farm, an insurance policy or furniture, will be presumed to have been made in anticipation of marriage, if made during the engagement.

The third category consists of out-and-out gifts of small value, which engaged persons frequently give each other as takens of affection.

All gifts (other than gifts in the third category that have been lost, consumed or alienated) must be returned if the engagement is terminated by mutual consent, death or for some reason (such as insanity or impotence) which does not involve fault on the part of either person.[12]

Presents given before an engagement have to be treated as unconditional out-and-out gifts, in the absence of a contrary intention. Presents given by third persons in anticipation of marriage may be recovered in the event of termination of the engagement on the basis of the Roman law condictio causa data causa non secuta - a formal claim of restitution in respect of something given where the event in respect of which it is given does not follow or take place. In Roman law an action lay "where a res was handed over for a return not given. It was a typical case of innominate contract, but wider in scope, e.g., it lay where money was given as dos, but the marriage fell through. If casus made the counter render impossible, the debtor was released in classical law and there was in general no right of recovery of what had been given. But some texts give such a right in most cases due to Justinian". (See William W. Buckland, Manual of Roman Private Law, p. 316 (2nd ed. 1939).)

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[12] In South Africa once the marriage has taken place, engagement gifts become subject to the ordinary rules regarding the property of the donee.

CHAPTER 3 POLICY ARGUMENTS REGARDING REFORM OF THE LAW

The arguments in favour of abolishing the action for breach of promise may be summarised as follows:

(a) The possibility of "gold-digging" actions has been adverted to in many countries;

(b) The opportunity for blackmail has been recognised elsewhere;

(c) The risk that a girl whose engagement has been broken will thereafter be shunned by potential marriage partners may well have lessened greatly in recent years;

(d) To equate responsibility for the termination of the engagement with "fault" may be mistaken policy in many cases. As has been observed,

> "in one sense the engagement period has been successful if the engagement is broken since one of the parties has utilized this time so as to avoid a marriage that in all probability would fail."

(e) The possiblity of a legal action may have the effect of encouraging persons with less than a full matrimonial commitment to marry. This might result in the marriage being an unsuccessful one.

(f) Most agreements within the family are not regarded as legal contracts, so that if the breach of promise action is abolished the law as to agreements between

husband and wife will be extended to agreements to marry. In Balfour v. Balfour [1919] 2 K.B. 571, 578 (which concerned a promise by a husband working in Ceylon to pay £30 a month to his wife living for medical reasons in England) Lord Justice Atkin said in regard to domestic agreements:

> "Those agreements, or many of them, do not result in contracts at all.... even though there may be what as between other parties would constitute consideration for the agreement.... They are not contracts.... because the parties did not intend that they should be attended by legal consequences.... Agreements such as these are outside the realm of contracts altogether."

(See further on domestic agreements Chitty on Contracts (vol. I, pp. 58-60 (24th ed. 1977).)

The arguments in favour of retaining the cause of action may be summarised as follows:

(a) The risk of "gold-digging" actions is more theoretical than real. The rule that the plaintiff's evidence must be corroborated should normally protect the defendant sufficiently.

(b) The fear of blackmail is one that affects many areas of the law, but the solution is not to abolish the right of action. Potential defendants must use their common sense and avoid placing themselves in awkward situations where they are not really serious or have not finally made up their minds.

(c) Whilst the stigma of a broken engagement may have lessened in recent years, the fact remains that the experience of being jilted by a person who has perhaps behaved with deceit or callousness is very

often a painful and humiliating one. The Commission inclines to the view that in rural Ireland a jilted woman may suffer more humiliation and "loss of chances" than a jilted woman in a city.

(d) The jilted party may well have suffered financial loss as a result of the engagement or may have foregone other opportunities of marriage.

(e) Whilst in some cases it is not right to equate responsibility for the termination of marriage with "fault" there are cases where engagements are broken for avaricious or dishonourable reasons. A remedy in damages should be available in such cases.

Having weighed these arguments on their merits, the Commission recommends that the present right of action be abolished. In place of the action, it recommends that there be enacted provisions specifying the rights of the parties to the engagement and others in respect of certain property matters.

These property questions may be grouped under the headings of (a) gifts and (b) other property.

(a) Gifts

The recommendations that follow are based on the premise that fault should be irrelevant in determining appropriate rules in relation to gifts.

(i) Gifts from third persons

The question of gifts from third persons is of significance in a larger context than breach of promise actions. The issue might arise where the marriage did not take place

because one of the parties died. Alternatively a dispute between the parties after marriage might involve questions of ownership of specific gifts from third persons.

Two views have generally been expressed regarding what intention should be presumed from the action of the third person donor. One approach is to consider that the party who is a relation or friend of the donor is the intended sole beneficiary; the other approach is to consider that both parties are intended to benefit jointly.

It is recommended that there should be a presumption of intention to benefit the parties jointly. There frequently are difficulties in deciding which party is "the friend" of the donor. It is often the case that the donor is a friend of both although he or she has known one longer than the other. It seems artificial in such cases to require the Court to infer, in the absence of evidence to the contrary, that only one party was the intended donee. Where, however, there is solid evidence of an intention that the gift should be the property of one spouse only, effect should be given to that intention.

The Commission recommends that a specific provision be enacted making it clear that, in the absence of a contrary intention, wedding presents from third persons are to be returnable if the marriage does not take place. This would appear to be the present law, and seems to be the sensible solution.

(ii) Gifts between parties to an intended marriage

The Commission believes that the law should remove any consideration of fault from the determination whether such gifts are returnable. If a gift is conditional on the wedding taking place it should be returnable; not otherwise. However, it is desirable to make certain presumptions to assist in the determination of whether a gift is conditional or unconditional.

The Commission recommends that any gift made by one party to an intended marriage to the other should be presumed, in the absence of evidence to the contrary, to be conditional (if the engagement terminates for any reason other than the death of the donor) and therefore returnable if the marriage does not take place.

The Commission further recommends that the rule applicable to gifts generally should apply to engagement rings also. The solution adopted in England in regard to engagement rings was a compromise one arising out of the desire to ensure that a jilted woman should be free to do as she wished with the ring. The legislature conceded that to give effect to this sentiment would be to reinstate the issue of responsibility for the termination of the engagement. So a general presumption that the fiancée was to benefit was introduced. It may be argued that this general presumption goes too far in protecting the position of the fiancée who breaks the engagement for no very good reason.

(b) Other Property

The best approach to the resolution of property questions between former parties to an engagement would appear to be to reduce complications as far as possible whilst protecting one party from unfair treatment by the other. The simplest way of accomplishing this - which is recommended for acceptance - would appear to be to provide that, where an engagement has been terminated, the Court should have power, if it appears to it that either party has been unjustly enriched by the other to make such order for compensation or restitution as appears to it to be just in all the circumstances. In making a determination the Court should not have regard to the question of the responsibility of either party for the termination of the engagement. However, the Court should be able to take account of "outrageous behaviour" by one of the parties.

A number of points about this recommendation should be noted:

Firstly, the issue of who was responsible for the termination of the engagement may not be considered by the Court. This should not mean that all "fault" considerations will be irrelevant to the deliberations of the Court. Where one of the parties has behaved despicably or dishonourably as, for example, by committing acts of violence on the other party, or by acts of fraud or deceit (moral or financial), such as seduction on the understanding of marriage, the Court should be able to give consideration to this fact. It would be probable, however, that in the normal case the question of fault would not enter into consideration very much, if at all.

Secondly, the Court could make an order where one party has been unjustly enriched by the other. Not every case of loss sustained by one party or of gain made by the other would give rise to judicial intervention. On the other hand, where a girl has made a number of payments for the rent of a house in which the engaged couple intended to live when married, and the engagement is terminated by her, the Court would be more likely to hold that her fiancé has been unjustly enriched, unless he paid some compensation to her. Whilst he has not gained a positive sum of money directly from her, he has benefitted indirectly, by not having paid sums of money that he might reasonably be expected to have paid. Clearly, the question whether or not this enrichment was "unjust" will depend greatly on the respective positions of the parties and, it must be acknowledged, on the particular perceptions of the Court regarding standards of fairness between the parties. Where rent and mortgage payments are substantial or increase the value of the "matrimonial" property they should be treated as contributions to the improvement of that property. (See pp. 8-12 supra.)

Thirdly, the Court would not be entitled to make an order for compensation or restitution by either party to the engagement to any third person, such as the girl's parent or friend, who may be out of pocket, except where there has been substantial and unjust enrichment. In the normal case of expenditure by a third person, that person enters into the transaction with his or her eyes open to the risk of the marriage not taking place. It would appear inadvisable to expose an engaged party to liability otherwise than to the other party and to third persons by whom he or she has been substantially and unjustly enriched.

An important question must be resolved with regard to the proposed provision. Should it replace or be in addition to the operation of (a) the law of trusts and (b) the law of tort (such as negligence or deceit)?

It is suggested that the best approach would be not to disturb the law in either of these areas except in so far as concerns contributions by either party to the engagement to the improvement of the "matrimonial" property. (See pp. 8 and 44 supra.) Whilst one may speculate on the possible outcome of an action based on negligent misstatement - for example, where a party has broken an engagement for no valid reason - it is considered advisable not to attempt to stifle the operation of the general principles of law in these areas. In most cases where an engagement has been terminated, if a party feels aggrieved the proposed provision based on unjust enrichment would be likely to prove the more attractive. Rather than tie down the development of the law in a manner that might result in unforeseen repercussions in other areas of the law, it is considered that the best course would be to do nothing in these areas. Section 2 of the General Scheme of the proposed Bill (on p. 49) should ensure that the fact of the termination of the engagement should not of itself be a basis of liability.

The Commission considers that the problem of a person who enters into a void marriage as a result of a misrepresentation by a married person that he or she is unmarried (see pages 2 and 9 supra) should be dealt with in the Commission's recommendations on nullity rather than in the present context. Breach of promise is an "excepted cause of action" and, accordingly, does not survive against

a deceased person's estate – section 6 of the Civil Liability Act 1961. And there would be little point in amending the existing law in the legislation now proposed so as to cover the situation that arose in Shaw v. Shaw [1954] 2 K.B. 429 (referred to supra at p. 9). In that case, Lord Justice Singleton explaining the law in England said at p. 439:

> "Mr Chapman also raises the question that even if there should be a right of action, it can only be in respect of the special damage alleged and proved, and he cited in support of that proposition the judgment of Roche J. in Riley v. Brown. I do not think that that judgment helps in the present case, for it seems to me that the Law Reform (Miscellaneous Provisions) Act, 1934, has altered the position by the words in section 1(1): "Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. . . ." There was, on the death of Shaw, a cause of action subsisting against him, and that cause of action survives against his estate."

Finally, the Commission is of the view that where an agreement to marry is terminated by one party, special provision should be made to cover sizeable expenses and outlay which in effect may be considered as "thrown away" by the other party as a result of the agreement. The Commission has in mind in this connection expenses incurred in a journey from a foreign country made by the jilted party while the agreement to marry was still in force.

CHAPTER 4 SUMMARY OF RECOMMENDATIONS

1. The action for breach of promise of marriage should be abolished - p. 40.

2. With regard to gifts from third persons to parties to be married, there should be a presumption of intention to benefit both parties jointly. In the absence of a contrary intention, wedding presents from third persons should be returnable if the marriage does not, for whatever reason, take place - p. 41.

3. Gifts between parties to an intended marriage should be presumed to be conditional and thus returnable if the marriage does not take place, except where this is due to the death of the donor - p. 42.

4. Engagement rings should be subject to the same rule as other gifts - p. 42.

5. (1) Where it appears that either party to an engagement to marry that has been terminated has been unjustly enriched by the other party or has been substantially and unjustly enriched by a third person, the Court should be empowered to make such order for restitution or compensation as appears to be just in all the circumstances. In making any determination the Court should not have regard to the question of the responsibility of either party for the termination of the engagement except where there has been violence, fraud or deceit by one of the parties - pp. 43, 44 and 45.

(2) The Court should be empowered to award compensation to a jilted party for sizeable expenses and

outlay "thrown away" because of the breach of promise - p. 46.

6. Where an agreement to marry is terminated, any rule of law relating to the rights of husbands and wives in relation to property should 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 - pp. 8, 12, 44 and 45.

7. Where either party to an engagement to marry contributes in money or money's worth to the purchase or improvement or maintenance of property (including any payments in respect of rent or in respect of a mortgage) in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the party so contributing should, if the contribution is of a substantial nature or increases the value of the property and subject to any agreement to the contrary between them, be treated as having acquired a share, or an enlarged share (as the case may be), in that beneficial interest of such an extent as may have been agreed or, in default of agreement, of such an extent as may in all the circumstances appear just to the Court before which the question of the existence or extent of the beneficial interest arises - pp. 8, 12, 44 and 45.

8. Where an agreement to marry is terminated, either party or any person concerned should be able to apply to the Court to determine the rights of the parties in relation to property in which either or both had a beneficial interest while the agreement was in force, provided that the application (which the Court may hear otherwise than in public) is made within three years of the termination of the agreement - pp. 8, 12, 44 and 45.

CHAPTER 5 GENERAL SCHEME OF A BILL TO REFORM THE LAW RELATING TO BREACH OF PROMISE OF MARRIAGE

1. Provide that the Act may be cited as the Agreements to Marry Act 1978.

2. Provide that an agreement between two persons to marry one another that has been entered into after the first day of January 1979 shall not have effect as a contract giving rise to rights in law and that no action may be brought for breach of such an agreement, whatever the law applicable to the agreement.

3. Provide that where two persons have agreed to marry one another:

(a) any property given by any other person to either or both of them as a wedding present is presumed, in the absence of evidence to the contrary -

(i) to have been given to both of them as joint owners, and

(ii) to have been given subject to the condition that it be returned at the request of the donor (or his estate), if the marriage, for whatever reason, does not take place;

(b) (i) any property (including an engagement ring) given by one of them to the other is presumed, in the absence of evidence to the contrary, to have been given subject to the condition that it be returned at the request of the donor, if the marriage does not take place for a reason other than the death of the donor;

(ii) any property (including an engagement ring) given by one of them to the other is presumed, in the absence of evidence to the contrary, to have been given unconditionally if the marriage does not take place on account of the death of the donor.

4. (1) Provide that where an agreement to marry is terminated, the Court may, on the application of either party or of a third person, if it considers that one party has been unjustly enriched by the other or that he has been substantially and unjustly enriched by the third person, make such order for restitution or compensation as appears just having regard to all the circumstances.

(2) Provide that in determining whether to make an order under subsection (1) and the nature of any such order, the Court is not to have regard to the issue of the responsibility of either party for the termination of the engagement, unless there has been violence, fraud or deceit by one of the parties.

5. (1) Provide that where an agreement to marry is terminated by the unilateral action of one party, the Court may, on the application of the other party, award compensation to cover substantial expenses and outlay "thrown away" by or on behalf of that other party as a result of the agreement.

(2) Provide that, for the purposes of this section, expenses and outlay "thrown away" means expenses and outlay incurred by reason of the promise to marry and in respect of which no benefit has accrued,

6. Provide that 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 applies in relation to any property in which either or both of the parties to the agreement to marry 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.

7. Provide that where either party to an agreement to marry makes a contribution in money or money's worth to the purchase or improvement or maintenance of any property (including any payment in respect of rent or in respect of a mortgage) in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the party who makes the contribution is, if the contribution is of a substantial nature or increases the value of the property and subject to any agreement to the contrary between them, to be treated as having then and thus acquired a share or an enlarged share (as the case may be) in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, of such an extent as may in all the circumstances appear just to the Court before which the question of the existence or extent of the beneficial interest arises.

8. Provide that where an agreement to marry is terminated, either party to the agreement (or any person concerned) may apply to the Court to determine the rights of the parties in relation to property in which either or both had a beneficial interest while the agreement was in force although the property has or may have ceased to be in the possession or under the control of either such party:

and provide that the Court may make such order (including an order for the sale of the property) as appears just in the circumstances.

9. Provide that the Statute of Limitations 1957 is amended by the addition of a section on the following lines after section 12:

> "12A. - An action under the Agreements to Marry Act 1979 shall not be brought after the expiration of three years from the date of the termination of the agreement to marry."

10. Provide that in the Act "the Court" means the High Court or (at the option of the applicant) the Circuit Court.

11. Provide that any proceedings under the Act may, if either party so requests, be heard otherwise than in public.
