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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR A POSTGRADUATE DIPLOMA IN HISTORY AT THE UNIVERSITY OF OTAGO, DUNEDIN, NEW ZEALAND.

1 NOVEMBER 1992
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Fig. 1. Line Drawings of Elizabeth Raddon and Frederick Rockett from *New Zealand Truth*, 5 September 1917, p. 5. See page 32.
INTRODUCTION

Courting and the decision to get married were significant events in the lives of New Zealanders from the pioneer period right through to today. Yet little is known about what the norms of courtship were and how people chose their marriage partners, especially in the nineteenth century. There are many questions surrounding this process still to be answered. For example how long was the average courting period? How important were family expectations? Were love matches common or was the decision to marry purely an economic one? Did men and women view the process in the same way? These questions assume significance because the family has always been the foundation of New Zealand society. How people chose the marriage partners with whom they would build a family is an interesting historical question. The aim of this research essay is to study engagements which did not reach their natural conclusion, those that broke down before the couple got to the altar. Because of the lack of readily available sources on broken engagements this will be a study of those extreme cases when the person who had been jilted sued their ex-fiancé for breach of promise of marriage. While this is only one facet and an unusual one at that, of the courtship and marriage process, such a study focusing as it does on a particularly sensitive area, can provide insights into the social values of New Zealanders.

Until the Domestic Actions Act was passed in October 1975 an agreement to marry, that is an engagement, was a legally binding contract. The legal remedy open to a jilted fiancée was an action for breach of promise of marriage. This was not a remedy to compel the reluctant suitor into marriage, but rather its aim was to provide monetary compensation to the wronged plaintiff. A common law action, the right to sue for breach of promise of marriage developed in England in
the seventeenth century when betrothal formed an integral part of the marriage. The earliest cases were brought to recover money paid on the faith of a promise of marriage after one party had broken the contract. Later cases sought damages based on monetary compensation for the loss of the marriage and for the plaintiff's injured feelings. This is the tradition of breach of promise of marriage which was imported to New Zealand with the English legal system.

There are some difficulties in locating breach of promise cases. As there is no list of them to provide an easy reference point many of the cases discussed here were found by reviewing legal literature. This method has limitations in that because breach of promise is a common law action it has not been widely affected by legislation. Reviewing the case law provided a few more cases and ensured that the legal aspects of breach of promise are able to be fully covered. To provide a more detailed account of these cases, one which does not concentrate on the legal aspects, newspaper accounts of the proceedings have also been used. Further to this other breach of promise cases were located in newspapers providing some cases which have not necessarily been significant in the legal development of this type of action. Where possible local newspapers have been used. These accounts were supplemented in many of the cases by accounts in New Zealand Truth, which provided more detailed, if more sensational, coverage of the court action. This was especially useful in the early cases but by the time A v. B came before the court in 1972 the paper did not cover breach of promise cases. Generally, because these

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cases became public spectacles, coverage of them in the newspapers was comprehensive. This has not escaped the notice of the legal profession, Inglis noting ‘newspapers have not been slow to exploit the dramatic possibilities of these actions, and few receive less than ... prominent publicity’.4

Such cases were certainly not commonplace events in New Zealand. The Torts and General Law Reform Committee noted, in their 1968 report on breach of promise of marriage, that the information they had, stated that only 5 such actions had been heard in the four main centres in the decade prior to September 1966. About 25 other actions had been commenced but these were settled or for some other reason did not reach the trial stage.5 Ten cases (including counter-cases) will be discussed in this essay, spanning the period of 1876-1975. These cases reflect the fact that throughout the century the norms of society and thus courtship processes changed significantly.

The legal background to the action of breach of promise of marriage is detailed in Chapter One. This includes a summary of both statute and case law as both were instrumental in shaping the legal aspects of the action. While case law seems to have been the predominant influence in how the courts handled breach of promise cases at times changes in the statute law had a significant impact. This is illustrated in Chapter Two by the case study of Hughes v. Shand a case heard in 1876 after changes to the evidence laws. Two other cases are studied in this chapter, both dealing in part with the impact of the changes to the evidence laws and the effects this had in practice. Raddon

4 B.D. Inglis, Family Law, Volume One, p. 27.
v. Rockett, a case which embodies many of the elements that breach of promise legislation was aimed at protecting women against, is the subject of Chapter 3. Three cases which set precedents in New Zealand because they were deemed to be illegal by the judiciary, are the subject of Chapter 4. Chapter 5 documents the process of abolishing the breach of promise action which began in 1968 and culminated with the Domestic Actions Act in 1975. The Conclusion examines whether the breach of promise action was fair and effective legislation, or whether it was based on the proposition that "...women...not only did but should have a status inferior if not servile to men."^{6}

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CHAPTER ONE LEGISLATION

The action for breach of promise of marriage has existed in British law since the seventeenth century, when betrothal was a contract entered into as much for monetary as for sentimental reasons.1 From the beginning it was not an action designed to compel the reluctant party into marriage, but rather to recover damages for the loss of marriage2. When New Zealand became a British colony in 1840, its inhabitants became subject to the laws of that country, later developing their own legal system on the principles of English law. Thus there is no statute specifically allowing actions for breach of promise in New Zealand because it was an action inherited with the common law system. However, while breach of promise is regarded as a contract and as such is dependent on common law, it has at times drawn the attention of the legislature. Often when legislation detailing the changing legal requirements for this type of action was implemented, it would come about as a result of changes in the British legislation. This tradition began in 1854 with the passing of 'The English Acts Act, 1854'. Encompassed in the English legislation adopted by New Zealand were several Acts which denied the parties to breach of promise cases the right to give evidence3. Neither were husbands and wives allowed to the parties allowed to take the stand in such cases4. In 1865 'The Colonial Laws Validity Act' ensured that thereafter New Zealand would not automatically include British law, but it was usually adopted anyway.

1 Homer H Clark, Law of Domestic Relations, p. 1.
3 These were Lord Brougham's Act - 14 and 15 Victoria and the amendments 16 and 17 Victoria, both passed in 1854, cited in N.Z.P.D., Vol 18, 1875, p. 604.
4 Mr Bowen, House of Representatives, N.Z.P.D., Vol 18, 1875, p.605.
An example of this is one of the early pieces of legislation enacted in New Zealand dealing in part with breach of promise, the 1875 Evidence Further Amendment Act. With all but one clause of this Act being a direct transcript of an English Act passed in 1869, the object of this Bill was to bring New Zealand into line with the English legislation.\(^5\) This did not however guarantee it an easy passage through parliament. First read in the House of Representatives in 1871, the Evidence Further Amendment Bill sought to declare the parties to an action competent to give evidence in that action. For those involved in breach of promise of marriage actions this would ensure that those most affected by the action, the plaintiff and the defendant, would be able to give evidence. A famous, if fictional example of a case in which the parties were restricted by evidence law before 1869 and thus not allowed to enter the witness-box occurs in Charles Dickens \textit{The Pickwick Papers}\(^6\). With the writ of action issued in 1827 neither Mrs Bardell nor Mr Pickwick took the stand, their friends and acquaintances supplying the evidence.

While most of the dissension in the House over this Bill was directed at a clause unrelated to the action for breach of promise, there were some questions as to the desirability of allowing parties involved in this type of case to give evidence on their own behalf. It was thought that this type of change in the law would result in an increase in the crime of perjury. Indeed the prohibition on parties to such a case giving evidence had been the rule in English law for more than 250 years. As early as 1602 this was explained on the ground that the people most interested in the case might be tempted to commit perjury for the purpose of winning the action\(^7\). The example used in parliament to illustrate this danger, was that


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a girl who was voluntarily seduced by a man, might later maintain that she had lost her virtue under a pledge of marriage, resulting in an unjustified action for breach of promise. The passing of this Bill had resulted in an increase in the number of actions for breach of promise of marriage against old people by their housekeepers. Thus Mr Waterhouse, the member for Wellington and the major opponent in the House of this piece of the legislation, suggested that it would be wise to gauge the effect of the legislation in Britain, before New Zealand implemented it. Mr Waterhouse was alone in voicing criticism of the clause relating to breach of promise of marriage. The main opposition to this Bill was still aimed at the fifth clause which would allow parties to criminal actions to give evidence on their own behalf, and it was decided to let the Bill lapse until there was clear evidence as to whether this clause would be effective.

The Bill was introduced to the House for a second time in 1873, but was again unsuccessful, the second reading being lost by one vote, after a considerable amount of discussion. Again the opposition was mainly focused on the controversial fifth clause, rather than the third clause of the Bill which related directly to breach of promise. When this Bill was again introduced into the House in 1875 the legislation had been implemented in England for six years and the changes had generally been acknowledged as beneficial. This ensured that the Bill had an easier passage through parliament this time, although there was still much debate over the fifth clause. The previously expressed opposition to allowing parties to an action for breach of promise to give evidence on their own behalf, was not raised again at this stage. The Bill was eventually passed on 18 October, 1875. It was a significant loosening of the laws regarding evidence in New Zealand, but

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8 Mr Waterhouse forwarded this example, noted in *N.Z.P.D.*, Vol 10, 1871, pp. 550-551.
9 *ibid.*
was tempered in the case of breach of promise by the requirement that any evidence given by the parties to the case, as to the existence of the actual promise to marry, had to be corroborated by some other material evidence. This was a pivotal question of law in at least one case, Hughes v. Shand [1876], which will be explored further in the next chapter.

The rules regarding the ability of the plaintiff to give evidence in breach of promise cases, were clarified in the Evidence Act 1908. Section 21. of this Act states that the testimony of the plaintiff must be corroborated by some other material evidence in support of the promise, if the plaintiff is to recover a verdict.11 Apparently the requirement of corroboration was intended to deter 'gold-digging' actions.12 All statutes are to some extent interpreted by the judges who administer the law. Case annotations commenting on this Act point out that the corroborating evidence must confirm the alleged promise, not the story as to other facts.

Other Acts have impacted in a minor way on the legal requirements surrounding an action for breach of promise of marriage. For instance the Magistrates' Court Act, enacted in 1928, confirmed that the magistrates court had no jurisdiction over breach of promise cases.13 Thus from 1928 at least, all actions of this type have been heard in the Supreme Court.

The judiciary was not always sympathetic to breach of promise cases, with judges in England questioning the benefit of such actions as early as 1928.14 In New Zealand, the Otago Daily

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11 Evidence Act 1908, No 56, The Consolidated Statutes of New Zealand, 1908, Wellington, 1908.
Times had commented after a breach of promise case in 1876, that they had hoped the English tradition of settling this type of case before a jury would not be carried on in the colony. By 1969 the view of many legislators and judges was that the action for breach of promise was something of an anachronism and this was reflected in some statutes. The Legal Aid Act, 1969, stated that legal aid would not be given in proceedings for breach of promise of marriage. The Minister of Justice, Mr J.R. Hanan commented that this type of proceeding should not be the responsibility of the taxpayer. He further remarked that he could foresee the day when legislation abolished this action and that to give legal aid for breach of promise cases would be 'ridiculous'. Also in 1969 the Minors' Contracts Act protected minors who had not already been married, from being bound by a promise to marry.

By this stage the Torts and General Law Reform Committee had presented a report to the Minister of Justice which advised that the action for breach of promise, among others, should be abolished. This was certainly in the minds of some politicians when the Illegal Contracts Bill came before the House in 1970. Clause 10 of this Bill protected the right of any person to bring an action for breach of promise, with an explanatory note stating that it was designed to preserve the decision made in an English case Shaw v. Shaw [1954]. It was held by the judge in this case that an unmarried person who contracts to marry someone, ignorant of the fact that that person is already married, is entitled to bring an action for breach of promise. This preservation of an action which was increasingly unpopular amongst the judiciary came about largely because the Minister of Justice had before the report of the Torts and General Law Reform Committee, which it was thought he would act on. This

committee finally saw its work come to fruition in October 1975 when the Domestic Actions Act, containing a clause abolishing the action for breach of promise of marriage, was passed.19

A survey of the legislation regarding breach of promise does not reveal all the legal history of this action. Under common law the judiciary depends upon a series of principles which are not usually written into the statutes. It is relevant to look at the case law for breach of promise to give a full indication of the legal requirements, as they stood when the action was abolished in 1975. Most of the precedents applied originated in Britain although at times judges have found it more relevant to refer to principles applied in Australian or American courts. It was rare for judges hearing cases in New Zealand to set precedents, as the principles governing most decisions could be found in the case law of another country. While for the most part the ordinary law of contract applied to breach of promise cases, because of the personal and non-commercial nature of the contract they had some peculiar characteristics. First, the action raises some special problems in the area of illegality. The Courts took the view that if one or both parties of a contract to marry was already married, the contract would be illegal on the grounds that it was contrary to public policy. In this instance it is public policy to uphold the sanctity of marriage, the promise to marry another contravenes this sanctity, and as such is an illegal and unenforceable contract. This rule was applied in New Zealand in the 1933 case of Lambert v. Dillon. The only exception to the rule was in a case where the unmarried party had no knowledge of the other party's marriage. Because the only case mentioned in support of this exception is an English case it is unlikely that it was ever applied in a New Zealand court. The other example of an illegal contract to marry occurred in Davis v. Hutchinson [1939], when the promise to

19 Domestic Actions Act 1975, see Appendix 1.

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marry was based on an immoral consideration, that is future illicit cohabitation. These cases are discussed more fully in Chapter 4.

Secondly, the remedy of specific performance or requiring the party in breach to fulfil the contract, could not be granted in breach of promise cases. Nothing would be gained by requiring a reluctant suitor to remedy the breach by proceeding with the marriage. The only remedy that could be applied was damages. It was decided in New Zealand that punitive damages could not be awarded in such a case by the magistrate in A v. B [1972]. Punitive damages are awarded as a punishment for the defendant and this was not applicable in actions for breach of promise. Rather general damages could be awarded to compensate the plaintiff for loss of the benefit of the marriage. It was also applicable to award aggravated compensatory damages for the injury to the feelings of the plaintiff, in which case the conduct of the defendant was relevant.

A third problem was that unlike commercial contracts it was possible that a specific date for the completion of the contract, that is the wedding ceremony, was not fixed at the time of making the contract. In these cases the law implied that the marriage should take place within a reasonable time. While the simplest breach of promise case would be one in which the defendant had not turned up on their wedding day, all the cases studied here were the result of an anticipatory breach. That is, the defendant had broken the contract either by refusing to marry the plaintiff or by marrying someone else. Thus either party to the contract could require the other to implement their promise at a convenient time, but could not succeed in an action for breach of promise unless it was shown that the request was unreasonably refused by the other.

The defendant to an action could use certain special defences which were not available in the case of a commercial
contract. These were that unbeknown to the defendant at the
time of making the contract, the plaintiff had some moral,
physical or mental infirmity which would make her [sic] unfit
for marriage. This defence was only available if the defendant
had found out about the infirmity after they had entered into
the contract. It also had to be confirmed that the plaintiff
did suffer from the alleged infirmity, not merely that it was
the opinion of the defendant that they did. An example of a
possible infirmity used in family law texts is that `...the
plaintiff's unchastity (at least if she be a woman), impotence
or insanity would be a good defence...'.\textsuperscript{20} Whether any
defendant ever took advantage of these special defences in New
Zealand is unknown, but the possibility of using them was
certainly available. Other than this the defendant could use
any of the general defences common to all breach of contract
actions. These include being a minor, or that the contract was
illegal or has been discharged in another way (eg. by mutual
agreement), or that he was under undue influence.\textsuperscript{21} The other
defence common to breach of promise cases was a denial of an
actual promise to marry and thus a denial that a contract was
ever formed.

The final area in which rules exist in common law which
relate specifically to breach of promise is in regard to gifts
given in contemplation of marriage. The rule applied in Stone
v. Scaife [N.Z.L.R.] (No.2) [1944] is that, in the case of a
broken engagement the innocent party is entitled to retain all
gifts given by the party in breach.\textsuperscript{22} All gifts given by the
innocent party must be returned to that person. Presents given

\textsuperscript{20} Bromley and Webb, \textit{Family Law}, New Zealand edition,
Butterworths, Wellington, 1974, p. 27.
\textsuperscript{21} ibid.
\textsuperscript{22} In this case the party in breach was actually the woman,
in that she had broken off the engagement. However she
won the case for breach of promise on the grounds that the
defendant was, unbeknown to her, married when he made the
promise. Marriage to a divorced man was against her
to the engaged couple in contemplation of their marriage, by third parties must be returned to the giver, whatever the reason that the wedding has been cancelled.

Thus while most of the important legal decisions made regarding breach of promise of marriage in New Zealand have been applications of the common law rather than statute law, it cannot be denied that legislation such as the Evidence Further Amendment Act 1875 was pivotal. Perhaps more than anything, the adoption of English Acts such as this resulted in increased public debate about the need for such legislation. While statistical evidence is unavailable to draw a conclusion as to whether this particular Act resulted in an increase in breach of promise cases, as some politicians feared, it is likely that it was easier for a plaintiff to prove that a promise did exist. Certainly it made such cases more dramatic, increasing public interest in them as the range of admissible evidence broadened considerably. In New Zealand these cases were to became public spectacles and scandals as the public caught a glimpse of courtship gone wrong.
CHAPTER TWO  BREACH OF PROMISE - CASE STUDIES

The impact that statute law could have on breach of promise cases was shown in a 1876 case, Hughes v. Shand and two cases heard in 1917, Pegler v. Coxhead and Marryat v. Moen. While each of these cases is an interesting case study of the breach of promise action together they illustrate the increased options the right to give evidence gave to the parties to an action. Hughes v. Shand23 was the first case to test the new law on evidence after the Evidence Further Amendment Act, was finally passed in 1875. It set a precedent on the issue of what would qualify as corroborative evidence, in support of the plaintiff's testimony. Probably the first breach of promise case in the colony in which the plaintiff and the defendant were eligible to give evidence, it attracted much media and public attention. The details of the case were reported in newspapers throughout New Zealand, leading the Otago Daily Times to question whether money could compensate for the ordeal of having private feelings dragged through such a public arena as an open Court24. If it was expected that allowing those most involved in a case to testify on their own behalf would act to clarify the events leading to the action, this was not to be the case in Hughes v. Shand.

This case was an action brought by Caroline Mason Hughes, a governess, to recover £3000 damages from James Shand, a farmer, for alleged breach of promise of marriage. Heard in the Dunedin Supreme Court before a Special Jury of twelve men, the case entertained the public for three days. Reports in the Otago Daily Times noted that on the second day of the hearing 'several enthusiasts spent the greater part of the day outside, trying to hear the proceedings through the open door and windows' because the courtroom itself was packed.25

23  *New Zealand Jurist 1876-78* (2), pp. 27-33.
newspaper also provided a daily report on whether the crowds' desire for 'fun' had been gratified the day before and what spectators could expect to hear if they ventured to the court that day. The lack of ardent love letters between the plaintiff and the defendant, it was noted, was apparently a source of disappointment to most spectators. It was in this atmosphere that the public spectacle of Hughes v. Shand was enacted, perhaps reminding some politicians why they had been against loosening the legal requirements for an action for breach of promise.

The lawyer for the plaintiff, Mr James Smith, stated in his opening address that the action was a very simple one. The defendant and the plaintiff had, on or about the 13th of November 1874, mutually agreed to marry one another and that while the plaintiff had always been willing to marry the defendant, he had broken his promise by marrying another. Thus the only redress left for the plaintiff was to seek damages in a court of law. Mr Stout, appearing for the defendant, denied all material allegations against him including that there was ever a promise to marry. Furthermore Mr Shand denied that he had ever courted the plaintiff. These opening addresses to the jury reflect the question at the heart of this case, whether there was ever a promise between the two parties to marry.

Caroline Hughes was the first witness to take the stand. In her evidence she stated that her acquaintance with the defendant had begun in 1864, when she moved to the Taieri and that soon after he proposed marriage to her. Although she accepted his proposal the marriage was delayed because the defendant's friends thought she would be '...useless as a farmers wife.' Mr Shand continued to court her until 1867, when his visits nearly ceased. The plaintiff did not press him

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27 Otago Daily Times, 22 January 1876, p. 2.
28 Plaintiff's testimony reported in Otago Daily Times, 21 January 1876, p. 3.
at this stage, but rather moved to Timaru, where she accepted a proposal of marriage from another man in 1868. She then returned to the Taieri at which stage the defendant sought her out and urged her to consider breaking her betrothal. She did this with the consent of the man she was engaged to, and Mr Shand once again paid his addresses to her. However the defendant soon ceased his visits, without offering an explanation. The plaintiff next went to England with her employers' daughter, returning in 1872. The acquaintance between Miss Hughes and Mr Shand was once again renewed, culminating in a proposal of marriage in November, 1874. Miss Hughes proceeded to inform her friends that she was engaged and started making preparations for the wedding. Mr Shand once again became inattentive and his visits had stopped altogether by late January or early February in 1875. This time the plaintiff pursued the matter by writing Mr Shand a letter, questioning his behaviour, to which he did not reply. When she sought an explanation for this Mr Shand taunted her by implying that she only wanted to marry him for a home. When the plaintiff became upset Mr Shand apologised and they parted friends. However in November 1875 he broke his promise to marry her when he married another woman.

Miss Hughes evidence was corroborated by her employer, Mr Peter Grant, who testified that on three occasions he taxed Mr Shand with his promise to marry Miss Hughes. On the first conversation the defendant neither admitted nor denied the promise but said that "he wasn't going to be bullied into marrying her".29 On the second occasion when Mr Grant talked to Mr Shand about his actions towards the plaintiff, Mr Shand replied that he was too busy with the harvest and did not have the time at the moment.30 At this time the defendant was warned that Miss Hughes might bring an action against him. In the third conversation Mr Shand implied that he did not like being

29 Mr Grant, reported in *New Zealand Jurist* 1876-78 (2), p.27.
30 ibid, p. 28.
bullied and would make up his own mind about the situation. It is worth noting that while the judge, Mr Williams, was later to accept this testimony as sufficient evidence to corroborate the statements made by the plaintiff, Mr Shand denied all the evidence against him.

When Mr Shand took the stand he denied that he had ever had a close relationship with Miss Hughes. Further he was willing to testify under oath that he there had been no promise to marry at any stage in their relationship. Several witnesses were called by the defence to show that Miss Hughes had never been seen at Mr Shand's frequent parties and that none of his friends knew of the engagement or even that the two were courting. However the defence faltered slightly when under cross-examination by Mr Smith the defendant could not explain references in a letter arranging an 'after dark' meeting with Miss Hughes, at 'the old place'. If they knew each other well enough to have a traditional meeting place, Mr Smith proposed, then surely they must have more than the passing acquaintance Mr Shand admitted to.

In the end the jury had to decide whether to believe the evidence of the defendant or the plaintiff. It took them about two and a half hours to decide that there had indeed been a mutual promise to marry in November 1874. Furthermore it was the defendant who had neglected and refused to marry the plaintiff and thus they had decided that the plaintiff was entitled to recover £750, in damages. This was evidently a popular decision with those who had watched the case. The Otago Daily Times reported that although the verdict did not come back until 10.30p.m., the Court was crowded, with numerous ladies present. When the result was announced 'a loud round of

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31 New Zealand Jurist 1876-78 (2), p. 28.
32 Otago Daily Times, 22 January 1876, p. 3.
33 ibid, p. 3.
applause was got up, but it was promptly suppressed. The judge disapproved of demonstrations in the Courts of Justice.

The decision was appealed but this was lost, with Mr Justice Williams ruling in the Supreme Court in Dunedin in April 1876 that there was sufficient material evidence to corroborate the plaintiff's testimony as to the promise of marriage. This established an important precedent in that it meant that the corroborating evidence did not have to go directly to the admission of a promise to marry, but was sufficient if it acted to validate the plaintiff's testimony. The fact that Caroline Hughes and James Shand presented such opposing evidence must have given some validity to the politicians who had been wary of an increase in perjury if parties to such an action were allowed to give evidence.

Other aspects of this case are interesting for what they might imply about courtship at this time. The degree of formality displayed by both Caroline Hughes and James Shand in their limited written correspondence with each other is marked. While they both ended their letters with salutations such as 'I remain, yours faithfully' and 'I remain, yours truly', they addressed each other by the formal titles Mr Shand and Miss Hughes, respectively. There was little evidence in the letters of an especially close relationship, apart from one reference to the 'old place'. Indeed this courtship could hardly have been called an ardent and open one. In its editorial on the case the Otago Daily Times had noted that it had exposed '...a style of courtship on which we do not like to look...'. While the lack of love letters had disappointed the public, they must surely have also been interested in why the question of whether or not the relationship between the pair had been a love relationship was never addressed in court.

34 Otago Daily Times, 24 January 1876, p. 2.
35 Otago Daily Times, 25 April 1876, p. 3.
36 New Zealand Jurist 1876-78 (2), pp. 28 and 30.
Miss Hughes' lawyer replying to a question from the defence as to why he did not ask Miss Hughes 'Did you love Mr Shand?', stated that to ask such a question would be an insult to the plaintiff. Throughout the hearing of the case the evidence supported the idea that Mr Shand thought that the plaintiff wanted to marry him for mercenary reasons. Miss Hughes had stated in her evidence that Mr Shand had said to her 'You were precious glad to meet me half way. I suppose you can get nobody better off than me, and you will take me for my home and my money.', when she asked him if she had ever sought him out. The fact that this relationship seems not to have been based on mutual love was not important to the case itself but does seem to have been of interest to the public spectators, at least to the extent that they wanted to be entertained by ardent love letters. This implies that by this stage in the colony marriages for love were not unheard of. Perhaps the public had expected this to be a courtship based on love simply because of the gap in the social status of a governess and a farmer. The grounds for determining whether or not compensation should be awarded to the plaintiff include injury to the feelings and loss of the benefits of marriage, not whether the couple were in love or not. In this case Mr Shand was perceived by the jury to have treated the plaintiff in such a dishonourable manner that the full amount of the damages asked for were awarded.

The fact that this case was so widely publicised cannot have been easy for either of the parties to the action, or Mr Shand's wife. Public interest in this case was very high increasing the personal cost for both the plaintiff in bringing such an action and the defendant in trying to defend it. For

38 Otago Daily Times, 24 January 1876, p. 3.
39 Otago Daily Times, 21 January 1876, p. 3.
40 James Shand had purchased land in Southland in 1875 and the New Zealand Land and Income Tax Department Return of the Freeholders of New Zealand - October 1882, Wellington, 1884, put his land value at £154,961, with 31,443 acres in Otago and Southland.
newspapers and those that crowded the courtroom the interest in the case probably arose out of the fact that with both the plaintiff and the defendant giving evidence more personal details than was usual would emerge in the course of the action. It must be noted that the law did not compel either party to take the stand and this was important in the cases which followed Hughes v. Shand. While in all the cases used in this study the plaintiff gave evidence, in some the defendant did not. While most of the time the woman could not prove her case without taking the stand for some considerable time, the defendant would sometimes be better off by not giving evidence. However this could leave them open to the accusation that they were not taking the stand because to do so would incriminate themselves. Thus in this respect the 1876 legislation on admissibility of evidence changed how breach of promise cases would be tried in the colony. If the law did not require the parties to the case to give evidence, that they were allowed to do so, led to a tradition in which the plaintiff at least, was compelled to take the witness stand if they wanted to prove their case. This legislation was probably also indicative of new customs in betrothal whereby it was unusual for a couple to put their promise to marry in writing and thus the evidence of the parties to the case became necessary to prove the breach of promise. In cases where the breach was admitted by the defendant the plaintiff still had to give evidence so that the court could decide what damages, if any, to award.

One case where the defendant did not give evidence was Pegler v. Coxhead. The hearing of this case began in the Auckland Supreme Court on May 19, 1917, before a jury of twelve men. That the engagement had been formed and the trial came to court while the country was at war was to be significant. Ilma Pegler testified that she had met George Coxhead in November 1915 and after a short courtship became engaged to him on March 14, 1916. The next day the defendant gave her an engagement ring and the betrothal was made known throughout the district. After the marriage the couple had intended to live at Kamo,
near Whangarei on a farm which had been purchased for the defendant by his father. Pegler testified that she had seen the farm and even picked out a site for the house to be built. During their courtship the question of Coxhead being liable to military service had often been mentioned between the couple and he had twice given her the impression that he was going to enlist. There were two sons in the Coxhead family, both being eligible for service. In September Ilma went to stay at the Kamo farm for four days. While there was nothing unusual in the way she was treated she had noticed that George seemed to be frightened of his mother. He had not liked it when she told him this. During the stay the wedding date had definitely been fixed for January. Yet when she was leaving Whangarei the defendant had told her his mother objected. But when she arrived back home Coxhead wrote her the usual loving letter. At Christmas they met in Auckland and the next day took the train to Manarewa where she lived. Nothing in the way he acted led her to think that the engagement would be broken off. However the next afternoon Coxhead called at her place and told her that the engagement was off. The reason he gave was that someone outside the family had told him something she was supposed to have said or done, but he refused to tell her what that was. It was Pegler's testimony that she had always been true to Coxhead and that she was 'very fond of him'.

In his opening address Pegler's lawyer, Mr J.C. Reed had stated that one of the reasons Pegler had brought the action was that the lack of an explanation from Coxhead, apart from to say that he had 'heard something' had left a slur on Pegler. Furthermore Mr Reed suggested, it was possible that Coxhead had been using the girl thinking that marriage would save him from military duty. It was noted that after the Military Service Act with its special conditions regarding those married after a certain date was bought into force, marriage would have had little advantage for Coxhead in this respect. This was only a theory however and could not be proven.42

42 *New Zealand Truth*, 19 May 1917, p. 3.
In the cross-examination of the plaintiff the lawyer for Coxhead, Mr R. McVeagh said that he did not suggest anything against the plaintiff's character, or that she had been untrue to Coxhead. Indeed throughout his examination of the witness Mr McVeagh stressed that Coxhead had not meant to slur Pegler or impute that she had done anything wrong. Having made these statements the defence declined to call any witnesses forward. While this saved Coxhead from taking the stand and perhaps being compelled to reveal why he had broken off the engagement, it did not impress Mr Reed. In his summing up he made much of the fact that Coxhead had not given evidence and that Pegler had been placed in a very humiliating position in her district as a result of the broken engagement. In the summing up of the defence Mr McVeagh objected to the imputation that Coxhead had proposed marriage to avoid being called up for military service. Further he stated that the reason the engagement had broken up was that Coxhead's affection for the plaintiff was waning. Pegler was awarded £200 of the £501 she had sued for.

By refusing to offer any defence of his actions, apart from those forwarded by his lawyer in closing, Coxhead was able to avoid giving any explanation as to why he had told Pegler that he had broken the engagement because of things he 'had heard'. While it was necessary for Pegler to take the stand to prove that she had a case and deserved damages for her suffering and the loss of the value of the marriage, Coxhead may not have helped his defence if he had taken the stand. However the personal cost of not defending himself may have been high as the newspapers all highlighted Pegler's evidence that she believed him to be afraid of his mother, and Mr Reed's theories that Coxhead had become engaged to avoid conscription. These allegations must have damaged Coxhead's reputation, despite the

44 *New Zealand Truth*, 19 May 1917, p. 3.
denials of his lawyer, in a country which was very concerned at the time with equality of sacrifice in the war.

Another case, Marryat v. Moen highlighted the effects that war could have on courtship and also the fact that even if the breach of promise was admitted to, it was imperative that complainant in the case gave evidence so that the damages to be awarded could be determined. For this reason the case in which Agnes Adela Marryat, spinster of Milton, sued Erek Moen, bank clerk of Dunedin, proceeded in court.46 Heard in the Dunedin Supreme Court on May 26 1917 before Mr Justice Sim, this case is curious in that there was no jury present, possibly because the breach was admitted and the only real question before the court was whether damages should be awarded and if so, how much.

The couple had become acquainted in 1913 and in December of that year became engaged, with the permission of Marryat's mother. At this stage Marryat was 26 years old and Moen was 20 years of age. Moen became a boarder in the Marryat household and in 1914 he consolidated the engagement by giving the plaintiff an engagement ring. In June 1915 Moen left to go to military camp at Trentham, finally leaving for the front in October 1915. Throughout Moen's time at war correspondence between the couple had been kept up. The defendant was wounded at the front and returned to New Zealand in December 1916. On his arrival in Auckland he wired Miss Marryat that he would arrive home on Saturday 23 December. However while he arrived in Milton on the Saturday he carried on to his family home in Waitahuna, giving no explanation to Miss Marryat as to why he was doing this. On the Sunday he arrived back in Milton and stayed at the plaintiff's house that night as usual.

46 It is noteworthy that while the newspapers described Agnes Marryat as a spinster she was actually employed as a tailoress, *New Zealand Truth*, 26 May 1917.
The first intimation the plaintiff had that something might be wrong was when Moen announced that night that he wished to end their engagement, according to the plaintiff's evidence, '... because he had found someone else...' \(^{47}\). This upset the plaintiff greatly and she was laid up for the next six days. While she made him remove all his belongings from the house, she refused to release him from his promise to marry her. In her evidence Agnes Marryat claimed that the defendant had made her promise before he went to war that she would not marry anyone else if something happened to him. While she had made the promise she described herself as being '...very much hurt over it...' \(^{48}\). The defendant had refused to release her from this promise and had also asked her to promise not to attend dances while he was away. Agnes Marryat also testified that she had prepared a trousseau in preparation for her marriage, spending £60 on it. This was a considerable sum as she only earnt 30 shillings a week from her job as a tailoress.

The lawyer for the defendant, Mr Hanlon, emphasised the age gap between Marryat and Moen, claiming that '...she clung to him although he was only a boy...' \(^{49}\). Moen, he asserted had travelled, seeing Egypt and France, where he had been injured. These experiences had broadened his vista, altering his views on marriage. Further to this Mr Hanlon stated that while Moen denied that he had broken the engagement because of another woman, everything else the plaintiff had said was true. Thus the only question to be decided was that of damages. The defence asserted that Moen only earnt £150 a year from his job at the bank. Throughout the defence Mr Hanlon had emphasised Moen's military service which led the judge to ask Moen, 'Did you kill many Germans?', to which the witness replied 'Not as far as he knew' \(^{50}\). In awarding damages the judge briefly referred to Moens financial position and awarded £100 to the plaintiff in damages.

\(^{47}\) New Zealand Truth, 26 May 1917.
\(^{48}\) ibid.
\(^{49}\) ibid.
\(^{50}\) ibid.
Neither of these cases seemed to cause the notoriety that had been aroused in the case of Hughes v. Shand, but newspaper coverage was still extensive with both cases being covered in detail in the local newspapers and in *New Zealand Truth*. However in these two cases there were no editorials dealing with the wisdom of breach of promise cases or with the case at hand because the editorial pages were full of war news. Notices that the cases were about to be heard did appear in the local newspapers, but this appears to have been standard practice for all Supreme Court cases. Three cases of breach of promise of marriage in 1917 have been found, which seems to have been an unusually high number, especially given that *New Zealand Truth* had remarked in its opening comments to the Pegler v. Coxhead case that these types of action were not everyday occurrences in New Zealand.51 While the cases described above illustrate the effects of a legislative change to the laws surrounding breach of promise of marriage, Raddon v. Rockett, also heard in 1917, is a case in which many of the social issues behind such cases were brought to the fore.

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51 *New Zealand Truth*, 19 May 1917, p. 3.
The case of Raddon v. Rockett which was held in the Christchurch Supreme Court from August 29 to 31 illustrates why the legal remedy for breach of promise of marriage was in place. There were several unusual features to this case, not least of which was the fact that Elizabeth Ann Raddon, the plaintiff, was 55 years old and the defendant, Frederick Vivian Rockett was 57. They had been engaged for seventeen years and had stepped out together for twenty years. The contract to marry was broken when Frederick married another woman. Subsequently Elizabeth Raddon decided to sue him for £501 for breach of promise of marriage.

The legal action for breach of promise of marriage was designed to compensate women or men who had been jilted for the injury caused to feelings and for the loss of the benefit of marriage. It was also designed to compensate women who had lost any opportunity they might have of another marriage by a prolonged engagement. All of these elements were present in this case. At 55 years of age it was unlikely that Elizabeth would have further marriage opportunities and the injury caused to her feelings was heightened by the fact that she had waited 17 years for an outcome to the engagement. Furthermore the plaintiff had invested considerable money in a house belonging to Frederick which she lived in and believed would be their home after the marriage. Loss of benefit of the marriage was usually decided on the fact that marriage brought women increased status and the breach of promise meant the women also had to forfeit this. This case then involved the type of situation that breach of promise legislation set out to remedy.

The newspaper headlines on the case were spectacular with the Christchurch paper, The Press, dubbing it the case of the 'Draper and Widow', while the New Zealand Truth had a five line headline enhancing the more sensational aspects of the case with lines like `Soul Cycles, Soul Affinities, Soul Mates and
Swedenborgian Love. The action was covered widely in the media throughout the country, with *New Zealand Truth* devoting an entire page to it, complete with line drawings of the plaintiff and the defendant. The case attracted such widespread attention because of the unusual aspects involved as outlined above but also because of the unusual religious beliefs of the parties. The defence to the action proffered by Frederick's lawyer was based on the tenets and beliefs of Swedenborg, the religion practised by the defendant. Emmanuel Swedenborg was an eighteenth century Swedish scientist and mystic. He believed that all phenomena in the physical world had a corresponding phenomena in the spiritual world. Although Swedenborg officially formed a church by the nineteenth century there were churches based on his writings, in England, the United States and New Zealand. Rockett's defence was based on the fact that marrying Raddon, who was a widower, would be against his religious beliefs.

The statement of the claim by Elizabeth's lawyer, Mr Dougall, set out that the defendant had, on or about June 17, 1900, asked Elizabeth to become his wife. She agreed and they fixed the last day of the year as their wedding date. The plaintiff had already received wedding presents when the defendant requested that they postpone the wedding because he was not in a sufficiently good financial position to get married. Although it was only a few days before the proposed wedding date the plaintiff agreed to this. However a new wedding date was not set. Despite the fact that Elizabeth had pressed him for marriage regularly in the seventeen years they were engaged Frederick married another woman on April 25, 1917. He had never broken his engagement to Elizabeth. The defence

52 *The Press*, 30 August 1917, p. 4. and *New Zealand Truth*, 8 September 1917, p. 5.
53 *New Zealand Truth*, 8 September 1917, p. 5.
55 ibid.
consisted of a general denial all round. The defendant alleged that he had never entered into an agreement to marry the plaintiff and that if he had so agreed or promised, which he denied, the plaintiff had discharged him from such a promise.
Because the engagement extended over a considerable length of time there was a lot of evidence. The plaintiff's legal counsel began the case. When the plaintiff first met the defendant in 1898 she was a 36 year old widow with two children. She worked for her living doing sewing and fancy work. The couple had met at a metaphysical gathering run by the late Mr O'Bryan Hoare, under the title of 'Our Father's Church.' They became engaged in July 1900 and intended to marry later that year. The wedding was put off for financial reasons, but it was understood that the delay was not to be a very long one. In 1902 a relative of Rocketts died in England and he had an idea that he was entitled to £2000 per annum from the estate. He went to England to prosecute his claim, on money loaned to him by Raddon, which he later paid her back. At this stage the plaintiff had reluctantly moved to Rockett's government property at Roimata, near Woolston. The defendant led her to believe that this would be their home when they married, and with this in mind she undertook improvements to the place. The estimated cost of this was £200.56 At this stage the plaintiff's counsel quoted extensively from the voluminous correspondence that Rockett had sent the plaintiff while he was in England. The aim of this was to show that intimacy and affection existed between the couple. The effect was to provide some comic relief for the court. Before the first one was read His Honour, Mr Justice Denniston, asked if they could not be taken as read. When Mr Dougall said he would like to read on His Honour resigned himself to it with the comment 'Well, I suppose it's for the benefit of the newspapers.'57 Two printed postcards submitted caught the interest of the judge because he said, he had never been sent one. One showed a map depicting 'the course of true love river' and the other a chart of 'betrothal bay showing the main route to the church door'58. These postcards sent to the plaintiff by Rockett were submitted as evidence of the

56 *The Press*, 30 August 1917, p. 4.
57 *New Zealand Truth*, 8 September 1917, p. 5.
58 *The Press*, 30 August 1917, p. 4.
sentimental feelings the defendant showed for the plaintiff. As evidence that a degree of intimacy existed between the couple counsel for the plaintiff added that when they had gone to a new church the clergyman had addressed them as 'Mr and Mrs Rockett'. His Honour commented that 'that would go a long way in Scotland.'\textsuperscript{59} Continuing the counsel noted that it was only in the last two years that the defendant had begun to cool off and it was his contention that the defendant had simply '...kept the plaintiff on the string.'\textsuperscript{60}

Elizabeth Raddon was the first witness to take the stand. She stated that Rockett had always taken her to the picture and other places of amusement. Until less than a year before he had kissed the plaintiff every time he came to her home. This was regularly as every weekend he would come out to the place at Roimata to have his weekly bath. He would also bring his washing and she would wash and mend it for him. Raddon noted that she did everything except starch his shirts. In March 1910 the plaintiff testified that she had had an offer of a dressmaker's business in Timaru and had consulted Rockett on the matter. The tenor of his reply led her to decline the offer.\textsuperscript{61} In describing how she had heard that Mr Rockett had married someone else, Raddon asserted that she had heard rumours to that effect when the defendant returned home from a trip to the North Island in July 1916. These rumours were denied by Rockett and he continued to visit every week. He took the plaintiff out right up until the middle of December and at this stage would still kiss her. In January of 1917 Rockett again went to the North Island and when he arrived back he was seen in town with a woman. The final confrontation with Rockett occurred one Sunday when the plaintiff went to the Spiritualists' Church, anticipating that the defendant would be there. Raddon was surprised to see him with the woman who was later to become Mrs Rockett on his arm. She sat beside the

\textsuperscript{59} ibid.
\textsuperscript{60} ibid.
\textsuperscript{61} ibid.
woman whom she described as 'the stout lady' and tried to ask her what Mr Rockett meant to her. It was not until after the service that she got the opportunity to tell 'the stout lady' who she was. At this time she also asked Mr Rockett if they were married, to which he replied in the negative. Rockett escorted her to the tram all the time saying to her 'And you call this love.' When Mr Rockett married he demanded that she pay rent on the Roimata property, the title to which he had deeded to his present wife.

Mr Alpers, the counsel for the defendant, subjected the witness to a lengthy cross-examination, the purpose of which was to get the plaintiff to admit that she had done most of the wooing in the romance. Mrs Raddon denied this, explaining that she had only tried to get the defendant to give her a definite statement as to whether or not he held affection for her. In this matter the defendant had remained elusive. The defence made much of the fact that the plaintiff had regularly reminded the defendant of his promise to marry her. Further cross-examination was held over to the next day as the witness having been in the box for a number of hours, showed signs of fatigue. The next day the main focus of the cross-examination dealt with a past engagement that Mrs Raddon had been a party to, which had lasted only 2-3 days. The judge admonished the defence for bringing this up as it had been dealt with by the system at the time and was irrelevant to the case at hand. Furthermore Mr Justice Denniston asserted that the defense must have known this when they bought it up. The plaintiff's evidence was supported by several other witnesses including her daughter, a clergyman and a schoolmaster, all of whom had the impression that Raddon and Rockett had been engaged to be married.

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62 *New Zealand Truth*, 8 September, 1917, p. 5.
63 *The Press*, 30 August 1917, p. 4.
64 *The Press*, 31 August 1917, p. 4.
The defence opened with one witness, Mr Rockett. He stated that he was a very religious man who studied the teachings of Swedenborg. This led him to believe that it was wrong for a person to marry for a second time. He believed that marriage was between two spiritual affinities and it was impossible for the plaintiff to have any affinity except to her dead husband. Counsel asserted that Raddon was aware of Rockett's views and that the plaintiff had never proposed marriage to her. This was despite the fact that Raddon used every 'wile and art' she possessed to force an engagement. Further to this Rockett denied that there was any talk of marriage after the plaintiff and her daughter went on a trip to Wakatipu with him in December 1899. Rockett testified that, while he had always been aware that the plaintiff had been positive on her side that there was an engagement, he had evaded giving a definite statement on every occasion. Under cross-examination he stated that he had sold the property at Roimata the April before, having first made it over to the lady who later became his wife. Mr Justice Denniston then proceeded to question the defendant on several points, establishing that Rockett knew that the plaintiff believed that they were engaged and that the defendant had never thought to tell her that he could not marry her because of his religion.

In his address to the jury the next day the judge commented that there was little dispute as to the facts, with the exception of the actual promise to marry. While he personally found the defendant's behaviour toward the plaintiff to have been indecently cruel, it was up to the jury to decide whether or not there was an actual promise to marry, based on the evidence before them. To do this they had to decide whether the defendant's conduct was consistent with that of a man who had entered into an agreement to marry. Referring to the question of damages he told the jury that it was a case in

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65 ibid.
66 The Press, 31 August 1917, p. 4.
which reasonable damages could be awarded. After an hour's deliberation the jury returned with the verdict that their had been an agreement to marry, which the plaintiff had never released the defendant from. Full damages of £501 were awarded to the plaintiff. While all the cases in this study, except the three which were deemed to be illegal, were won by the plaintiff, Raddon v. Rockett was the only case in which full amount of damages claimed were awarded.

67 *The Press*, 1 September 1917, p. 4.
CHAPTER 4 ILLEGAL CONTRACTS

Every breach of promise case discussed so far resulted in a judgement for the plaintiff, with significant damages to be paid, but it was not a foregone conclusion that the plaintiff would win, even if much of the evidence suggested that a breach of promise had occurred. Legally, establishing that there was an actual promise to marry, is paramount in breach of promise cases. However in some cases it was also up to the plaintiff to prove that the promise, if it existed, was not tainted with illegality. As was noted in Chapter One the breach of promise action raised some specific issues in the area of illegality. The law for these cases was the same as any other contract in that the taint of illegality made the contract null and void but the factors which made a promise to marry illegal were unique to this type of case. Briefly, they included promises to marry which were based on immoral considerations or which contravened the sanctity of an existing marriage. The latter type of contracts were declared to be contrary to public policy. This chapter will detail three New Zealand cases which were instrumental in defining what exactly made a contract to marry illegal.

On June 1 1933 the case of Lambert v. Dillon came before Mr Justice Blair in the Christchurch Supreme Court. Marjorie Ada Lambert, a housekeeper residing in Christchurch, was claiming damages of £385 from Patrick Dillon, a farmer from Prebbleton, for alleged breach of promise of marriage. The case began with the defence applying for two preliminary questions of law to be decided before the hearing. Marjorie Lambert alleged that in April 1928 she had verbally agreed to marry Patrick Dillon, as soon as she could obtain a divorce. At this time she was a married woman who had been deserted by her husband for more than 20 years. In addition to this, she alleged that Dillon had agreed to pay the costs of obtaining her divorce. When

68 The Press, 2 June 1933, p. 9.
Lambert gained her decree absolute Dillon then refused both to pay the divorce costs and to marry her. The action before the court was for damages for breach of promise of marriage and for special damages to cover the costs of the divorce proceeding.69

The lawyer for the defence, Mr L. J. Hensley, claimed that there were some novel questions of law at issue. While these had been dealt with in other countries, they had not been dealt with in New Zealand.70 The legal questions were: (a) Was the alleged promise to marry when the plaintiff had obtained a divorce actionable, in light of the fact that at the time of the alleged promise the plaintiff was a married woman; and (b) in view of the above facts, was the promise to pay the costs of obtaining the divorce a valid promise?71 The defence petitioned that a promise to marry which was conditional on a divorce taking place was void, because it was against public policy. In this case it was suggested that such a promise undermined the sanctity of the marriage already in existence and this in turn was against public policy, which sought to protect the sanctity of marriage. The defence showed that there was precedent in English law for declaring illegal a promise conditional on the ending of an existing marriage. In reply the lawyer for the plaintiff, Mr M. J. Burns, contended that the legislature in New Zealand took a broader view of divorce law than their British counterparts and thus it was not applicable to follow British precedent. He asked the court to relax the rigidity of the rule on public policy, on the grounds that in New Zealand a separation agreement which had existed for more than three years was sufficient grounds for divorce and that at the time of the alleged promise the plaintiff had been deserted by her husband for more than twenty years.72

70 The Press, 2 June 1933, p. 9.
72 N.Z.L.R., [1933], p. 1059.
Judgement was reserved at this stage and the hearing for a decision was laid down for 16 August.

At that hearing Mr Justice Blair held that it would be against public policy to allow an action based on such a promise as that alleged by the plaintiff to be maintained. This conclusion was based on the idea that there is little difference between a promise to marry after a wife's death and one to marry after a divorce has been obtained. There was a precedent for the first example in English law and the judge used this to establish the limits of public policy in New Zealand. Even though no harm would be done to a third party in either case the judge stated that this was immaterial. Exceptions to the rigid rules of public policy had been granted in some English cases in which the married party had a decree nisi at the time of the alleged promise. It was held that a mere separation was not enough to negate this rule, even though in New Zealand a separation of more than three years was grounds for divorce. Thus the judgement was for the defendant, because the alleged promise to marry was against public policy, making it illegal. Further to this, the claim for the cost of obtaining the divorce was covered by the same principle applied to the promise to marry.\textsuperscript{73} The legal questions in this case were decided in favour of the defendant before either party to the action had to enter the witness box, sparing them some of the rigours of a breach of promise action.

That the courts of New Zealand were not prepared to take the more lenient line that Lambert's lawyer had argued for was confirmed thirty five years later by the ruling in Dobersek v. Petrizza, heard in the Wellington Supreme Court in 1968. In this case the defence argued that the agreement to marry was originally made in 1951 and later affirmed when the defendant arrived in New Zealand, from Italy, in May 1960. In addition

\textsuperscript{73} \textit{N.Z.L.R.}, [1933], p. 1064.
to the $4000 for the breach of promise of marriage the plaintiff was asking for $356.80 in special damages, this being the amount of the defendant's fare from Italy to New Zealand. However when both the promises of marriage were made the defendant was legally married and on these grounds the defence argued that the promises were invalid. Mr Justice Wild affirmed that an agreement to marry was against public policy if at the time of the agreement one of the parties is already married and the other party has knowledge of this. Further he asserted that this rule holds even if the agreement is to marry when the existing marriage is ended, either by death or decree. It made no difference if there were grounds for immediate divorce in the existing marriage, because it was only after a decree nisi was attained that an enforceable agreement to marry could be made.\footnote{Dobersek v. Petrizza, \textit{N.Z.L.R.}, [1968], p. 211.} While the action failed, the Judge noted that this case was a hard one for the plaintiff. However he also pointed out that the law had to govern the validity of the promise in question and could not make exceptions for hard cases.\footnote{ibid, p. 216.} Thus breach of promise cases in which the plaintiff probably had reasonable cause to feel aggrieved could not succeed if the promise they were based on were deemed to be illegal.

This was the case in what was to be one of the landmark New Zealand breach of promise cases, at least in a legal sense. Davis \textit{v.} Hutchinson was significant not just for the legal decisions handed down in both the Supreme Court and the Appeal Court, but also for the insights it provided into the question of what motivated a woman to sue for breach of promise. The case was heard in the Gisborne Supreme Court on June 1, 1939. The allegation which formed the basis of the action was that York Hutchinson a Poverty Bay sheep farmer, aged 34, had made certain proposals to the plaintiff a few days after she took up a position as housekeeper at his Raukituri home in 1937.
Catherine May Davis, a 43 year old widow, alleged that the defendant had promised to marry her if she had sexual relations with him and if a child were conceived as a result. Davis declared that she had agreed to this proposition and that when she became pregnant Hutchinson promised to marry her before Christmas of that year. The plaintiff put this forward as evidence of a second promise to marry.\textsuperscript{76} She alleged that Hutchinson had later refused to marry her, stating that his father had forbidden the marriage.\textsuperscript{77} As a result Davis had decided to sue the farmer for £5000 for alleged breach of promise of marriage. The defence consisted of a denial that there had ever been an arrangement between the couple to marry.

The legal counsel for the plaintiff, Mr L.T. Burnard, opened the case by stating that since Mrs Davis' husband died four years ago she had supported herself and her adopted child by working as a relieving housekeeper. She had taken the position as Hutchinson's housekeeper in 1937 and they had soon after discovered that they had much in common. The facts of their relationship according to Davis, as described above, were put before the court. Further to this it was stated that when Hutchinson proposed that they get married before Christmas in 1937 he showed a lot of concern for Davis. However when Hutchinson's parents visited in December they allegedly forbade the marriage for three reasons. They were concerned about the fact that Davis was older than their son and was not of the same religion as their family. Hutchinson told her they were also worried that he would have to accept responsibility for her adopted daughter. Despite the fact that the defendant refused to carry out the promise of marriage he still acted as if he cared deeply for the plaintiff for a time after his parents departure. This had changed by April of the next year according to Davis, who had by this time moved out of

\textsuperscript{76} \textit{N.Z.L.R.}, [1939], p. 425.
\textsuperscript{77} \textit{New Zealand Truth}, 7 June 1939, p. 1.
Hutchinson's home. Mr Burnard stated that Davis intended to give evidence that she had only decided to make Hutchinson pay for his actions towards her after he had treated her badly at a local dance.\textsuperscript{78} It appears that a threat of breach of promise was made to Hutchinson at the same time that lengthy legal negotiations regarding the issue of maintenance for Davis and their child were taking place. Counsel noted that while these legal negotiations were taking place the plaintiff was in some financial difficulty. Finally, in despair of reaching a settlement with Hutchinson, the plaintiff had decided to bring this action of breach of promise of marriage.\textsuperscript{79}

Davis gave evidence along the lines that Mr Burnard outlined, stating that she only agreed to Hutchinson's proposal when he agreed to marry her if anything happened. When she did become pregnant, Hutchinson had seemed to be very pleased and had made a promise to marry her before Christmas. Davis also stated in her evidence that she understood that Hutchinson was a member of a wealthy and well-known family in the Poverty Bay area. Hutchinson himself owned considerable property, while she was unable to resume her work as a housekeeper. This concluded the questioning by the plaintiff's lawyer and the subsequent cross-examination of the plaintiff was undertaken by Mr F.L.G. West, the counsel for the defendant. Davis admitted under his questioning that she might have suggested to Hutchinson that it was impossible for her to have children, as none had resulted from her 14 year marriage. She also conceded that her age was 43 not 41 as she had first answered when questioned on this by the defence. The issue of the plaintiff's age was to come up again, when the defendant stated in his evidence that she had told him when they first met that she was 39. Questioning as to the details of the arrangement between the couple continued, with Davis admitting that if there was any question of morality she was equally to blame as Hutchinson.

\textsuperscript{78} New Zealand Truth, 7 June 1939, p. 1.
\textsuperscript{79} ibid.
The defence went on to ask if there had ever been any mention of love between the couple. This is interesting in so far as this question had largely been avoided in many of the cases noted in this study. Reasons for getting engaged were many and in a breach of promise case it would usually be against the defendant's best interests to come across as a cad who had broken his ex-fiancee's heart. Counter to this, if the plaintiff could not confess that she felt great love for the defendant, she ran the risk of being perceived as mercenary by a jury, conceding damages awarded on the grounds of injury to feelings. To some extent then there was an inclination, as was shown in Hughes v. Shand, to play down the love question. In reply to the defence's query, Davis stated that there was great affection between her and Hutchinson. She was then asked if it was not dangerous to marry if there was little love involved, to which she replied 'Not when there is a child involved'.

Clearing up a point raised by the defence as to whether the sole reason for bringing this action was to get some financial support for her child, Davis stated that she also wanted some compensation for herself. When asked for the specific amount she wanted for herself Davis replied £3000. New Zealand Truth reported that the questioning continued as follows:

Mr West: What do you consider marriage with Mr Hutchinson would have brought you?

Mrs Davis: I would have had a position as a married woman.

Mr West: Without love or affection in the match?
Mrs Davis: Yes.

80 New Zealand Truth, 7 June 1939, p. 21.
Mr West: So you value Mr Hutchinson's name at £3000, even without love and affection?

Mrs Davis: Yes.⁸¹

The acknowledgement by the plaintiff that a woman's position in society was to some extent determined by her marital status, especially if she had a child, was important. It supported the idea that when a woman lost an opportunity to marry she also lost an opportunity to gain the rights of a married woman and that that loss was significant. Damages in breach of promise cases were determined by the perceived loss, monetary or otherwise, that the woman had incurred by the broken promise. In a later case, A v. B, the judge pointed out that consideration of the loss of the position of a married woman must be taken into account when determining damages. However it was also noted that the loss of the benefit of marriage was not as great in modern times as it was in the nineteenth century.⁸² In 1939 there were still many economic and social advantages specific to married women and this would have been especially true in Davis' case. First it would have provided legitimacy for the couple's child and secondly if she was married she would have been able to claim economic support from her husband. As it was she had testified that it was impossible for her to continue her housekeeping work.

The questioning by the defence continued, with Mr West asking if Davis still felt, as she had said in a letter to Mr Hutchinson, that she was bringing the action with the intention of causing a scandal in the district and of dragging the name of the Hutchinson family in the mud.⁸³ While Davis replied that this had only been her feelings at the time, these

⁸¹ New Zealand Truth, 7 June 1939, p. 21.
⁸³ New Zealand Truth, 7 June 1939, p. 21.
comments provide some insight into the trauma that the broken engagement had caused. The action for breach of promise was intended to compensate for injured feelings, as well as financial costs incurred by the broken engagement contract. The views expressed by Davis in her letter to Hutchinson show a tacit acknowledgement that she was aware that the action would have personal ramifications for Hutchinson and his family, whom she partly blamed for his refusal to marry her.

The cross-examination concluded after Mr West tried to imply that the plaintiff was implicated in the breakdown of the marriage of a man whom she had recently socialised with in a group situation. Davis denied these accusations. Questioning the plaintiff's conduct in other relationships or trying to imply that she had been involved with other men seems to have been a common ploy by defence counsel in breach of promise cases. In Hughes v. Shand for example, a past engagement of Caroline Hughes was brought up and in Raddon v. Rockett the plaintiff was also questioned on a past engagement. While both engagements were shown to have been dealt with in an appropriate manner at the time and to have little relevance to the case at hand, there very mention may have discredited the plaintiff in the eyes of some jurors. This was noted in Raddon v. Rockett when the judge pointed out that the past engagement had no significance in the breach of promise case at hand. In Davis v. Hutchinson the defence was allowed to question Davis on events which had no direct relevance to the primary issue of whether or not there was a promise to marry, which was subsequently broken. It seems in this particular case that the morals of the plaintiff were examinable and thus could have some bearing on the outcome.

Davis' own lawyer then questioned her on the absence of an engagement ring which Davis explained was due to her and Hutchinson's desire to keep their relationship a secret. The evidence for the plaintiff was continued with Miss Patricia
Croon, a niece of Davis' taking the stand to give evidence which corroborated Davis' statement, that Hutchinson was happy about her pregnancy. She also stated that she was engaged to help on Hutchinson's station while Davis was sick and that during this time the couple often talked about their marriage and their plans for the future. This closed the evidence for the plaintiff.

There was lengthy legal debate during the case between the legal counsel as to the nature of the alleged arrangement that Davis and Hutchinson had entered into. When the counsel for the plaintiff closed his case the counsel for the defendant moved that the case be withdrawn from the jury. In relation to this Mr Justice Smith ruled that the court could not give any standing to the first alleged promise, which was based on certain relations taking place between the couple, the promise of marriage being dependent on a child being the result of those relations. This alleged contract was deemed to be illegal, as it was based on an immoral consideration. However the second promise of marriage, which occurred during the plaintiff's pregnancy, was held by Mr Justice Smith to have been a new promise and therefore was not tainted by the illegality of the first promise. The evidence of Davis' niece, Miss Croon, stood as the corroborating evidence on the nature of the couple's relationship at the time of the second alleged promise.84 On this basis the submission by the defendant's counsel, that the case should not go before the jury, was not allowed.

The evidence for the defence began with Mr Hutchinson taking the stand. In his testimony he stated that he usually took his housekeeper to any social occasion in the district as his station at Raukituri was in a lonely location. He contended that there had never been any arrangement to get married

84 *N.Z.L.R.* [1939], pp. 427-429.
between him and Davis. Further to this he alleged when sexual relations between them commenced Davis had implied that it would be impossible for her to become pregnant, as she had been married for many years without having a child. When she did become pregnant, he did not propose marriage to her, but assured her that the child would be provided for. At this stage, he noted that his farm had shown a loss for many years and he had actually been working for his father for £3 a week.

Around April he had gone to Christchurch to have flying lessons and had written to Davis, offering to make provision for her and the child. He was anxious to break off their personal relationship. None of the letters he had sent Davis had included suggestions that he had broken a promise to marry her and it was only after the dance, at which he had 'cut' her, that she had threatened him with such an action. Under cross-examination he stated that the relationship between him and Davis was more one of physical attraction than affection, although he conceded that they had been fond of each other, 'in a way'.

His evidence concluded with the admission that he had never met his child, although he had seen him on the street a few times. The evidence for the defendant concluded after a solicitor employed by Hutchinson to arrange the settlement for the child, testified that Davis had never mentioned breach of promise or the possibility of marriage to Mr. Hutchinson, to him. Under cross-examination from Mr. Burnard, he noted that payments made to Davis were a temporary measure until she found work and subsequent to this reduced payments would be made for the child.

After four hours of deliberation the jury declared, in a majority verdict, for the plaintiff. Reporting their decision they confirmed that they regarded the promise to marry made in

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85 *New Zealand Truth*, 7 June 1939, p. 21.
November 1937 to be independent of the original promise.\(^\text{86}\) Damages of £1250 were awarded. However a stay of execution on this decision was granted, pending a motion for a new trial.\(^\text{87}\) The defence appealed Mr Justice Smith's judgment that the alleged second promise of marriage was not tainted by the illegality of the first proposal. On the basis of this appeal, they also forwarded a motion to set aside the verdict of the jury, who had been directed in the legal matters by Mr Justice Smith, and hold a new trial. They claimed that the verdict was against the weight of the evidence and that the damages were excessive. The case was removed to the Court of Appeal.

The case of Hutchinson v. Davis was argued in the Wellington Appeal Court before four judges.\(^\text{88}\) They held unanimously that the first promise was based on a consideration which the law regarded as immoral and that this promise was therefore illegal and void. In a majority decision, with one dissenting opinion, they held that the second promise was not a new promise, but rather could only be viewed as a promise to carry out the original promise, or a ratification of the original promise. The second promise was therefore also illegal and the appeal from the judgment of Mr Justice Smith was allowed.\(^\text{89}\) The ruling stated that the case should have been withdrawn from the jury at the conclusion of the plaintiff's evidence, with a judgment being entered for the defendant.\(^\text{90}\) In effect this meant that Catherine Davis had lost the action, as both promises had been judged to be illegal, being based on immoral considerations.

The moral attitudes of the day led the judiciary to rule that the promises of marriage in the three cases described above


\(^{87}\) *New Zealand Truth*, 7 June 1939, p. 1.


\(^{89}\) ibid, p. 491.

were illegal. In light of this it is pertinent to question the effectiveness of the breach of promise action in practice. It seems that the action was designed to protect the plaintiff from false promises of marriage. There is a double standard inherent in the fact that in Davis v. Hutchinson the defendant, who made the proposal, won the case because that proposal was judged to be immoral and therefore illegal. The plaintiff, on the other hand, lost the case solely because she accepted and relied on a proposal which was deemed to be based on immoral considerations. In the cases which were ruled to be based on illegal contracts the breach of promise action failed to fulfil its purpose of compensating for false promises to marry.
 CHAPTER 5 THE ABOLITION OF BREACH OF PROMISE

The action for breach of promise of marriage was not always a popular one with the judiciary or the legislature. Newspapers even expressed doubts about its usefulness with the *Otago Daily Times* stated in 1876, while commenting on Hughes v. Shand, that they had hoped such cases would be unnecessary in New Zealand. This sentiment was being expressed in various legal texts by the 1960s. For example B.D. Inglis noted in his text on family law, that members of the judiciary had expressed doubt about the need for such legislation. As was noted in Chapter One, various politicians asserted, while passing related legislation, that this type of action should be abolished.

One aspect of the action for breach of promise of marriage which seems to have been repugnant to many people was that the only remedy for the injured party was monetary damages. While on the one hand this seems to take an entirely material view of the loss of a marriage, on the other hand it would have been more morally repugnant to compel a wary suitor to follow through on a promise of marriage. The awarding of damages was not a measure designed to punish the defendant, but rather to compensate the plaintiff for monetary loss and injury to feelings. In New Zealand the position of the judiciary with respect to damages in breach of promise cases was clarified by the 1972 case reported as A v. B.

Heard in the New Plymouth Supreme Court before Mr Justice Mahon, the plaintiff in this case claimed the defendant had promised in 1970 to marry her but later refused to fulfil this promise. The defendant denied any promise of marriage was made, but in using this defence was faced with the difficulty

92 B.D. Inglis, *Family Law*, p. 27.
that the plaintiff could table a written promise to marry. General and special damages to the amount of $2598.85 were asked for. While the legal issues in this case were important, in so far as they clarified what type of damages could be awarded, the details of this case are worthy of note, if only because they show how much the attitudes of society had changed since Hughes v. Shand in 1876.

The plaintiff, A, was a single 27-year-old woman, who had one child from a previous relationship when she met the defendant in 1969. The defendant, B, was married at this time, but was separated from his wife. They became friendly in January 1969 and intercourse took place between them on several occasions in the next few months. In April 1969 the plaintiff and her child moved to New Plymouth and lived with the defendant until February 1971, when she parted from him. In her evidence the plaintiff said that, from an early stage in their relationship, the defendant had said he wanted to marry her and she had agreed to marry him after he had his decree absolute from his existing marriage. A wedding was subsequently planned for October 1969, according to the plaintiff. She produced as evidence receipts for material bought for her wedding gown and invoices for a watch and a wedding ring she bought as wedding presents for the defendant. However while he acknowledged receiving the gifts, the defendant in his evidence denied any promise to marry at this stage or at any other point in their relationship. When October came, the plaintiff testified, the defendant said he was too busy with his business and the wedding was put off. In the meantime she continued to live with him and was also working at his boarding house, for which she did not receive any regular wage.

By the end of 1969 she noticed that the defendant was taking an interest in other women and at this stage she went to the defendant's ex-wife, Mrs B, to seek her advice. Mrs B claimed
that this type of behaviour was the defendant's character and was sceptical about the defendant's promise to marry the plaintiff. In June 1970 the plaintiff discovered that she was pregnant and although the defendant was the father, he still did not set a date for the wedding. The plaintiff testified that he continued to show a steady interest in other women. By this stage she was anxious at his continual deferment of his promise to marry her and on 10 October 1970 she again pressed the defendant on the issue. In response to this the defendant 'wrote out a promise to marry her, which she submitted to the court as evidence. The defendant claimed, in his evidence, that this was written at a time when he was affected by alcohol and that there was no serious intent behind it. The Judge later noted that he accepted all of the plaintiff's evidence where it was in conflict with the defendant's.

The end of 1970 came and the defendant had still not kept his promise. It had become clear to the plaintiff that the defendant had no intention of marrying her and in February 1971, 5 days before their child was born, she left the defendant's home. The baby was adopted and the plaintiff eventually returned to live at her parents' house.94

In his ruling Mr Justice Mahon stated that the action for breach of promise was a contractual one and thus exemplary or punitive damages, which were intended as a punishment of the defendant, could not be awarded.95 General damages could be awarded for the loss of the value of the marriage. It was noted in the ruling that the loss of the benefit marriage generally may have diminished in importance in recent times, as

95 Mr Justice Mahon noted that while some cases in the past have seemed to awarded exemplary, these in fact came under the heading of general damages as they sought to compensate the plaintiff, rather than punish the defendant, reported in A v. B N.Z.L.R., [1974] p. 682.
an element in the assessment of damages. This would be especially true when the plaintiff seemed to have had a lucky escape from marrying an unsuitable man. Referring to this case in particular, the Judge stated, of the defendant, 'that the plaintiff is well rid of him.' Aggravated compensatory damages could also be awarded, it was ruled, for the injured feelings of the plaintiff. In considering the amount of these damages, the conduct of the defendant was relevant. Thus it was noted that the defendant had subjected the plaintiff to considerable mental distress, both through his actions while they were engaged and his refusal to marry her. However Mr Justice Mahon also considered that he had to take into account the plaintiff's history before she met the defendant, including the fact that she had an illegitimate child and her willingness to live with the defendant. Giving weight to these factors he still concluded that the actions of the defendant had deepened the injury caused to the plaintiff's feelings. Finally assessing the two components which made up the general damages, compensatory damages and aggravated compensatory damages, the sum of $1500 was awarded to the plaintiff. In addition to this $222.86 was recovered by the plaintiff, as the value of expenditure laid out in expectation of the marriage. It was ruled that personal gifts from the plaintiff to the defendant were not recoverable in an action for breach of promise of marriage.

It is somewhat ironic that the first clear ruling on how the law should be interpreted, with regard to damages for breach of promise of marriage, should come only three years before the action was abolished altogether. It had fallen to the Judge to

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96 ibid, p. 682.
97 ibid, p. 685.
make a ruling and award damages in this case because it was not heard before a jury. In actions heard before a jury it was up to that jury to determine the amount of damages. One legal text notes that when trial by jury was still common for this type of action, "...juries tended to make a high assessment of damages."101.

Inglis theorises that another repellant feature about breach of promise actions was that they provided an opening for the prospective 'gold-digger'.102 Evidence for this type of claim seems to have been based around the fact that breach of promise cases attracted a lot of media attention through newspaper coverage. The prominent publicity these cases drew was seen by some to be a tool which a predatory plaintiff might use to blackmail wary suitors into marriage. In most of the cases discussed in this essay the plaintiff had to give the majority of the evidence to prove the action, and sometimes endure the harshest questioning. It seems that as much publicity was drawn to the plaintiff's actions as to the defendants. Furthermore, while there were perhaps significant monetary gains to be made if the action was successful, the case had to stand up to some stringent legal requirements as to the legality of the promise in question. Even in 1975, when the action was finally abolished, the plaintiff's testimony as to the actual promise of marriage still had to be corroborated by another witness. Yet the perception of these trials, at least in some circles, by the 1960s was that the defendant suffered more public embarrassment and anguish than the plaintiff. For example Doris Meares Mirams argued in *The New Zealand Law Journal* in 1962, calling for the abolition of the breach of promise action, that a man who breaks off an engagement '...is condemned.'103. Women who did not fulfil their promises to

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101 Bromley and Webb (eds.), *Family Law*, p. 32.
102 B.D. Inglis, *Family Law*, p. 27.
marry did not face the same loss of reputation and were not likely to be threatened with a breach of promise action. Mirams argues that if the woman did suffer more in the break up of an engagement she should '...just put up with it and bear the consequences - quietly if she is wise.'104. She cites the story of a man who had married even though he realised he was making a mistake, because he was fearful of a possible Court case. Had there been no legal remedy for breach of promise and thus no possibility of '...disgrace for the male partner'105, this marriage and thousands like it would not have gone ahead. This legislation was at least partially responsible, Mirams argues, for the rise in the divorce rate.106

It was this aspect of the implications of the action for breach of promise of marriage that the Torts and General Law Reform Committee concentrated on in their report on miscellaneous family law actions, which was presented to the Minister of Justice in 1968. Three groups were asked to comment on the usefulness of the breach of promise action. The New Zealand Law Society replied that it favoured retaining the action, on the grounds that it might be useful in some cases.107 The National Council of Churches was asked for its view, but opinion among their various representatives was reported to be divided. The argument which convinced the Committee came from the Chief Marriage Guidance Adviser of the Department of Justice. He expressed the view that the existence of a monetary remedy for breach of promise of marriage was at best unnecessary. At worst, it was capable of encouraging people to enter into unsuitable marriages. The action, it was argued, was inconsistent with the growth of marriage guidance facilities. In this organisation emphasis

104 ibid.
105 ibid.
106 ibid.
was put on the right of an engaged person to call off the marriage plans, right up to the wedding day if necessary.\(^{108}\)

The Committee agreed with this argument, noting that it was better for an engagement to be broken than for a marriage to take place which at least one of the parties did not want. The community was not well served by the broken homes which could result from such a marriage.\(^{109}\) They also contended, referring to the already cited work of B.D. Inglis, that the action provided opportunities for the prospective 'gold-digger'.\(^{110}\) On the basis of these arguments, the Committee recommended that the action of breach of promise of marriage be abolished, while some legislation regarding the settlement of property disputes in cases of broken engagements be retained.\(^{111}\)

The legislature was slow to pick up on these recommendations and did not bring legislation before the House to implement them until the Domestic Actions Bill was introduced in 1975. Several family law texts stated that the recommendations of the Law Reform Committee were noted by the Law Commission in England and subsequently implemented in Britain in 1970, five years before New Zealand reformed their laws on the issue.\(^{112}\) Politicians also commented in the period between 1968 and 1975 that breach of promise legislation was something of an anachronism in the modern age.\(^{113}\) Apparently the reason for the delay was that in 1968 Sir John Marshall, the then Minister of Justice, had shelved the report, because he did not feel it justified action. He argued, when the Domestic Actions Bill was introduced, that the Law Reform Committee should not

\(^{108}\) Ibid, p. 2.
\(^{109}\) Ibid.
\(^{110}\) Ibid, p. 3.
\(^{111}\) Ibid, p. 5.
\(^{112}\) Bromley and Webb (eds), *Family Law*, p. 37.
\(^{113}\) For example Hon. J.R. Hanan, the Minister of Justice in 1969 commented when discussing the Legal Aid Bill that he could foresee the day when breach of promise was abolished, in *N.Z.P.D.*, Vol 360, 16 May 1969, p. 46.
comment on matters which related to the nation's social life.114

Dr A.M. Finlay, the Minister of Justice, introduced the Domestic Actions Bill, which was based on the recommendations of the Law Reform Committee, in May 1975, noting that it '...is appropriate in this International Women's Year that the actions should be swept away...'. The actions dealt with in the Bill included the claim for damages for adultery and for enticement of a spouse. All of the actions involved, Dr Finlay argued, were '...based essentially on the proposition that women, and especially married women, not only did but should have a status inferior if not servile, to men.'116. Addressing the breach of promise clause specifically he stated that public interest was not served by people who wanted to break off an engagement having the possible threat of court proceedings hanging over them. Marriage should be contemplated with complete freedom of choice, and the existence of the breach of promise action jeopardised that freedom. The claim that the actions dealt with in the Bill were not beneficial for women was disputed by Sir John Marshall who said that it was his opinion that some of the provisions in the Bill deprived women of their rights.117

Some politicians could still see a place for the action with Mr Wilkinson, the member for Rodney, asking what would happen under the new legislation in a case where actual economic loss as a result of the breach had occurred. In reply Dr Finlay stated that this was one of the extremes which had to be considered. However he also noted:

115 ibid, p. 1621.
116 ibid.
117 ibid, p. 1625.
At the other extreme is the case mentioned by the Law Reform Committee of the frank and almost open gold digger who takes advantage of a situation to turn as honest a penny as she can in the circumstances.

When questioned on whether he meant 'he or she' Dr Finlay replied that he was '...not distinguishing in International Women's Year.' 118 The Law Reform Committee never literally cited an actual case in which, in their view, the plaintiff had been a 'gold-digger'. They had taken this example of how the breach of promise action might be used from Family Law by B.D. Inglis, who also never provided evidence of such a case. Rather he noted that the legislation provided '...an ideal outlet for the prospective "gold-digger".' 119 At least some of the enmity expressed towards the breach of promise action then was based more on the possibility of the legislation being in such a way, than on evidence that it had actually happened.

There was a perception amongst the parliament that the action for breach of promise was somewhat outdated and therefore should be abolished. It was pointed out that it was an anomaly that a breach of the pre-marriage contract could result in a claim for damages whereas a breach of the marriage contract could not. All seemed to agree that it was better for an engagement to be broken than for a marriage which one party was having doubts about, to go ahead. Thus on 3 October 1975 the Domestic Actions Act was passed into law. 120 Clause 5 of the Act abolished the action for breach of promise of marriage stating that 'no agreement between two persons to marry each other, wherever made, shall be a contract...'. 121 The second part of the Act dealt with property disputes arising out of

118 ibid, p. 1624.
119 B.D. Inglis, Family Law, p. 27.
120 Domestic Actions Act 1975, see Appendix 1.
121 ibid.
engagements but from this time on engagement would be purely a social function rather than a legally binding contract.
CHAPTER 6 CONCLUSION

After more than one hundred years of breach of promise of marriage cases in New Zealand the action allowing them was abolished. In this time the nature of these actions had changed sharply, from the widely celebrated case of Hughes v. Shand in 1876 to the less public case of A v. B. in 1972. It could be argued that the reasons for which the action was deemed to be outdated and for which it was subsequently abolished had more to do with the public perception of breach of promise cases than the reality. To win a case the plaintiff had to furnish evidence of a promise to marry; if she was to receive significant damages under the heading of loss of marriage and injury to feelings, she would have to prove that these were in fact serious effects. Even in 1972 at least the plaintiff also had to be ready, as was noted in A v. B, to have her own past and current actions taken into consideration when the Judge decided damages. In light of these facts it might seem that pursuing a breach of promise case for purely 'gold-digging' reasons would have unacceptably high personal costs. To assess whether it was indeed likely that people went through with marriages because they were scared of the possibility of a breach of promise action, more information is needed.

However there was an impression amongst the politicians that the public good would not be served if there was not complete freedom of choice available to those considering marriage. This concern that people should not be compelled, by the threat of a breach of promise action, into a marriage they were unsure of arose partly out of concern about the increasing divorce rate. Mr Munro, the member for Invercargill, stated that his interpretation of community attitudes was that it was thought that "...a broken engagement is better than a divorce.'

122 N.Z.L.R., [1974], p. 685.
Coupled with this was the idea expressed by the Chief Marriage Guidance Adviser in his submission to the Law Reform Committee, that young people could now expect a married life of about 50 years and for this reason it was vital to maintain complete freedom of choice before marriage.\textsuperscript{124} Marriage was a long term commitment but increasingly liberal divorce laws meant that this too was a contract which could be dissolved. However the potential social effects of a rising divorce rate were worrying and for this reason freedom of choice, embodied in the opportunity to have a change of mind, without fear of legal action, was seen to be important.

Mr Munro also commented that the Domestic Actions Act would mean that "...any young woman can break off her engagement without risking court proceedings."\textsuperscript{125} Contrary to the impression created by this statement social conventions surrounding the breach of promise action meant that it was an action used mainly, if not totally, by women. There is no evidence to suggest that men ever used the action although they were certainly legally entitled to do so. There is evidence to suggest that in England at least the courts were not sympathetic to a man suing a woman for breach of promise.\textsuperscript{126} This lack of sympathy was based on several assumptions about the engagement process. For example men had the initiative in proposing the contract and they should exercise this power wisely. They could only be subjects of scorn if they were tricked, or claimed to succumb to 'feminine wiles'. Women, generally, were younger and less experienced than their potential husbands and were dependents within marriage and therefore it was their duty to choose their husbands carefully. Finally it was also assumed that it was a woman's prerogative

\textsuperscript{124} Report of the Torts and General Law Reform Committee of New Zealand - Miscellaneous Actions, p. 2.
\textsuperscript{125} N.Z.P.D., Vol 401 1975, p. 1625.
to change her mind.\textsuperscript{127} Such perceptions were not conducive to men using the action for breach of promise. All of the cases used in this study were brought by women and there is no evidence in New Zealand to suggest that men used their right to claim damages for broken engagements.

It has been suggested that the fact that breach of promise actions are usually brought by women might be the reason they were often seen as occasions for judicial humour.\textsuperscript{128} It may also be the reason they were subject to much public ridicule. Newspapers such as New Zealand Truth were aware of the public interest aspect of these cases and highlighted the humorous or scandalous in each case. By 1972 when A v. B came to trial breach of promise could not compete with the other scandals of the day and was not even noted in New Zealand Truth.

The breach of promise action had not been effective or 'good' legislation, in many ways. It was based on the perception that women were not equal partners in a betrothal. While this is not explicitly stated, there were strong social conventions deterring men from using the action. Legislation which provides women with a remedy to recover monetary damages for the loss of a marriage reinforces the idea that women have an inferior position, both in the courtship process and in marriage. By 1975 the breach of promise action was an anachronism in a modern society. However the politicians who abolished the action only recognised the sexist elements of it in passing.

In abolishing the right to sue for breach of promise of marriage the legislature was in effect ensuring that parties planning to marry were no longer contractually bound if they changed their minds. Engagement had become a purely social

\textsuperscript{127} ibid.
function no longer legally reminiscent of a time when a betrothal was as binding as a marriage. While breach of promise has not appeared in accounts of social life in New Zealand, the history of this action provides some interesting insights into relations between the sexes in New Zealand.
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Appendix 1

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REPRINTED ACT
[WITH AMENDMENTS INCORPORATED]

DOMESTIC ACTIONS
Reprinted as on 1 March 1990

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THE DOMESTIC ACTIONS ACT 1975
1975, No. 53

An Act to abolish the actions for damages for adultery, [for enticement of a spouse,] for harbouring of a spouse or child, and for enticement or seduction of a child, and for breach of promise of marriage, and to provide for the settlement of property disputes arising out of the termination of agreements to marry

3 October 1975

The words in square brackets were inserted by s. 190 (1) of the Family Proceedings Act 1980, see s. 190 (3) of that Act.
1. **Short Title**—This Act may be cited as the Domestic Actions Act 1975.

   As to the exercise of jurisdiction of a Family Court and a District Court under this Act, see s. 11 of the Family Courts Act 1980.

**PART I**

**Damages for Adultery**

2. **Abolition of right to claim damages for adultery**—
   (1) Part V of the Matrimonial Proceedings Act 1963 is hereby repealed.
   (2) Nothing in this section shall affect any claim for damages made on a petition filed before the commencement of this Act.

**Common Law Actions**

3. **Abolition of action for enticement of a spouse**—
   (1) No person shall be liable in tort to any other person for inducing the spouse of that other person to leave or remain apart from that other person.
   (2) This section shall have effect in relation to events occurring before as well as after the passing of the Family Proceedings Act 1980 but shall not affect any action commenced before the passing of that Act.

   This section was substituted for the original s. 3 by s. 190 (2) of the Family Proceedings Act 1980, see s. 190 (3) of that Act.

4. **Abolition of actions for enticement, seduction, and harbouring**—
   (1) No person shall be liable in tort—
   (a) To a parent for—
       (i) Inducing a child of that parent to leave or remain apart from that parent; or
       (ii) Seducing the child of that parent; or
       (iii) Harbouring the child of that parent; or
   (b) To any other person for—
       (i) Seducing the servant of that other person; or
       (ii) Harbouring the wife of that other person.

   (2) In this section the expression “parent”, in relation to any child, includes a guardian or person standing in the place of a parent to that child.

   (3) This section shall have effect in relation to events occurring before as well as after the commencement of this Act but shall not affect any action commenced before the commencement of this Act.

5. **Action for breach of promise of marriage abolished**—
   (1) No agreement between 2 persons to marry
each other, wherever made, shall be a contract, and the action for breach of promise of marriage is hereby abolished.

(2) This section shall have effect in relation to agreements made before as well as after the commencement of this Act but shall not affect any action commenced before the commencement of this Act.

Amendments and Repeals

6. Consequential amendments and repeals—(1) Sections 21 and 22 of the Evidence Act 1908 are hereby repealed.

(2) This subsection substituted a new proviso for the proviso to s. 3 (1) of the Law Reform Act 1936 (reprinted 1979, R.S. Vol. 3, p. 191).

(3) Section 3 (2) of the Law Reform Act 1936 is hereby amended by repealing paragraph (b).

(4) Section 68 of the Matrimonial Proceedings Act 1963 is hereby amended by repealing subsection (2) and the proviso to subsection (1).

(5) This subsection substituted a new paragraph for para (d), of s. 15 (2) of the Legal Aid Act 1969 (reprinted 1975, Vol. 3, p. 2124).

(6) Section 11 of the Minors’ Contracts Act 1969 is hereby repealed.

(7) Section 11 (2) of the Illegal Contracts Act 1970 is hereby repealed.

(8) This section shall not affect any action commenced before the commencement of this Act.

PART II

Property Disputes Arising out of Agreements to Marry

7. Interpretation—In this Part of this Act, unless the context otherwise requires,—

"Agreement to marry" includes an agreement to marry which, immediately before the commencement of this Act, would have been void:

"Court" means a Court having jurisdiction by virtue of section 9 of this Act:

"Party to the agreement" includes the legal personal representative of such a party:

"Property" includes real and personal property and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest.

8. Property disputes arising out of agreements to marry—(1) Where the termination of an agreement to marry
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gives rise to any question between the parties to the agreement, or between one or both of the parties to the agreement and a third party, concerning the title to or possession or disposition of any property, any such party may, in the course of any proceedings or on application made for the purpose, apply to the Court for an order under this section.

(2) Every application under this section shall be made within 12 months of the date of termination of the agreement or within such longer period as the Court may allow.

(3) Subject to subsection (6) of this section, on any such application the Court shall make such orders as it thinks necessary to restore each party to the agreement, and any third party, as closely as practicable to the position that party would have occupied if the agreement had never been made.

(4) In determining the orders to be made on any such application, the Court shall not take into account or attempt to ascertain or apportion responsibility for the termination of the agreement.

(5) In order to give effect to subsection (3) of this section, but without limiting the general power conferred thereby, the Court may, on any such application, notwithstanding that the legal or equitable interests of all parties in any property may be defined, or that a party may have no legal or equitable interest in any property, make orders for—

(a) The sale of all or part of the property and the division or settlement of the proceeds in such shares and upon such terms as it thinks fit:

(b) The partition or division of the property:

(c) The vesting of property owned by one or 2 parties in 2 or more parties in common in such shares as it thinks fit:

(d) The conversion of joint ownership into ownership in common in such shares as it thinks fit:

(e) The payment of sums of money by any party to any other party or parties.

(6) Where any property in dispute is a gift from a third party and the Court is satisfied that the third party does not wish the gift to be returned to him, the Court may make such orders with respect to that property as appear just in all the circumstances, but without taking into account or attempting to ascertain or apportion responsibility for the termination of the agreement.

(7) An order made under this section shall be subject to appeal in the same way as an order made by a [District Court]
or the [High Court] in an action in a [District Court] or in the [High Court], respectively, would be.

(8) Nothing in this section shall limit or affect the right of any person to bring an action for money had and received.

In subs (7) the references to the High Court were substituted for references to the Supreme Court by s. 12 of the Judicature Amendment Act 1979, and the references to a District Court were substituted for references to a Magistrate's Court by s. 18 (2) of the District Courts Amendment Act 1979.

9. Concurrent jurisdiction of High Court and Family Court—(1) The [High Court] and a [Family] Court shall each have jurisdiction to make orders pursuant to section 8 of this Act:

Provided that a [Family] Court shall have no jurisdiction to make any such order in respect of any property on an application made while proceedings relating to or affecting the property were pending in the [High Court].

(2) The [High Court], upon application by any party to proceedings pending on an application made under section 8 of this Act in a [Family] Court (other than an application made in the course of other proceedings in that Court), shall order the proceedings to be removed into the [High Court] unless it is satisfied that the proceedings would be more appropriately dealt with in a [Family] Court. Where the proceedings have been so removed they shall be continued in the [High Court] as if they had been properly and duly commenced in that Court.

(3) This subsection added subs. (3) to s. 50 of the District Courts Act 1947 (reprinted 1980, R.S. Vol. 5, p. 28).

In subs. (1) and (2) the word "Family," wherever it occurs in square brackets, was substituted for the word "Magistrate's" by s. 17 (1) of the Family Courts Act 1980, and the references to the High Court, wherever they occur, were substituted for references to the Supreme Court by s. 12 of the Judicature Amendment Act 1979.

10. Procedure—(1) On any application made under section 8 of this Act, such notice as the Court directs shall be given to every person having or appearing to have an interest in the property in question, and any such person shall be entitled to appear and be heard in the matter as a party to the application.

(2) An order made by the Court pursuant to section 8 of this Act that a sum of money be paid to any person shall take effect as a judgment of the Court in favour of that person for that sum and shall be enforceable accordingly, and a sum of money ordered to be paid in respect of any estate or interest in land shall also constitute a charge against that estate or interest, and may be registered under the provisions of the Statutory Land Charges Registration Act 1928.
(3) Where any order made pursuant to section 8 of this Act affects the ownership of any estate or interest in land which is registered in the office of the District Land Registrar or the Registrar of Deeds, a copy of the order sealed with the seal of the Court shall, upon application by any party to the application and upon payment of the prescribed fee (if any), be registered by the District Land Registrar or the Registrar of Deeds, as the case may require, and shall thereupon have effect according to its tenor.

(4) Without limiting the provisions of subsection (2) of this section, where under any order made pursuant to section 8 of this Act a person is or may be liable to pay a sum of money to another person, the Court may direct that it be paid either in one sum or in instalments and either with or without security and otherwise in such manner and subject to such conditions as the Court thinks fit.

11. Rights of mortgagee, etc., not affected—The rights conferred on any person by an order made under section 8 of this Act shall be subject to the rights of the person entitled to the benefit of any mortgage, security, charge, or encumbrance affecting the property in respect of which the order is made if it was registered before the order was registered or if the rights of that person arise under an instrument executed before the date of the making of the order:

Provided that, notwithstanding anything in any enactment or in any instrument, no money payable under any such mortgage, security, charge, or encumbrance shall be called up or become due by reason of the making of any such order not being an order directing the sale of any property.

The Domestic Actions Act 1975 is administered in the Department of Justice.