Promises of Marriage in Maltese Law

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IT is too well known what betrothal is to start in the hackneyed way of laying down a general definition. We must however refer to its purposes in order to realize the important place it occupies in social life and therefore also in law. The modern systems regulating the relations arising from such promises of marriage are an elaboration of what Roman Law laid down and therefore a short reference will have to be made to this source. The whole question is socially of very great consequence and for this reason particular norms regulating it were to be found everywhere and at all ages, the only exception being in those places where women were not held in high esteem and where polygamy was admitted. The importance of betrothal grew as civilization progressed, and as the attitude of society towards women became more liberal. Its purpose is to prevent ill-advised and immature unions and to secure future happiness by revealing obstancles which otherwise would only have been known too late. It constitutes a reciprocal exchange of promises which does not merely create a social relation but it definitely establishes according to the *jus comune* a juridical bond from which important consequences follow. Not all laws agree on the nature of the effects arising from this bond, and particularly the Italian Code contains an exception to the priciples of the *jus comune* of which we shall speak later on.

In Roman Law the nature of betrothal or *sponsalia*, as it was called, as well as its sanctions were clearly established. Though according to Justinian bare consent was enough, *sufficit nudus consensus ad constituenda sponsalia*, certain symboolical formalities were always adhered to. The *paterfamilias*, even in the matter of betrothal, had wide powers over his children, which were based on the ancient *jus quiritium*. As regards age the *L. Julia et Papia Poppea* laid down that the minimum age was to be ten years and that marriage was to follow within two years: *sponsam post hanc legem decenni minorem nemo habeto desponsam intra biennium domum ducito*. A valid *sponsalia* produced a juridical bond which, however, could be easily dissolved by one party even against the will of the other. In such a case

of unlawful refusal the guilty party forfeited the gifts and the *arrhae* he had given; and he had to restore the gifts and twice the *arrhae* he received. On the whole, however, the freedom of the will of the parties until marriage was closely safeguarded and any agreement on penalties in case of non-fulfilment was prohibited as detrimental to good morals.

What is important as a historical background to our laws on the subject besides Roman Law is Canon Law especially in view of the fact that up to 1834 betrothal was exclusively governed by the laws of the Church. In Canon Law we find also an adaptation of various rules of Roman Law. A great step forward was however made by establishing the freedom of the will of the parties abolishing certain contrary rules of Roman and Greek times and by issuing the Decree *Ne Temere* (1907) to provide, as we shall state later on, concrete proofs of the mutual promises.

In Malta until some time ago engagements were considered as great events and adequate celebrations were made. Abela-Ciantar in the book "*Malta Illustrata*" give a colourful description of these festivities which more than anything else evinces the social importance of betrothal. The need of some legal norm or sanction is however evident, for it is not always that affairs subsist in this ideal state, and promises are often broken. When dissensions arise one cannot decide on one's own who is in the right and who is in the wrong. The regulating influence of the law has to intervene to set things right. Now we shall examine the cases *when* the law has to intervene and *how* it sets things right.

Our law contains two landmarks from which we must take our bearings to decide questions relating to promises of marriage. The first one is the Promises of Marriage Law (Proc. VI of 1834) which is now contained in Ch. 7 of the Revised Edition and which is intended to abolish the power of the Courts to order the specific performance of promises and contracts of marriage and to provide another remedy for the breach thereof. Reference to the relevant provisions of this Ch. will be made later on when dealing with the problems which our Courts had to solve. The second landmark is Ord. XIV of 1913 which is incorporated in s. 1277 of the Civil Code (Ch. 23). This Ord. of 1913 provided that certain transactions must be expressed in a public deed or a private writing among which is included "for the purpose of the

Promises of Marriage Law (Ch. 7), any promise, contract or agreement therein referred to." So a formality is imposed in order that an engagement valid in all other respects should produce the effects contemplated in the Promises of Marriage Law. The parties have all the right to keep their betrothal private and not to draw it up in a public deed or a private writing; but then in the event of an unlawful breach the innocent party is deprived of the right to recover an indemnity by way of moral or material damages under the Promises of Marriage Law. This innovation in the law was necessary in order to provide adequate and irrebutable proofs of the reciprocal promise. It has had also the effect of lessening litigation. As it is only required for the purpose of being able to claim eventual damages in the majority of cases it is not resorted to for it evinces a blatant lack of confidence in the other party. The consequence therefore generally follows that if the reciprocal promise is broken the innocent party has no action against the guilty party. If any evidence in figures is required suffice it to say that in the period of 22 years from 1891 to 1912, 38 cases came before the Civil Court of First Instance (some being referred to the Court of Appeal) while in the same period from 1914 to 1935 there were only 6 cases.

The need for such legislation was felt in various countries a long time before 1913. The reform of Canon Law took place in 1907 and it is contained in the decree of Pope Pius X starting with the words *Ne Temere*, wherein it is laid down that "*ea tantum sponsalia habentur valida et canonicos sortuuntur effectus, quae contracta fuerint per scripturam subsignatam a partibus et vel a parocho aut a loci ordinario vel saltem a duobus testibus.*" But this reform did not affect our Civil Laws (before 1913) and an action for breach of promise could still be maintained notwithstanding the engagement was contracted only in verbal form; *Pace* v. *Cachia*, 1907. The solemn form is also required in Italy and Spain but it is not required in England and Scotland.

Our law, however, as various other continental laws, contains a provision which in many cases mitigates the effects of the Ord. of 1913. This is sec. 1074 (Civ. Code) which lays down that "every person, however, shall be liable for the damage which occurs through his fault." A breach of promise of marriage may be prejudicial to a person's property or reputation. If such promise had been drawn up in writing no difficulty would present

itself and both moral and material damages could be claimed in virtue of the Proc. of 1834. If however this formality had not been complied with the innocent party would have no right of action arising from the said Proc. which deals specifically with promises of marriage but the general principle of liability laid down in s. 1074 might well be invoked with success. This is the view upheld by our Courts in *Ruggier* v. *Zammit* (1922), *Farrugia* v. *Chircop* (1921), and in *Dalli* v. *Atkins* (1920). Probably, however, as in these cases only material damages will be granted and not also moral damages.

We have seen how also according to Canon Law a promise of marriage has to be drawn up in writing; but for the civil effects the formalities imposed by Canon Law cannot supercede those of Civil Law. A divergence between the two is to be found when one of the parties is illiterate. The question was decided in *Farrugia* v. *Said* (1917). The Court of first instance granted moral and material damages in favour of the plaintiff but the decision was reversed by the Court of Appeal. The promise of marriage was inscribed in the Parish Register, signed by the Parish Priest, by the defendant and by a witness. As the plaintiff could not write it was declared "*sponsa nescit scribere*". Such inscriptions are made in accordance with Canon Law (1) but as they do not constitute a public deed or a private writing requited by the civil Law the Court of Appeal gave judgement against plaintiff. Matters would have been different if the plaintiff had set her mark attested by the Parish Priest and in the presence of two witnesses whose signature appeared as well according to s. 634 (2) (3), Code of Org. and Civ. Proc. Naturally if both parties signed the Parish Register then it would avail as a private writing; *Runza* v. *Attard* (1919).

In those countries where no formality is necessary for the validity of the promise, it has to be proved by the circumstances attending each particular case. The judge is to use his own discretion which at times is severely taxed. Our Courts were in the same predicament before 1913. They had to see whether there was the consent of the parties of binding themselves reciprocal-

(1) "Quod si utraque vel alterutra pars scribere nesciat, id in ipsa scriptura adnotetur, et alius testis addatur qui cum parocho, aut loci ordinario, vel duobis testibus, de quibus supra, scripturam subsignet"—decree *Ne Temere*.

ly, whether there was the mutual and accepted promise of a future marriage; *Said* v. *Said* (1910). The Court adopted in this case the concept of the betrothal as understood and defined in Canon Law: *praevius contractus de futuro matrimonio inter marem et foeminam initus*. There must necessarily be a valid consent, manifested orally or in writing, determinate as regards the persons of the engaged couple, and free, i.e. not simulated or given by way of joke or deceit. In any case the promise must be conclusively proved by considering all the circumstances which taken in their complexity show beyond doubt the serious resolution of the parties of binding themselves; *Ghio* v. *Pace* (1895). The evidence of reatives was not excluded for the simple reason that they are interested parties; *Mifsud* v. *Bugeja* (1907). It is they who can best know of the facts; *Ghio* v. *Pace*.

It need hardly be noted that even before 1913 the parties could have adopted the solemn formality of a public deed or a private writing and as early as 1840 a case arose in which the promise was made in writing before a notary.

It is not enough that a promise of marriage has been made in this solemn form in order that civil effects may follow; we have yet to see whether it is lawfully made; *Farrugia* v. *Bondin* (1864). The most important question in this regard concerns the capacity of the parties. S. 3 of the Promises of Marriage Law is quite clear and it leaves no doubt as to the minimum age a person is required to have in order that an action for damages can be directed against him. He must be a person competent by law to enter into obligations, or if he is not so competent from being under paternal or other lawful authority or limitation after obtaining the consent duly granted of the person or persons in whom such authority is legally vested. In spite of this the Civil Courts seemed at one time to have some doubts in applying the provision in its entirety. In *Farrugia* v. *Bondin* (1864) defendant was a minor whose father far from having given his consent to the promise of marriage actually opposed it. The Civil Court of first instance very rightly held on these grounds that there was not a valid engagement. But the Court was not at that time very categorical in its decision: "Da tanto sembra doversi conchiudere, che i voluti celebrati sponsali da essi contendenti, non sono stati validamente contratti e quindi non producenti effetto." The Court of Appeal then reversed the judgement and as might

be expected the reasons given were not very persuasive. It was stated "secondo la legge gli sponsali sono validi, quando consti della loro contrattazione da uno maggiore di anni sette." As regards the question whether the consent of the father had to be obtained or not the Appeal Court applied a provision of the Code De Rohan (2) in preference to s. 3 of the Promises of Marriage Law. The Municipal Code required the consent of the father only in those cases when on account of the disparity in the social condition of the parties scandal might arise. This did not apply in this particular case and so though defendant's father had not given his consent the promise was valid. Then as regards the civil effects of breach of promise the Promises of Marriage Law was resorted to.

This judgement, inconsistent as it is, did not become a settled principle. The Civil Court of first instance came to another conclusion in *Bugeja* v. *Tonna* (1907) which is more conformable to the principles of reason and to the provisions of our law. S. 3 of the promises of Marriage Law was examined. It evidently applied the general principles of the capacity to contract so that reference was to be made to the relevant provisions. S. 1011 (Civ. C.) lays down that any obligation entered into by any person who has attained the age of fourteen years, but has not attained the age of eighteen years is null, if such person is subject to paternal authority, or is provided with a curator, *saving always any other provision of Law relating to marriage*. On the other hand, according to Canon Law marriage and engagement can be contracted by a person under eighteen years. So that a doubt might arise whether the saving clause of s. 1011 is intended to enforce the rule of Canon Law in preference to the general principles of capacity. But it was held that it refers only to the validity of marriage and betrothal and it cannot be extended also to the civil effects deriving from the breach of promise of marriage. The Promises of Marriage Law lays this down expressly, as we have seen, and it was manifestly intended "a sottrarre gli effetti civili derivanti da infrazioni di sponsali al dominio delle leggi Canoniche i quali effetti cosi la stessa assoggetta

(2) "Tutta sorte di promesse di sponsali che da figli si faranno senza consenso de' loro genitori, non avranno sussistenza alcuna, semprecchè effettuandosi, attesa la disparità delle condizioni, sarà per nascere grave scandalo, o ignominia alle parentele"—Bk. III, Tit. 2, 3. 16.

unicamente all'impero della legge civile giusta le norme in essa sanzionite."

The general hypothesis now is that a reciprocal promise of marriage has been made and we shall enquire into the effects that may follow. It may be laid down outright that promises of marriage like all other obligations have acquired a legal importance and merit any special consideration only in so far as they are violated. It is then that the law has to decide whether the claims made by one party against the other have any legal foundation. Promises of marriage are now considered as giving rise to a contract *sui generis* and as not subject to specific enforcement. If one party is not true to his word the other must seek some other remedy than claiming the fulfilment of that which had been promised. This is now admitted in all countries though some time ago certain laws provided that a person who unjustly refused to fulfil his promise should be compelled to do so by means of personal arrest. Our Promises of Marriage Law expressly forbade such specific performance (s. 2) but it also intoduced another remedy. We are now to deal with this remedy i.e. the granting of moral and material damages in favour of the innocent party.

This is the most debated question in this branch of law and various writers have put forth conflicting opinions on the subject. Some uphold the principle that a person can in no way be compelled to contract marriage whether directly by specific enforcement or indirectly by granting damages against him. This view is eminently held by Italian writers. Others are of opinion that damages are due because we cannot legalise acts which are definitely prejudicial to others both materially and morally. This is what our law as well as English law upholds. The opinions of French writers are divided. We shall now examine the merits of both sides of the question premising at the same time that though in accordance with our law we favour the granting of damages much can be said on both sides.

Italian Law expressly provides that no legal effects are to follow from promises of marriage. Keeping this in mind we shall inquire into the merits of such a provision in comparison with what our law lays down. We have chosen Italian Law as our point of departure because on account of this express provision Italian writers are more adamant in the principles they extol. At any rate what is said as regards their theory generally applies to

all writers possessing the same views as the reasons adduced by all are in the main of one nature. Two arguments are generally brought forward in support of their contentions which are to be found in various judgements. The first is as the Court of Appeal of Milan stated, that as the promise of marriage does not produce a legal obligation of fulfilling it, it likewise cannot produce the effect of obliging the resilent party to indemnify damages sustained by the other. The second argument is in the words of Prof. Ciccaglione that if the guilty party "fosse minacciato dal pagamento di una forte somma a titolo di danni ed interessi, potrebbe per considerazioni d'interesse, contrarre quel vincolo, da cui l'animo si rifugge".

The first argument has no immediate bearing on our law which sanctions expressly the granting of moral and material damages. The question may however arise whether our law is justified in sanctioning a principle which may be turned into an indirect enforcement of the promise of marriage. Ricci tells us that the utility of deviating from the general principle of liability is to be found in the interests of society which require that in marriage the consent of the parties must be absolutely free and which envisage an irreparable harm in those marriages in which one of the parties was in any way enforced. This, however ,is the application of the Roman Law principle that marriages are to be free and it is for this reason that it is untenable. It is based on an old prejudice and, as Toullier points out, it is highly immoral because the Roman maxim was applied principally to marriages which had already been contracted. It was meant to maintain unhampered the absolute freedom of divorce and it was applied with greater ease to promises of marriage which of course were less binding than marriage itself. In this manner Roman jurists concluded that *sponsalia* produced no civil effects and that a party thereto could as easily break off as he could ask for divorce. Experience on the other hand, Toullier adds, shows that in exonerating the guilty party from damages rather than favouring the principle of freedom in marriages we encourage bad faith, vanity, egoism and at the very least infidelity. Indeed, says Demolombe, a promise of marriage is conditional and each of the parties has the right to break off, but it cannot be asserted that each of them may play fast and loose with the other, may abandon the other at will. for a mere whim

or perhaps through inconstancy or lust. Finally, Toullier admits that promises of marriage lessen the liberty of the contracting parties. This effect is however common to all promises and obligations of doing or forbearing from doing something. In all such cases a person alienates a part of his liberty of action and in the event of unfulfilment the promise or obligation is changed into an action for damages in virtue of the general principle *nemo potest praecise cogi ad factum*. Canon Law deals expressly with this question and it lays down that an action for damages can be maintained — *non datur actio ad petendam matrimonii celebrationem sed ad reparationem damnorum si qua debeatur*.

It is interesting to note that Italian law grants an action for the reimbursement of expenses made for the projected marriage. This may give way especially in doubtful cases to arbitrariness. The whole question will always boil down to what interpretation is to be given to the word "*spese*", an interpretation which is not to be so strict as to work out injustice on the innocent party neither so wide as to fall out of the limits prescribed in the law. It seems therefore that the gulf separating our law from Italian law is not so wide as it may be made out to be as generally all material damages can be conveniently grouped under the heading "*spese*", the only difference being as regards moral damages. This was made apparent in an Italian judgement delivered in 1879 which is reported by various writers. That judgement is universally criticised but in any case it is a sure index of the need to throw off the shackles imposed by the strict provisions of Italian law which are only intended as a homage to an unfounded tradition having no basis or justification in actual life.

As it has been stated both moral and material damages are specifically provided for in our Promises of Marriage Law. We shall first deal with moral damages. Salmond calls them exemplary damages to distinguish them from compensatory damages which are measured by actual material loss and which we know by the name of material damages. "Exemplary damages," Salmond says, "are a sum of money awarded in excess of any material loss and by way of *solatium* for any insult or other outrage to the plaintiff's feelings that is involved in the injury complained of." Elsewhere he says that "exemplary damages are not allowed in actions for breach of contract save in the exceptional case of breach of promise of marriage — *Addis* v. *Gramophone Co.*". So English case-law is quite similar to the express provi-

sions of our law. The amount of moral damages is always and necessarily at the discretion of the Court, which taking into consideration the social condition of the parties and all the attending circumstances of the case adapts them accordingly. This is contained in the Promises of Marriage Law and in various judgements delivered by our Courts such as *Gerada* v. *Chetcuti* (1894), *Camenzuli* v. *Farrugia* (1905). Consequently the amount varies with the degree of unjustness in breaking off the engagement. Thus in *Pace* v. *Mizzi* (1916) defendant signified his refusal to fulfil his promise on the very day on which the marriage had to take place demanding for the celebration of the marriage a sum of money which had not been agreed upon. The Court of First Instance assessed moral damages at £10 but in view of the particular circumstances mentioned the Court of Appeal doubled the amount. In a prior case the Court of Appeal reduced the damages granted to plaintiff because she had broken certain injunctions given to her by defendant, *Mifsud* v. *Saliba* (1913).

The defendant in a suit of breach of promise has to be very cautious in the defence he adduces to justify the violation of his promise especially when his pleas concern the person (3) or the integrity of the other party. In such cases if his pleas are not admitted by the Court far from throwing a good light on his cause they will have the inevitable effect of increasing the injury and hence also the moral damages. This often happens when the defendant accuses the plaintiff of irregular conduct. If sufficient evidence is forthcoming the plea will avail as a just cause for breaking the engagement, if not the plaintiff will have a right to an increase in the moral damages, *Attard* v. *Leopardi* (1898). In *Mifsud* v. *Bugeja* (1907) moral damages amounted to £70 as the plea of illicit relations was not conclusively proved.

Once a person has been condemned to pay a sum of money by way of moral damages the judgement loses its effect when he indemnifies the injury by a serious and firm intention to contract marriage within the time-limit approved by the Court. If the abandoned party promises to marry another person or actually contracts another marriage the defendant will be still held for moral damages, *Bartolo* v. *Mulictt noe* (1892). The defendant is however freed from indemnifying moral damages when the

(3) V. judgement delivered by the Court of First Instance in *Grixti* v. *Cassingena* considered by the C.A. in 1892.

plaintiff acquiesces in the withdrawal of the promise by the defendant. Such acquiescence may be construed from the circumstances of the case. Nevertheless the defendant's obligation as regards material damages and the restitution of the gifts remains, *Schembri* v. *Zammit* (1866), *Attard* v. *Leopardi* (1898).

Tha abandoned party has also a right to material damages, the assessment of which presents no special difficulty. The Court in this case has to examine questions of fact and evidence while moral damages are calculated in proportion to the injury suffered and to the social condition of the parties. Material damages usually include all those expenses which the innocent party made in contemplation of marriage and which are rendered useless by the non-fulfilment of the promise. Two conditions have therefore to concur in order that material damages may be claimed. First of all there must be the link of casuality between the projected marriage or the non fulfilment of the promise and the expenses made. Thus those expenses necessitated by social convenience may not be claimed. Secondly the abandoned party must not reap any advantage from the expenses made because then it would be highly unjust that such party should have the right to claim reimbursement deriving so to say a double profit. These material damages may include for example sums disbursed for the renting of a house and the purchase of furniture. Naturally if the plaintiff prefers to retain the furniture there may be no claim for the reimbursement of its price. On the same lines it was held in *Pace* v. *Mizzi* (1916) that if the plaintiff preferred to retain her trousseau the expenses undergone for making it should not be included under material damages (4). These material damages sometimes take the form of those expenses which are caused through defendant's fault and which may not therefore be considered as made in view of the projected marriage. This question arises when for example the abandoned party is left with illegitimate offspring. The damages will be considerably increased and will include lying in expenses and maintenance allowances for the child, *Galea noe* v. *Aquilina* (1865), *Cristodulo* v. *Cassar* (1913). Likewise whoever opposes the marriage of another person or seeks a mandate *de non nubendo* and such action is subsequenty recognised unjust, is held to reimburse the ex-

(4) See also *Montesini* v. *Vassallo* (1894).

penses which he thereby caused to the other party in virtue of the general principle that every person is liable for the damage which occurs through his fault, *Gauci* v. *Cachia* (1898), *Debono* v. *Ciantar* (1906). There is no end to the diversity of material damages which may be claimed and to examine even the more important cases which generally are only theoretical would take us out of our subject into an examination of the general principles of liability.

Another effect of breach of promise of marriage is the restitution of the gifts which the guilty party received from the party abandoned. This is governed by s. 1899 and s. 1905 of the Civil Code. The important thing to note here is that the gifts must have been made in contemplation of marriage and as such they are to be distingished from those which are ordinarily exchanged during betrothal, *Portelli et* v. *Grech et* (1910). A tacit resolutive condition is always implied in the former so that if marriage does not take place once the purpose for which they were made is not realised they are to be returned. S. 1905 (2) adds that the donee may retain the things given if the marriage does not take place by reason of the refusal of the donor without just cause to contract such marriage. This principle underlies the general effects resulting from a breach of promise of marriage. The resilent party must restore the gifts and make good moral and material damages only if his refusal to fulfil the promise was unjust, otherwise justice and logic require that he should not bear any consequences.

The subject of our next inquiry is to see when is a party justified in withrawing his promise. It is impossible to give an exhaustive list of various hypotheses, as what is a just cause for one person is not invariably so for all others. But we may mention a few cases of a general nature to show what is the tendency of our Courts. A grave and supervening change in the health of one of the parties will always avail the other to withdraw, for example if one party contracts some illness after betrothal which prevents him or her from fulfilling conjugal duties or from earning one's living, *F.G.* v. *G.G.* (1871), *Grixti* v. *Cassingena* (1892). The Court showed that such illness must not have been known before betrothal or at least it was then not of such gravity as it later turned out to be. It is to be noted that even the person who has contracted the disease may in some

cases justly withdraw. In *Margherita Magro* v. *Pullicino* (1926) plaintiff started showing signs of chronic arthritis as a result of which she could be subject to limping. The Court decided that the plaintiff had a just cause to withdraw her promise in view of the fact that she would not be fit for farm work and both her parents and defendant were peasants. Reprehensible conduct on the part of one party showing untrustworthiness or weakness of character will also generally avail the other to withdraw. In *Concetta Gasan* v. *Bonnici* (1910) defendant justly refused to keep his promise because he resented the constant intrusion of an undesirable person. A reticence regarding the age of the bride when it later results that she is much older than her future husband entitles the latter to break off. *Gaffiero* v. *Spiteri* (1880). Threats, jealousy and a fixed intention of imposing unreasonable prohibitions during married life are also just causes to withdraw from the promise, *Camilleri* v. *Zammit* (1905).

Sometimes it happens that the defendant pleads as his justification for withdrawing his promise an impediment at Canon Law. In 1871 the Court of Appeal stated that betrothal between persons who may not enter into a valid marriage is not null if they intend to obtain the necessary dispensations, *M.C.* v. *M.D.* Since then it has been constantly upheld by our Courts that any impediment to matrimony whether diriment or impedient renders betrothal null even if the condition "*si Sancta Sedes dispensaverit*" was imposed (5). This condition is always implicit especially when the impediment is known to both parties and its actual inclusion cannot have any ulterior effect. It is important to keep in mind that in such cases as betrothal is void the abandoned party has no action *ex sponsu* but only any other action according to Law.

The Promises of Marriage Law lays down two ways in which a person is generally guilty of breach of promise and is **therefore liable to an action for damages. The first way is a wilful and unlawful refusal to fulfil the promise which leaves no** doubt as to guilt and bad faith. The second is evinced from the **non-fulfilment of the promise within a reasonable time after re-**

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(5) V. *Buttigieg* v. *Abdilla* (1873); *Azzopardi* v. *Hiscock* (1879); *Bugeja* v. *Moore* (1890); *Bugeja* v. *Grixti* (1894); *Ginnis* v. *Decelis* (1897); *Camilleri* v. *Sammut* (1897).

quest made (of the reasonableness of which time, the Court shall be the competent judge). It might seem at first tight easy to determine when a refusal is wilful and unlawful but in certain cases a careful examination of all circumstances has to be made before arriving at any conclusion. It is an inquiry into motives and intentions which at times may look very laudable and unselfish but on a deeper analysis it is discovered that they are merely the result of rashness or precipitation. Thus in certain cases defendant pleaded that he had no means whereby to contract marriage but the Court did not allow such a plea. *Muscat* v. *Dingli* (1896). *Davison* v. *Pace* (1903). *Spagnol* v. *Ghirxi* (1908). The plea of insufficiency of means is a just cause not to contract betrothal at all and it is also perhaps morally a just cause to break off but it is not a just cause according to our Civil Law. Disparity of condition in life is not a just cause for non-fulfilment, nor are the threats by defendant's father that he would demand liberation from the duty to supply maintenance (s. 34, Civil Code), or that he would disinherit defendant (s. 660 (g) Civil Code), *Abela* v. *Scicluna* (1912). Again a party is not justified in withdrawing his promise for incompatibility of character when this could have been realised before betrothal, *Camenzuli* v. *Farrugia* (1905). Another example of an unjust refusal was *Vassallo* v. *Formosa* (1882). The husband has no right to compel his wife to live with others except in cases of extreme economy. Consequently the refusal on the part of the future wife to live with others after the marriage is no just cause for the husband to withdraw his promise. In this case a condition was imposed that she was to live with her mother-in-law who was in a state of imbecility. The Court laid down a general rule in *Bartoli* v. *Pace* (1894). It was stated that any condition which is not verified and in view of which the betrothal was contracted must be a real and serious condition to avail as a just cause for the withdrawal of the promise. If betrothal subsisted after that the non-fulfilment of the condition was known it cannot be annulled later on. This is what Demolombe has to say on the subject : "Ciò che può dirsi per regola generale si è, che la promessa di matrimonio è subordinata alla condizione che lo stato delle cose sia lo stesso fino al dì della celebrazione, e che non si scoprirà o sopraggiungerà un cangiamento tale, che uno dei fidanzati abbia diritto a dire che non avrebbe accettato questo nuovo stato di

cose se avesse potuto conoscerlo''. Coppola in the *Digesto Italiano*, quoting Bianchi, gives us the norm of the reasonable man, ''in sostanza basta che i giudici di merito possan convincersi che la desistenza dal matrimonio è il risutato di una seria riflessione, non della mera incostanza o del capriccio.''

As soon as there has been a wilful and unlawful breach of promise an action for damages can be maintained. Such an action according to the Promises of Marriage Law is not to be considered irregular because it is not preceded by a demand for fixing a time-limit. This condition is not established by the law and in any case it would have been a useless formality when it is shown that the defendant has definitely broken his promise. The judge may neither in such a case exonarte defendant from the payment of damages by granting him a time-limit within which to contract marriage, *Galea* v. *Aquilina* (1865) and later judgements. It may happen however that the defendant takes a passive attitude and merely lets time pass without signifying any definite intention. The question will then arise as to what steps the other party is to take. Can it ask the Court to fix a judicial time-limit after the expiration of which an action for damages will be maintained? Case law does not seem to be well settled on this point though the Promises of Marriage Law does not leave any doubt about the matter and *Vella* v. *Xuereb* (1901) ought to have authoritatively settled it. In this case the learned judge decided that according to the letter and the spirit of the Promises of Marriage Law the judicial authority cannot fix a time limit for the celebration of marriage. As we have already stated that law provides that the action therein contemplated must be preceded either by a definite refusal or by a failure to fufil the promise after request made. Such request however cannot assume the aspect of a demand for fixing a judicial time-limit. It is to be made by one party to the other and as the Court of Appeal very aptly stated in *Busuttil* v. *Pace* (1881) the law does not lay down any way in which the promisor can be constituted in delay. It only establishes that after the request however made, the promisor must have a reasonable time to carry out his promise and it merely leaves to the Court to judge whether such a time-limit was reasonable according to the circumstances. The words of the Proclamation ''of the reasonableness of which time the Court shall be the competent judge'' leave no doubt. A judicial time-

limit would compel, at least indirectly, the difendant to give effect to his promise and it would therefore go also against the spirit of the Proclamation which was meant to divest any court of the authority "to compel, adjudge, decree or order any person specifically to perform or complete any promise of marriage made to another." It is true on the other hand that when one party defers the execution of his promise from time to time the other party may have sufficient reason to adopt certain measures to induce him to fulfil it. But such an end would not be realised satisfactorily by fixing a judicial time limit and it can be achieved more easily by an amicable settlement. It is for this reason that the Proclamation has not laid down any specific form and it leaves to the interested party the choice in establishing the other party in delay. However once there is an action for damages if the Court thinks that there was not a sufficient time-limit between the demand and the action it may still, once the action is justified, lay down that damages are not to be due unless the guilty party does not contract marriage within a certain time. Such a provision is not tantamount to fixing a time for the celebration of the marriage. It is only the exercise the faculty which the Court has of deciding of the reasonableness of the time limit which lapsed until the action was instituted.

The spouses have all the right to agree that marriage is to take place after a certain time and so the question arises whether any action can be brought before such period lapses. This was the point at issue in *Zahra* v. *Grech* (1897). The Promises of Marriage Law lays down that betrothal is governed by the rules common to all contracts. S. 1115 (Civil Code) moreover specifies that what is only due at a certain time cannot be claimed before the expiration of such time. So it would seem that in the matter of promises of marriage no action can be instituted before the prescribed time-limit has elapsed. It is only then that it can be said conclusively that one of the parties has not been true to his word. In this particular case defendant denied any obligation on his part and his good faith was placed under suspicion Though the time-limit had not yet expired the Court authorized the plaintiff to establish the existence and validity of the contract and to demand damages unless marriage followed on the prescribed date.

We have already seen how Canon Law also contains specific provisions on promises of marriage and therefore a breach of promise may constitute a violation both of Civil Law and of Canon Law. Nevertheless the actions arising therefrom are separate and distinct. The one based on Canon Law falls under the exclusive jurisdiction of Ecclesiastical Courts and it is obligatory only morally for the fulfilment of marriage. The other action is a civil one under the exclusive jurisdiction of Lay Tribunals according to the Proc. of 1834, which establishes moral and material damages. The Law expressly lays down that Ecclesiastical Courts legally established in these Islands shall have power to enforce their judgements by censures, monitions, excommunications, or other spiritual means as the laws of the Church shall prescribe and which shall not be incompatible with the public peace and good order but are devoid of temporal compulsion (Proc. V, 1828, s. 6). It is a fundamental principle of Ecclesiastical Public Law and of the Proc. of 1828 that the jurisdiction of Ecclesiastical Courts regarding spiritual matters and of Lay Tribunals regarding temporal matters are totally independent, *Camilleri* v. *Baldacchino* (1898).

Another point regarding actions arising out of breach of promise which is not settled concerns the period of prescription. To reach any solution on the matter we have first of all to decide whether such actions arise from the non-fulfilment of a contractual obligation, *culpa contractualis*, or from a tort or quasi-tort, *culpa Aquiliana*. In the first case the period of prescription is of 5 years while in the second case it is of 2 years. According to Italian Law the action for the reimbursement of expenses is prescriptible after one year. The reason for this short period is, as Coppola says, the fear that the threat of judicial proceedings may constitute an indirect enforcement of the promise of marriage. In *Borg* v. *Fenech* (1894) the Court held that the action to which the abandoned party in a breach of promise is entitled is actually an action for damages and interests arising from *dolus* or at least from the *culpa* of the resilent party. It is substantially, as Laurent says, the effect of a quasi-delict and consequently the action is prescriptible after 2 years. The Court chose the other alternative in *Simiana* v. *Fenech* (1900) and in an earlier case, *Camilleri* v. *Frendo* (1889) the Court of Appeal stated also that the prescription is that of 5 years. That prescrip-

tion, it was held, which tends to extinguish the exercise of rights by the mere passage of time is not susceptible to extensive interpretation. The action contemplated in s. 2258 (Civil Code) which is prescriptible after 2 years arises out of tort and it corresponds to that which in Roman Law was derived directly or indirectly from the Lex Aquilia. It would be an extensive interpretation not justifiable by positive law or by rational principles to extend that article to every case of damages arising from violation or non-fulfilment of contract. Coppola says: "questi (danni), sebbene dipendenti da fatti connessi alla promessa, ma non elementi necessari per costituire la promessa stessa, sono sempre una conseguenza diretta e immediata dell'inadempimento della promessa; e questo indica che è un'azione di danni derivanti da colpa contrattuale non da colpa extra-contrattuale. La Corte stessa lo rileva quando dice che, se non vi fosse inadempimento della promessa non vi sarebbe ragione di ristoro di danni." Various foreign writers do not subscribe to this view but their opinions on the subject may not be conclusive in so far as our law is concerned because according to them promises of marriage are null and therefore an action for damages can only arise in virtue of a tort or quasi-tort (Laurent, Duvergier). Demolombe, however, does not seem to be of the opinion that promises of marriage are null and he nevertheless says that any action for damages and interests does not derive from the promise validly made but from an act which causes damage. In fact, he continues, it is not the promise of marriage, purely and simply, which has caused damage but the entire conduct of the resilent party and all the circumstances which put together do not constitute an error in contract but a quasi-delict. Likewise Pacifici-Mazzoni speaking on the analogous case of the reimbursemnt of expenses says that "quell'obbligo nasce dal fatto dell'ingiusto rifiuto di mantenere la promessa, che può considerarsi come un quasi-delitto". It would seem that this is the correct solution.

The question regarding the nature of the action is also important, as Prof. Del Giudice says, in relation to the burthen of proof. If we are dealing with *culpa in contrahendo* the resilent party must prove that there has been a just cause for non-fulfilment. If one the other hand it is a case of *culpa Aquiliana* the plaintiff must prove the unlawful act of the defendant consisting in a delict or quasi-delict.

The legal significance of promises of mariage is plainly apparent in view of the various problems, intricate at times, which they give rise to. Juists and legislators from Roman and Greek times to the present day have dealt with the subject providing new legal norms to keep it in step with the development and practical needs of society. Our positive law, as we have seen, does not deal with all the questions that may arise, but the line taken by our case-law compares favourably with the highest authorities on Continental Law.

PURPOSE OF PUNISHMENT

"To Englishmen the importance of arriving at definite principles on the purpose of punishment is peculiarly great: for our abolition of minimum punishments has given our Judges a range of discretion, and, therefore, of responsibility not usually entrusted to Continental tribunals."

KENNY.

SUSPENSION OF DEATH PENALTY

"I believe that hanging cuts down murders. Because of them I am opposed to abolish capital punishment..... If contrary to my fears, the experiment turns out to be a success no one will be more ready to admit his error than I. But I cannot feel at present, when we have this distressing wave of crime with more gangsters going about with arms than before, it is a wise moment to try the experiment."

LORD JOWITT.