[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]

(November 7, 1953)

CHRISTOS MARKOU OF FAMAGUSTA, *Appellant*,

v.

GREGORIA MICHAEL OF TRIKOMO, *Respondent*.

(*Civil Appeal No.* 4035.)

Breach of promise—Assessment of damages—Contract Law (Cap. 192) s. 73 enacts Common Law rule—Plaintiff's conduct relevant in actions for breach of promise—Philippou v. *Moschovia not followed.*

The plaintiff sued the defendant for breach of promise to marry. The trial Court found the plaintiff liable but stated that the "plaintiff's conduct, while not sufficient to justify the rescission of the contract of marriage, was such that (if evidence in mitigation of damages was admissible in a suit for a breach of promise to marry) the damages would be substantially reduced." But being bound by the decision in *Philippou* v. *Moschovia*, 15 C.L.R., 116, the Court could not take the plaintiff's conduct into account as mitigating damages. The defendant appealed.

Held : (1) The Contract Law (Cap. 192) s. 73 merely enacts the Common Law rule in *Hadley* v. *Baxendale* for assessing damages in contract. This Common Law rule is subject to exceptions which include the amount of damages in actions for breach of promise.

(2) Following the principle established in the case of *R.* v. *Charalambos Erodotou* (19 C.L.R., 144, *supra*) not only the Common Law rule but its exception should also apply. The decision in *Philippou* v. *Moschovia* is no longer good law. Applying the Common Law rule in actions for breach of promise, the plaintiff's conduct can be taken into account in mitigation of damages.

Appeal allowed.

Appeal by defendant from the judgment of the District Court of Famagusta (Action No. 451/52).

N. Zannetides with *T. Orphanides* for the appellant.

N. Nicolaides for the respondent.

Judgments were delivered by :

HALLINAN, C.J. : In this case the appellant has been sued by the respondent for a breach of promise to marry. The trial Court found that the appellant was liable for breach of this contract to marry the respondent and assessed the damages in the following words :

"Plaintiff, a woman of about 35, of good standing in her community and of irreproachable reputation has lost an apparently good and healthy husband, about 10 years her younger, a skilled carpenter, earning now £4. 15*s*. a week or say £250 a year. She has her own house in her village where she could live well settled in life, on the parties' standards. I find her loss at £250."

The learned trial judge considered that the appellant had shown that the respondent's conduct, while not sufficient to justify the rescission of the contract of marriage, was such that (if evidence in mitigation of damages was admissible in a suit for a breach of promise to marry) the damages would be substantially reduced. Indeed, I may say at once that the trial Court on the evidence, might reasonably have concluded that the respondent's conduct towards the appellant after their betrothal made it unlikely that their marriage would be happy and harmonious ; and that common sense would require this mitigating factor to be taken into account when assessing the injury which the respondent had suffered by the breach of the contract. However, the trial Judge with obvious reluctance considered that the decision in *Philippou* v. *Moschovia*, 15 C.L.R., 116, precluded him from taking into consideration evidence in mitigation of damages, although he reviewed some more recent decisions of the Supreme Court and expressed some doubt as to whether *Philippou's* case should still be considered as a correct statement of the law. The question before us upon this appeal is whether, notwithstanding the decision in *Philippou's* case, damages in a breach of promise case can be reduced by taking into account the conduct of the plaintiff.

It will be convenient to consider first how this Court would consider the question which falls to be determined in this appeal unfettered by the decision in *Philippou's* case.

At Common Law, an action for breach of promise to marry has one peculiar feature which is explained in the judgment of Bowen, L.J., in *Finlay* v. *Chirney and another* 57 L.J. (Q.B.D.) 247 at p. 252 :

> " The question we have to decide to-day relates to a class of action which, though in its form and substance contractual, differs from other forms of actions *ex contractu* in permitting damages to be given as for a wrong. This double aspect of an action for breach of promise creates the perplexity in the present instance. On which side of the line is to fall an action which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner as well ? "

The matter is further explained by Lord Esher, M.R., in the same case at p. 249 :

> " The injury, or cause of action, has always been treated as personal, and the damages have been treated as arising from the personal conduct of both parties ; and, therefore, evidence as to the conduct of the parties has always been allowed to be given in aggravation or

mitigation of damages. Thus, the age and the whole behaviour of both parties may be taken into account as aggravating, or mitigating, as the case may be, the damages arising from the breach of the promise."

The manner in which damages have been assessed is described in the following passage from Chitty on Contracts (20th edition at pp. 1189–1190):

" The damages, which may be aggravated by seduction, infection by disease, are peculiarly a matter for the jury ; in no reported case, has a new trial been granted for excess of damages, and in many cases it has been refused. Exemplary damages may be given, and the conduct of both parties up to and at the trial, and the injury to the feelings of the plaintiff may be taken into account, as well as the impairment of her chances of marrying another person, and the monetary loss and special damage which she has sustained. In assessing the value of the marriage which the plaintiff has lost, the means of the defendant may be taken into account. The defendant may, in mitigation of damages, give evidence that his relatives disapproved of the match ; or that he is in a bad state of health ; or of the plaintiff's licentious conduct, or general character as to sobriety, virtue or temperance."

Now the only express provision in the statute law of Cyprus concerning damages for breach of contract is contained in Part VII of the Contract Law (Cap. 192), and it has been contended for the plaintiff-respondent in the present case that the only matters which can properly be considered in assessing damages are such loss or damage as are allowed under section 73 (1) of the Contract Law. This section reproduces section 73 of the Indian Contract concerning which Pollock and Mulla (6th ed. p. 418) have the following note : " The intention was plainly to affirm the Common Law as laid down in the Court of Exchequer in the leading case of *Hadley* v. *Baxendale* ". If damages for breach of promise were circumscribed by the rule in *Hadley* v. *Baxendale*, then the misconduct of either a plaintiff or a defendant in this class of action could not be considered. In *Addis* v. *Gramophone Co. Ltd.* (1909) A.C. 488 at p. 495 Lord Atkinson said :

" There are three well-known exceptions to the general rule applicable to the measure of damages for breach of contract, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it, actions for breach of promise of marriage, and actions like that in *Flureau* v. *Thornhill*, where the vendor of real estate, without any fault on his part, fails to make title. I know of none other."

In deciding whether the Common Law exceptions to this general rule applicable to the measure of damages for breach of contract, are part of the Law of Cyprus, this Court must, I consider, have regard to the principle which was laid down by the full bench of the Supreme Court in the case of *R.* v. *Charalambos Erodotou* when the Court on 29th November, 1952, gave its opinion on questions of law reserved by an Assize Court.* One of the questions there to be decided was whether the law of provocation as enacted in section 202 of the Criminal Code (Cap. 13) contains a complete statement of that Law or whether it can be amplified by reference to English authorities. The Court found that it was the intention of the legislative authority in section 202 to reproduce the Common Law and that it did not contain a complete statement of that law. The Supreme Court then laid down a principle which is very relevant to the present case:

> " The Common Law has taken centuries to formulate and it needs considerable erudition and elaborate drafting to capture its many-sided wisdom. Few sections in the Criminal Codes of colonial territories aim at such completeness. A section, so far as it goes, may reproduce the Common Law, but it may omit some material element in the law which is being reproduced.
>
> Reading the section it is obviously the intention of the legislative authority to enact a certain part of the Common Law, but the enactment is not complete. In such circumstances the English decisions on this part of the Common Law are authoritative in Cyprus. It must always be a matter for a Court, in applying any section of the Criminal Code, to consider whether its structure is so elaborate as to suggest that it is a full and complete statement of law, in which case the English decisions will not apply ; or whether it intends to reproduce the common law, in which case the English decisions are authoritative and the Courts of this Colony are bound to follow such decisions in the manner stated earlier in this opinion."

This principle enunciated in respect of the interpretation of the Criminal Code is of course of general application when interpreting the statute law of the Colony and is of especial relevancy when construing codes such as the Contract Law where an attempt is made to condense "*multum in parvo*". Codes usually aim at a concise statement of legal principles; they are not intended to be a complete and exhaustive statement of the law. If they are to be administered without hardship they must be adapted to the permutations of common affairs which should not be distorted to fit the Procrustean bed of a legal code. Mr. D. Lloyd, Reader in English Law in the University of London, delivered an interesting lecture in that University advocating the

* See p. 144 of this volume.

codification of English Law; the lecture is published in Current Legal Problems, 1949. He states:

> "Portalis, the pilot of the Code Civil, was singularly free from the extravagant notion that a code could contain the whole of the law and even dispense with judicial interpretation .... Nevertheless the illusion gained force in France that the Code was complete in itself and that legal study must be confined to the Code and the Code alone. Recent developments have, however, done much to dispel this idea and to stress the vital function of interpretation. The modern Swiss Code, enacted in 1907, recognises this explicitly by providing that in the absence of an applicable rule of law or custom, '*le juge prononce ..... selon les regles qu' il établirait s' il avait à faire acte de legislateur*'."

It is not clear whether Mr. Lloyd would follow the Swiss Code and give British judge power to fill in the gaps in Codes as if they were the legislature; I would never advocate that such power be given to our judges. But it appears to me a sensible solution of this problem when a code purports to codify the Common Law that it should be amplified and interpreted according to the decided cases which have formulated that Law.

The rightness of this view is, I think, well illustrated by the example which the present case affords. If damages for breach of promises to marry must be fitted to the Procrustean bed of section 73 (1) of our Contract Law which reproduces the rule in *Hadley* v. *Baxendale*, then the conduct of the parties in aggravating or mitigating damages is shut out. But no one who has been concerned as a lawyer or a layman in a breach of promise case would, I think, contend that justice can be done and a proper remedy provided by assessing damages in such a case in terms of purely temporal loss arising *ex contractu* without taking into account the conduct of the parties, outraged feelings on either side, and the prospects of happiness or misery which the proposed marriage held in store. Who can doubt that our law is incomplete and harsh if it failed to temper the general rule as to damages in contract in section 73 (1) by qualifying the rule in its application to cases of breach of promise as has been done by the Common Law? I am not suggesting that a rule is not good law merely because it is harsh. I merely say that this case clearly illustrates the injustice that must arise if the principle laid down by this Court in the *Charalambos Erodotou's* case were not applied in ascertaining the measure of damages in actions for breach of promise.

I now come to the decision in the case of *Philippou* v. *Moschovia*, 15 C.L.R. 116. There the trial Court found for the plaintiff, who had in fact suffered grave loss for

she had been seduced by the defendant, but the Court considered that damages could only be awarded under section 73 (1) of the Contract Law and that the plaintiff had suffered no loss for which damages could be awarded under that section ; the trial Court awarded nominal damages of one guinea. The Supreme Court, upon appeal, held that the trial Court was right in considering that damages were limited to those which might be awarded under section 73 (1) but had erred in two respects: first, nominal damages could not be awarded under the Contract Law ; and secondly, damages for loss to the plaintiff's prospects of marriage and her loss of the defendant as a husband were temporal loss which could be assessed under section 73 (1). The judgment of the Court concluded :

> " Finally the seduction of the plaintiff can only be taken into consideration in the assessment of the damages in so far as it has injured the plaintiff's prospects of marriage to somebody else, and not in the light of its being misconduct on the part of the defendant to be visited with punitive damages."

Philippou's case is a clear decision of this Court that damages in cases of breach of promise must be governed by the general rule as to damages in contract, and it is in direct conflict with the conclusions that I have already set out in this judgment. *Philippou's* case was decided in 1937. It was only in 1939 in the case of *Vassiliou* v. *Vassiliou*, 16 C.L.R. 69, that the application of the Common Law to matters in the purview but not included in a code was first considered. The principles upon which the Common Law can be invoked to remedy the deficiency of our codes has been further worked out in the *Universal Advertising and Publishing Agency and others* v. *Panayiotis Vouros* (decided on 2nd April, 1952) * and in *Erodotou's* case already referred to in this judgment. It has not infrequently happened during the long history of British Courts that a principle decided in one case was subsequently discovered to be in conflict with a previous decision which was reached without that principle having been discussed or considered. In my view the principle which I have extracted from *Erodotou's* case and set out in this judgment must prevail over the decision in *Philippou's* case. *Erodotou's* case has been decided after *Philippou's* case by the full bench of the Supreme Court and lays down a principle which is of far wider importance than the issue in *Philippou's* case.

Since *Philippou's* case can no longer be regarded as a correct statement of the law, I may without impropriety mention a certain difficulty I find in following the decision in that case as to how the plaintiff's loss of prospects of marriage could be taken into account under the general

* Civil Appeal No. 3901. See p. 87 of this volume.

rule as to damages for breach of contract. In *Addis* case (1909) already referred to in this judgment, it was held by the House of Lords that where a servant is wrongfully dismissed from his employment, the damages arising *ex contractu* from the wrongful dismissal cannot (*inter alia*) include compensation for the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment. If in that action, founded on contract, difficulties in obtaining fresh employment are not relevant in assessing damage, it is hard to see how in an action for breach of promise, difficulties in obtaining another husband could be considered unless the damages were assessed as in tort. In *Philippou's* case the trial Court was also directed to assess the plaintiff's loss of the defendant as her husband. Admittedly, a Court or jury are not absolved from assessing damages merely because loss cannot be estimated with precision, but surely it must have been well nigh impossible for a Court to assess the loss of a husband as a purely temporal loss and exclude from their minds the non-material relationship of man and wife.

For the reasons I have discussed in this judgment, I consider that the learned trial Judge might properly have taken into account the evidence in mitigation of damages in the present case. He has stated in his judgment the amount of damages which he would have awarded were he at liberty to consider the evidence in mitigation, namely £125.

This appeal is therefore allowed with costs; the order of the trial Court will be varied by substituting the sum of £125 *for the sum of* £250 *awarded as damages.*

GRIFFITH WILLIAMS, J.: This is an appeal from the judgment of the President of the District Court of Famagusta in an action for breach of promise of marriage.

The facts as found by the Court were shortly as follows:

The respondent, who was of respectable family, the daughter of a farmer in Trikomo, got engaged to the appellant, a skilled carpenter in Famagusta, and on or about the 12th September, 1950, their engagement was solemnized in accordance with the rites of the Greek-Orthodox Church. The appellant and respondent did not live together but met, perhaps, on an average once a week, during the period of their engagement, went out together and occasionally stayed in each other's houses. Respondent was about 10 years older than the appellant, and it seems that from the beginning of their engagement their relations were not entirely happy; in any case there were disagreements, and after about four months the appellant put an end to the engagement, and in consequence the respondent brought this action against him claiming damages.

The learned President of the District Court who tried the case in the Court below made the following finding with relation to the culpability for the breach :

"On the evidence before me I find that the plaintiff's (respondent's) conduct during the engagement was below the defendant's (appellant's) expectations, but it was not such as to afford him a sufficient justification to rescind the contract between the parties by breaking the engagement as he did."

Having found for the respondent he then turned to the question of damage ; but in estimating what damages he ought to award in respect of the breach of contract, he felt himself bound by the decision of the Supreme Court in the case of *Philippou* v. *Moschovia*, 1937, 15 C.L.R., 116. That case decided that in breach of promise actions different principles governed the assessment of damages in England and Cyprus ; that damages for breach of promise of marriage could only be given, as in the case of every other breach of contract under sec. 73 (1) of the Contract Law, Cap. 192 ; and that though in England the conduct of the parties could be taken into account and the damages increased or diminished to make them either nominal or vindictive such was not the case in Cyprus. In this Colony the successful plaintiff can only be given as damages, to quote the section, "compensation for any loss or damage caused to him thereby or which naturally arose in the usual course of things from such breach."

The learned President stated that, were he able to do so, he would, on account of the respondent's conduct, have halved the amount of compensation awarded to her.

As the judgment in *Philippou* v. *Moschovia* is clearly of particular importance to this case, I will quote the relevant passages *in extenso :*

"In England an action for breach of promise of marriage, though in form an action for breach of contract, is in substance an action for personal injury, i.e. an action in tort. Hence, in England, the conduct of both plaintiff and defendant may, in such an action, be taken into consideration and damages aggravated, vindictive, punitive or exemplary, as they are variously called, may be awarded on grounds which find no place in actions which both in form and substance are contractual. In England in such an action the plaintiff's feelings of injured pride, and her disappointment due to the breach, may be taken into consideration, and so may her seduction by the defendant as grounds for enhancing the damages. In Cyprus, the action both in form and substance is an action for breach of contract, because a contract to marry comes within section 10 of the Contract Law, 1930. The remedy given by section 73 (1) of the Contract Law, 1930, to a person injured by

breach of such a contract is compensation for loss or damage caused by the breach and as it makes no provision for the award of nominal damages where no loss due to the breach has been established it is clear that if a plaintiff fails to establish loss or damage caused by the breach the action must be dismissed..................

....

The scheme of section 73 (1) of the Contract Law, then, is compensation for loss or damage sustained by the breach, and it is limited to such loss or damage as flows naturally from the breach or which was known to both parties when making the contract as likely to result therefrom ....

Finally the seduction of the plaintiff can only be taken into consideration in the assessment of damages in so far as it has injured the plaintiff's prospects of marriage to somebody else, and not in the light of its being misconduct on the part of the defendant to be visited with punitive damages."

Now it seems to me that the learned P.D.C. rightly held that he was bound to follow this decision, though from his comments regarding the present trend towards introducing Common Law remedies, it would appear that he did so with some misgiving. It is indeed the fact that since the decision in *Vassiliou* v. *Vassiliou*, 16 C.L.R., 69, Sec. 28 (1) (*c*) of the Courts of Justice Law has been invoked to introduce Common Law remedies, whenever the Cyprus Laws are found to be deficient. The relevant part of section 28 (1) (*c*) is as follows :

" 28 (1) Every Court in the exercise of its civil or criminal jurisdiction shall apply—

(*c*) the Common Law and doctrines of equity save in so far as other provision has been or shall be made by any law of the Colony."

It is no longer stated in the section, since the amendment introduced by Law 29 of 1952, that the Common Law and principles of equity referred to therein are those " as in force in England ". The section, unamended, referred to ' the Common Law and Rules of Equity as in force in England on the 5th day of November, 1914 '. I will assume however that the legislature intended that the words " as in force in England " should continue to be understood and only the date " on the 5th day of November, 1914 " deleted as otherwise the section would have no meaning.

Under this section (then section 49 (1) (*c*) of the Courts of Justice Law, 1925) the Supreme Court in *Vassiliou* v. *Vassiliou*, 16 C.L.R., 69, held that an action lay at Common Law for damages for assault there being no provision for such an action in the Civil Wrongs Law, 1932. It rejected the argument that that law should be considered exhaustive of the torts recognised in Cyprus. In the judg-

ment of the Court delivered by Crean, C.J., the following passage occurs:

> "It is a well-known principle of interpretation that where there is a new law making a provision inconsistent with a provision in an earlier law, it is the provision contained in the latter law that must prevail, unless expressly excluded by that law. Now the section already set out states definitely that the English Common Law and Rules of Equity are only to apply in the absence of any provision in the existing law. It does not exclude expressly or impliedly the whole existing law relating to tortious acts, and so following the above principle can only be held to exclude such tortious acts as are already provided for by the Civil Wrongs Law, 1932. That law nowhere states expressly that it is exhaustive of the civil wrongs in the Colony, as supplying remedies for all injuries caused by tortious acts; it merely codifies the civil wrongs for which action could, under that law, be brought."

This case has recently been followed and approved by this Court in the case of the *Universal Advertising Agency & others* v. *Panayiotis A. Vouros* (Civil Appeal No. 3901).* When the learned C.J. stated in his judgment: "I consider that the intention of the legislative authority when introducing the Common Law in 1935, can best be implemented by refusing to allow the saving clause in section 28 (1) (*c*) to exclude a Common Law right unless the "other provision" is clear and imperative: a cause of action at Common Law should after 1935 be available unless this remedy is either expressly taken away by any Law of the Colony or is clearly repugnant to any such Law."

An extension of the principle of applying English Common Law rights and remedies to Cyprus was seen in the case of *Rudolf Schmuel* v. *The Officer in Command Illegal Jewish Immigrants' Camp, Karaolos*, (1948) 18 C.L.R., p. 158. That was an application for a writ of *habeas corpus*; and it was held that, as the writ of *habeas corpus* derives from the Common Law of England, it follows by virtue of sections 49 and 51 of the Courts of Justice Law, 1935, as amended by Law 19 of 1940 (now sections 28 and 30 of Cap. 11) that both the substantive law from which the writ of *habeas corpus* derives and the procedural law governing its issue are in operation in Cyprus.

This decision was followed in the case of Civil Application 8/50† in which it was decided that the Supreme Court had power to issue an order of *certiorari* to remove proceedings from a Rent Assessment Board for the purpose of quashing them. An order of *certiorari*, like a writ of *habeas corpus*, is among the prerogative proceedings of the Crown, and, being part of the Common Law in England, is issuable in Cyprus.

* See p. 87 of this volume. † See p. 26 of this volume.

In the case of *Queen* v. *Haralambos Erodotou*, page 144 *supra*, a further step was taken in extending the application of the Common Law. In all previous cases the Common Law had been called on to supply a right of action where no right otherwise existed or introduce some form of procedure in which the local law was deficient. In this criminal case, however, the Common Law was invoked not to give a remedy where none existed, but to explain and extend a particular doctrine of law—viz. provocation—already contained in and defined by the Cyprus Criminal Code (Criminal Code Law, Cap. 13). Although provision was made by section 202 of the Cyprus Criminal Code for the doctrine of provocation in cases of homicide, the Court held that this does not prevent the Court applying the Common Law principles relating to provocation, the section being neither contradictory nor exhaustive. The Court considered section 202 to be an attempt in a few words to introduce the Common Law doctrine of provocation and held that the Common Law could in consequence be resorted to in order to explain or supplement it. A relevant extract from that judgment reads as follows:

> A section, so far as it goes, may reproduce the Common Law, but it may omit some material element in the law which is being reproduced. Reading the section it is obviously the intention of the legislative authority to enact a certain part of the Common Law, but the enactment is not complete. In such circumstances the English decisions on this part of the Common Law are authoritative in Cyprus.

From these decisions it can be seen that section 28 is sufficiently wide to introduce all the principles of the Common Law where such are not expressly excluded by prior provision in the local law. This being the case, and there being no provision in Cyprus available or suitable for assessing damages in the case of breach of promise of marriage there can be nothing to prevent resort to the Common Law principles for assessing such damages.

It would seem therefore that no adequate damages could be given under section 73 (1) of the Contract Law (Cap. 192) but that a Common Law remedy was available—and the action could be treated as one for personal injury and damages assessed as for a tort.

In order to understand more clearly the nature of the breach of promise actions it is expedient to go to the English authorities. These actions have always presented an anomaly, for though they are framed in contract, damages are assessed as for personal injury. They arise *ex delicto* and not *ex contractu*, and the damages awarded are frequently vindictive.

Chitty on Contract, 20th edition, p. 409, states at para. (*e*):

> " Exemplary or vindictive damages are seldom awarded in contract. They are awarded when feelings have been

wounded or self-respect outraged. Possibly the only example in contract is the action for breach of promise of marriage."

Now section 73 (1) (*c*) of the Contract Law paraphrases and embodies the rule as to assessment of damages in cases of breach of contract which was formulated in the case of *Hadley* v. *Baxendale*, (1834) Ex. 341, 23 L.J., Ex. 179. In his judgment in that case Alderson B. stated : " When two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

If this rule for assessing damages in contract is compared with the principles of assessment applied in English cases of breach of promise of marriage it will be seen that it bears little resemblance to them. In the following passage from Chitty on Contract, 20th edition, p. 1189, the principles for assessing damage in cases of breach of promise are considered :

" The damages, which may be aggravated by seduction or infection by disease, are peculiarly a matter for a jury. In no reported case has a new trial been granted for excess of damages, and in many cases it has been refused. Exemplary damages may be given and the conduct of both parties up to and at the trial, and the injury to the feelings of the plaintiff, may be taken into account, as well as the impairment of her chances of marrying another person, and the monetary loss and special damage which she has sustained. In assessing the value of the marriage which the plaintiff has lost, the means of the defendant may be taken into account. The defendant may in mitigation of damages give evidence that his relatives disapproved of the match ; or that he is in a bad state of health; or of the plaintiff's licentious conduct or general character as to sobriety, virtue or temperance."

Perhaps the most instructive case on this subject is that of *Finlay* v. *Chirney* (1888) 20 Q.B.D., 494, in which a breach of promise action was brought against the personal representatives of a deceased person. In this case the two kinds of damage, special damage, which must be specially pleaded, and ordinary damage, that for personal injury, were distinguished.

Lord Esher, M.R., speaking of an action for breach of promise states :

> " The injury or cause of action, has always been treated as personal, and the damages have been treated as arising from the personal conduct of both parties : and therefore evidence as to the conduct of the parties has always been allowed to be given in aggravation or mitigation of damages. These things and the whole behaviour of both parties may be taken into account as aggravating and mitigating, as the case may be, the damages arising from the breach of promise. All this shews that the action is in respect of an injury strictly personal."

He went on to state that principle and authority were conclusive that no action would lie against a personal representative of a deceased person for breach of promise without proof of special damage. " *Actio personalis moritur cum persona* " must apply to actions of this kind as if they were actions in tort.

Later he continues, " In my opinion special damage can only arise if beside the promise of marriage there has also been at the same time as that promise another promise which affects property—a distinct something which goes to the consolidation of the promise of marriage made by the other party."

In the same case Bowen, L.J., at p. 252, states : " The question we have to decide to-day relates to a class of action which, though in its form and substance contractual, differs from other forms of actions *ex contractu* in permitting damages to be given as for a wrong. This double aspect of an action for breach of promise creates the perplexity in the present instance. On which side of the line is to fall an action which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which damages may be given of a vindictive and uncertain kind not merely to repay the plaintiff from temporal loss, but to punish the defendant in an exemplary manner as well? How far is such an action within, how far without the maxim " *Actio personalis moritur cum persona* " ? "

In *Chamberlain* v. *Williamson* " It was held that an action of this sort in which no special damage was alleged would not lie, on the ground that except when such special damage had been occasioned the action was in reality an action arising out of a personal injury ". " The general rule of Law ", says Lord Ellenborough, " is *Actio personalis moritur cum persona*, under which rule are included all actions for injuries merely personal. Executors and administrators are representatives of the temporary property, that is the debts and goods, of the deceased, but not of

their wrongs, except where those wrongs operate to the temporary injury of their personal estate ". The decision in *Chamberlain* v. *Williamson* shews at all events, that the Courts of this country will even, although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim "*Actio personalis, etc.*" to so much of the damages as are a remedy for mere personal wrong and will allow only so much of the remedy to survive as seems to belong to the ordinary category of actions *ex contractu.*"

From these cases it appears that an action for breach of promise has always been treated as an action *ex delicto* rather than *ex contractu.* The Common Law maxim "*Actio personalis moritur cum persona*" applies only to cases of personal injuries and not to contracts relating to goods, debts, nor wrongs unless they have caused some special damage to the temporal estate of the promisee. But if this maxim applies to cases of breach of promise of marriage where there is no proof of any special damage affecting the temporal property of the promisee, the only damage that can be awarded is under the law of tort as for a personal injury. It follows therefore that damages cannot be awarded or assessed under the rule in *Hadley* v. *Baxendale* or in Cyprus under section 73, which is only applicable in assessing damages for breach of other forms of contract or where there is special damage arising out of the breach of promise. And this special damage has reference to property not to personal injury.

I have no doubt that the case of *Philippou* v. *Moschovia* was wrongly decided. But at that time the full significance of the change in the law effected by the introduction of English Common Law by the Courts of Justice Law, 1935, had not been realised. It seems to me that whatever may have been the position in respect of actions for breach of contract between the year 1930 when the Contract Law was passed and 1935 when the English Common Law was introduced, the introduction of the latter affected the position fundamentally. It could not be maintained that section 73 of the Contract Law adequately provides for assessment of damage in what has so long been considered in English an action for personal injury. If before 1935 there was no Common Law to give a remedy in damages, it would appear doubtful whether section 73 of the Contract Law—bearing in mind that it restates the rule in *Hadley* v. *Baxendale*—could give any but special damages for loss or injury to property of the promisee as the result of the breach. Hence it appears to me that in awarding any damages at all to the plaintiff in the case of *Philippou* v. *Moschovia* the Court must in fact have been awarding damages for personal injury whether or not it so intended. Any damage which might be suffered through the non-materialization of the marriage, that is apart from subsidiary agreements

concerning property would be altogether too indefinite, speculative and inestimable for assessment of damage. Such damage would have to be proved and would be generally impossible of proof. Hence, in my view, damages could properly have been awarded on the principles stated in *Philippou* v. *Moschovia*, though much wider and more liberal damages for the personal injury done to the plaintiff might have been awarded if the Court had applied the principles of the English Common Law introduced by the Courts of Justice Law, 1935.

In the judgment in this case the learned President said that had he been able to take into account the conduct of the respondent towards the appellant he would have awarded a smaller sum as damages. It appears to me that the sum of £250 awarded as damages was estimated on a wrong principle, as there was no claim of any special damage which was capable of assessment under section 73 of the Contract Law. The damage, if any, suffered by the plaintiff was purely personal, and such as could only be awarded under the Common Law as for a wrong. The considerations for estimating it, such as the age of the parties, their relationship and their conduct up to the time of judgment must be taken into account in estimating the degree of culpability of the party *in delicto*, in this case the appellant.

However, looking at the judgment of the learned P.D.C. as a whole it would appear that if he had not felt himself bound by the decision in *Philippou* v. *Moschovia* he would have assessed the damages in accordance with the English Common Law as in cases of personal injury ; and actually mentioned that he would have awarded only half the amount. In the circumstances and to avoid the expense of remitting the case to the trial Court, *I consider that the P.D.C.'s estimate of damage should be accepted and the appeal allowed with costs.*