C.A. 337/62

GUNTER-GIDEON RIEZENFELD

v.

ROSA JACOBSON AND OTHERS

In the Supreme Court sitting as a Court of Civil Appeal
[May 15, 1963]
Before Olshan P., Silberg J., Berinson J., Witkon J and Cohn J.

Contract - Conditional promise of marriage - Breach of promise - Agreement immoral and contrary to public policy

The appellant, a married man, and the respondent formed a liaison with the intention that they would marry on the appellant obtaining a divorce from his wife. Soon after he acquired an apartment out of his own money and had it registered in the respondent's name. It was understood, however, that the apartment did not belong to the respondent, its registration in her name being a token of their mutual affection, and that if they did not marry, the apartment would be transferred back into the name of the appellant. Subsequently they fell out and the respondent barred him access to the apartment. The appellant sued for a declaration that the apartment was his and an order for possession. The respondent defended by pleading that his claim was based on agreement which was immoral and contrary to public policy. Her defence succeeded in the District Court: hence this appeal.

Held (Olshan P. and Silberg J. dissenting),

(1) Whilst the law in England regarding breach of promise by an already married person is based on the sacramental nature of marriage - although modified in recent times - in the Jewish law of marriage and divorce the position is different, marriage being not a status but a contractual tie, even of a most solemn kind, which may always be dissolved by agreement. Consequently (*per* Cohn J.) an agreement with another woman, during the subsistence of an existing marriage, does not offend against public order or morality. Alternatively (*per* Witkon J.) where the existing marriage has virtually collapsed, a promise to marry another will not have the dire effects which are implied by an appeal to public policy and morality.

(2) The agreement as to future marriage must be distinguished from the agreement over the apartment. Whatever may be said about the first. there is in respect of the latter - which in many

respects was in the given circumstances extraneous to the promise of marriage - the conflicting but equally important principle of the sanctity of contracts. In any event, no justand desirable result can be reached unless that agreement is given the benefit of the doubt.

Per Silberg J.

In the moral conception of Jews everywhere extra-marital sexual relations are improper and vile because they undermine the purity of family life. The agreement over the apartment was here inseparably bound up with the promise of marriage and was therefore immoral.

Israel cases referred co:

1. *C.A.* 136/56 - *Slavko Fouks v Elon & Erzioni* Ltd. (1957) 11 P. 358.
2. C.A. 127/62 - *"Yahad" Workers and Meat Transporters Cooperative of Haifa.* Ltd. *v Zvi Shimansky* (1962) 16 P.D. 2341.
3. C.A. 110/53 - *Harry Jacobs v Yaakov Karroz* (1955) 9 P.D. 1401.
4. C.A. 191/51 - *Leib Skornik v. Miriam Skornik* (1954) 8 *P.D. Selected Judgments, Vol. II,* 327.

English cases referred co:

5. *Spiers v Hunt* (1908) 1 K.B. 720.
6. *Wilson v Carnley* (1908) 1 K.B. 729.
7. *Skipp v Kelly* (1926) 42 T.L.R. 258.
8. *Fender v. Mildmay* (1937) 3 *All.E.R.* 402: (1938) A.C. 1.
9. *Jones v Randall* (1774) 98 E.R. 954.
10. *Pearce v Brooks* (1886) 14 L.T. 288.
11 *Upfill v.* Wright (1911) 1 *K*.B. 506.
12. *Shaw v* D.P.P. (1961) 2 *All E.R.* 446.
13. *Holman v Johnson* (1775) 98 E.R. 1120.

American cases referred co:

14. *Smythe v Evans* 70 N.E. 906.
15. *McManus v. Fulton 67 ALR* 690 (1929).

Dr. S. Wolf for the appellant.

M. *Ben-Dror for* the respondents.

COHN J. This appeal is well-founded. The first respondent is the registered proprietor of a one room apartment on the fourth floor of a house at 4 Yodfat Street, Tel Aviv (Plot 41, Block 6954) and the holder of 410 ordinary shares in Havazelet Yodfat Limited in the name of which company the house is registered. The appellant asks for a declaration that the apartment and shares are his, an order that the apartment and shares be registered in his name, an order that the respondent yield up possession of the apartment and an order that certain chattels which the respondent received from him be returned or payment therefor made. The District Court dismissed the appellant's action. Hence this appeal.

The necessary facts are very simple indeed and actually not in dispute between the parties. The apartment was acquired out of the appellant's funds and was intended to be the residence of both the appellant and respondent. From the time of its registration in June 1958 in the respondent's name until August 1958 the parties lived there as man and wife, although the appellant was then married to another woman and resided in his former home. In August 1958. (as the learned judge says in his judgment) the respondent changed "the lock of the apartment and locked its doors to the appellant." On the evidence before him, in particular that of the parties themselves, the learned judge found that they intended to get married after the appellant had succeeded in divorcing his wife; and further that the respondent "did not think of the apartment as her separately acquired property but regarded its registration in her name as an expression of the appellant's trust and affection, and even said that she would retransfer it if the marriage did not take place. She said that both before the registration, when it did not occur to her that her bond with the appellant might be broken, and afterwards, when it was already more or less clear to the parties that they were not going to marry."

In these circumstances the respondent pleads - and this is the only plea which the learned judge found proper to consider - that the appellant's action must fail, since it is based on an agreement which offends against public morality and public policy, as stated in section 64(1)of the Ottoman Civil Procedure Law. The offence against public morality and

public policy consists, it seems, of joining by immediate intercourse and future marriage with another woman whilst marriage with one's lawful wife is still valid and in effect. This plea found favour with the learned judge but he was vague about it and did not explain in his judgment the considerations which led him to his conclusion (apart from a lengthy quotation from a book by one Lloyd regarding the considerations to be taken into account in such a case as the present). Since he found the parties' agreement to be illegal, he refused "to entertain a claim arising out of its breach".

At first I asked myself whether the appellant's action arose only out of a breach of the respondent's agreement to marry him or also out of a breach of an agreement under which she consented to live with him as man and wife even before marriage. Assuming for the moment that such two agreements are illegal and not enforceable by the courts either specifically or by way of damages, is the appellant actually claiming performance or damages for their breach? Not in the least. I suspect that not a little of the confusion which has occurred in this case is due to the way of the respondent's Defence was framed - repeatedly it refers to "the agreement referred to in paragraph 2 of the Statement of Claim"- and from the negligent manner in which the Statement of Claim is formulated. Paragraph 2 of the latter states that the appellant acquired the apartment in question "in the expectation of marriage" with the respondent and on "the express condition, in agreement with the (respondent), that if for any reason the marriage between the parties should not take place, the registration would be cancelled". In so far as there is any plea of an agreement here, it is not an agreement to marry or to live together without marriage but only one for the return of the apartment in the particular event of the marriage between the parties not taking place. And if the parties' agreement that they should enter into marriage after the appellant divorced his wife is illegal and unenforceable, then law and morality have been fully satisfied by the respondent not performing the agreement. But in her rightly omitting to do so, the condition stipulating the return of the apartment to the appellant has been met. Why should the court then not compel her to do that?

Be that as it may, even assuming that what is involved is a claim arising out of "an agreement between a man and a woman to live together unmarried and a mutual promise to get married whilst one of them is married (to another) and the court has not decreed any

divorce", in the words of the learned judge, in my view, such an agreement does not in Israeli law offend against public morality or public policy and it bears no taint of illegality.

Before, however, dealing with Israeli law, I must pause to consider English law on which the parties in this case relied. The English courts have held that a claim in damages for breach of promise to marry after the promissor's wife has died will not be heard *(Spiers v. Hunt* (5) and *Wilson v Carnley* (6)). They have also refused to award a woman damages for breach of promise**,** when given whilst she was married to another man *(Skipp v Kelly* (7)). In so far as public policy obliges observance of the principle that spouses should abide by their obligations to one another, as English marriage law lays down, all are agreed that such a policy is not consonant with the implementation of any agreement that may undermine marriage. But in as far as public policy is invoked to avoid an agreement because of extraneous fears lying outside marriage law itself, the prevailing rule today in England as well is that no public policy requires nullification of the agreement. This is what Lord Atkin said in *Fender v Mildmay* (8) (at pp. 409-10) in speaking of the reasons why the courts refuse to award compensation to women who are promised marriage after the death of a living lawful wife

> "The judges appear to have thought that a promise made in such circumstances tended to cause immoral relations. They may be right. Speaking for myself, I really do not know whether that result would follow as a rule. I can only say that, if the lady yields to a promise with such an indefinite date, she is probably of a yielding disposition, and it would appear difficult to predicate that immorality is either facilitated or accelerated by the promise. As to the suggestion that such a promise is bad, because it tends to induce the husband to murder his wife, I reject this ground altogether. Alderson B. ... classes such objections as ridiculous. They appear to afford another instance of the horrid suspicions to which high-minded men are sometimes prone."

In that case the House of Lords was dealing with a promise of marriage after the defendant-husband had already obtained a decree *nisi* of divorce from his first wife. The majority held that in these circumstances the promise of marriage was of effect and awarded

damages for its breach. The reason was that at that point in the marital relationship prevailing English marriage law no longer required the married couple to live together, and since the test for applying the rule of public policy was maintaining observance of that law, there was no occasion to apply it when the spouses themselves were under no duty in that respect. As Lord Atkin put it (ibid. at pp. 410-11):

> "In these circumstances, what possible effect can a promise to marry a third person have by way of interference with matrimonial obligations? There is no single duty which is being observed by either to the other, and it appears to me merely fanciful to suggest that the public interests are in any respect being impaired. If a respectable man, whose wife has fled with the lodger, leaving the children in his charge, engages himself to another respectable person, to marry her as soon as he is free, no public interests suffer. In my opinion, they benefit. Similarly in the converse case of a wife whose husband is living with another woman, of whose child he is the father. Does either of these persons still owe any kind of duty to love or cherish the other spouse ... or any duty which ... will be impaired by a promise to marry a third person when free? From the point of view of law, it ought to be remembered ... that, by legislation, it has been established that it is not contrary to public policy that married persons should obtain a divorce, and not contrary to public policy that, immediately after final divorce, either of them should marry ... I must confess it appears lamentable that the law should set its ban upon promises made to do a lawful act by persons who, in the interval between the promise and the fulfilment, do nothing, and are not induced by the promise to do anything, contrary to public policy. I dismiss with indignation the idea that public policy is to be involved, on the ground that such promises tend to immorality."

The minority view was that for centuries a promise of marriage made during the subsistence of a previous marriage has been deemed to be contrary to morality as well as to all the hallowed ideas of religion in England and there was no occasion even today to depart from this important rule. As long as a marriage subsists, in theory as in practice, a promise

to marry another woman will not be enforced by the courts. Lord Russell of Killowen said in the above case (at p. 417)

> "(W)hen England was a Catholic country, matrimony was a sacrament, conferred upon themselves by the spouses. This sacramental nature of marriage, the holy state of matrimony, was the basis of the civil law of Europe with regard to it. When, in the reign of Elizabeth, England abandoned the old faith and became a Protestant country, matrimony ceased ... to be ranked among the sacraments ... The status of marriage became the product or result of a contract between the parties. But the obligations resulting from the status, the importance to a civilized community of its maintenance, remained almost unimpaired. Until the first Divorce Act, in 1857, the marriage tie was indissoluble except by legislation... The question now arises whether, as a result of that Act, and subsequent divorce legislation, there has come about such an alteration in the public view of the status of marriage, its obligations, and the importance of its maintenance, that, without any offence to public policy or public opinion, a spouse may validly contract to marry another ..."

And (at p. 422)

> "As I see in this case, there is here no question of inventing a new rule of public policy. It is only an illustration of an old rule applied to new facts ... The institution of marriage has long been on a slippery slope. What was once a holy state, enduring for the joint lives of the spouses, is steadily assuming the characteristics of a contract of a tenancy at will. For myself, I am glad that the opinion which I have formed of the law which is applicable to this case is consistent with the view that the obligations of married people do not cease, in the eyes of the law, until, in the eyes of the same law, they cease to be married...."

I have quoted at length in order to show, not only how far leading English lawyers (like Lord Atkin) also labour over the understanding and reality of a public policy of age-old tradition, but principally that this public policy derives from features peculiar to English marriage law and that the odour of Catholic sacrament pervades it. For ourselves, it has already been decided that, in respect of public morality public order mentioned in section 64 aforesaid resort to the English criteria of public policy not required ("*Yahad*" v *Shimansky* (2)). If that is generally so, even in matters in which there are no basic differences of approach between us and the English, it is all the more so in matters concerning the marriage of Jews contracted under Jewish religious law, the nature and features of which are to be found in the confines of Jewish tradition.

Indeed, it seems to me that we do not have to look beyond the applicable substantive law for the public morality in matters of the marriage of Jews. If from the viewpoint of such substantive law no defect or flaw mars an agreement or promise of marriage after an existing marriage is dissolved, then the inevitable conclusion is that such agreement or promise also does not impair public morality and public order.

The Mishnah (*Kiddushin* III, 5) expressly states

> "If (a man) says to a woman 'Behold, be thou betrothed to me after I become a proselyte' or 'after thou becomest a proselyte'...or 'after thy husband dies' or 'after thy sister (i.e. his existing wife) dies'...she is not betrothed. Similarly, if (a man) says to his neighbour' If thy wife bears a female, let her be betrothed to me', she is not betrothed. If (however) his neighbour's wife was pregnant. the child being discernible. his words are valid. and if she bears a female. she is betrothed."

The reason why in the instances given the betrothal is not valid is, in the words of Rashi (*Kidd*. 62a). because "things which have not yet come into existence are involved and it does not lie in his power to betroth the woman." The Gemora gives a further reason, that of public policy. not to create "evil feeling" in the mind of the husband or sister. as the case may be (*Ibid* 63a). But nowhere is it mentioned or suggested that betrothal of woman when her husband dies or divorces her is morally bad either in law or in religion. Some of the

Tannaim have held that in all the instances set out in the *Mishnah,* whilst the man cannot effectively betroth the woman at that instance, she is so betrothed the moment the given condition is satisfied (see the views of R. Meir and R. Judah Ha-Nasi, *Ibid*. 63a). It is in fact a leading rule of law that a conditional betrothal will come into effect upon the condition being fulfilled, whether it was the man or the woman who stipulated the condition (Manimonides, *Hilkhot Ishut* IV, 1). It is not our concern to elaborate on the law relating to conditions. It is enough to observe that substantively every condition is effective. Even the stipulation of what is physically impossible or contrary to biblical prescription, although initially void, will not disqualify the betrothal. A stipulation that betrothal should not take effect until a certain event occurs - that the father consents or another woman agrees, for instance - is lawful and valid and the betrothal will become effective on fulfilment of the conditions (*ibid*, VII,1) since the condition is not contrary to any prescript of the Torah nor impossible to perform (cf. *ibid*, VI, 12).

It follows that

> "So long as it is not a matter of religious prohibition but depending on another's mind, since the latter may be persuaded by being offered money, the condition is effective." *(Bet Yosef to Tur Even Ha-Ezer,* 38].

Moreover, in contemplation of Jewish law the divorce is not affected, witness the many divorces arising from doubt. In addition also a temporary betrothal may *ab initio* be entered into even if only for a matter of days *(Yevamot* 37b: *Even Ha Ezer 2 :* 10) although the rabbis did not welcome marriage with an intention to divorce, not made known to the woman. Originally, divorce lay entirely within the husband's power (*Gittin* 90a) but since the ban of Rabbenu Gershon the woman's consent is essential. Far from such consent being not forbidden or invalid, it is altogether desirable.

Unlike English Common Law, Jewish law does not confer on spouses the "status" of marriage which, once entry thereinto has been decided upon and solemnized, cannot be abandoned except by legislation or divine decree. Marriage in Jewish law is a contractual tie, although of a most solemn kind, between a man and a woman which, if they so wish, they can enter into and, if they so wish. may dissolve and terminate. Where a consenting couple so desire, the only task of the courts is to supervise and carry into effect the entry

into marriage or its dissolution. In this very difference of Jewish law from Christian marriage law lies its greatness and, if you will, its modernity, not the rigidity of status but freedom of contract, not the incontestable determination of status but the right of spouses to choose in their discretion between marriage and divorce.

Consequently an agreement to marry cannot be injurious to public morality or public order merely because its implementation is made conditional upon obtaining the consent of the spouse of one of the parties to be divorced. Again in the words of Lord Atkin (at p. 413),

> "I do not myself understand a doctrine of public policy which is founded merely on a statement that one contract is inconsistent with, or incompatible with, another. I venture to say that the doctrine is meaningless, unless the impugned contract leads, or is likely to lead, to injurious action, and I have pointed out that this cannot be predicated of these contracts, in the circumstances in which they are made. The whole notion of any danger to public interests seems to me fanciful and unreal. For these reasons, I think that public policy demands that these contracts should be enforced..."

I fully agree.

Accordingly the learned judge erred in refusing to hear the appellant's action.

The learned judge said, and not incidentally, that he had no power to order the respondent to yield up possession of the apartment. It is not so: since the action was in respect of ownership and not of use or possession alone, it does not come under section 28(3) of the Courts Law, 1957.*

Regarding the claim for the chattels, the learned judge notes that many of these have in the meantime been returned to the appellant but he comes to no decision about the remaining goods which have not yet been returned (except for the watch, the claim for which was dismissed).

* This section deals with the jurisdiction of the Magistrate's Court: Ed

There is no appeal before us against the dismissal of the action for return of the sums paid to the respondent for keeping house.

I would grant the appeal.

SILBERG J. With great respect, I disagree with the judgment of my learned colleague, Cohn J. In my opinion, the appeal should be dismissed, although without costs, because of the large part also played by the first respondent in this immoral agreement.

2. What happened is that the appellant, husband and father, became tired of his lawful wife and wished to divorce her. Over a long time the wife, rightly or not, refused her consent to a divorce, and he cast his eyes on another woman, a divorcee with a child, the first respondent.

Relations between the appellant and respondent grew stronger and closer, they began to have sexual relations, and ultimately at the end of summer 1957 the appellant bought an apartment in Tel Aviv to live undisturbed with his mistress until the "redeeming" divorce eventuated and they could marry lawfully. Sexual relations were had during the day and not at night, since to have, so to speak, the best of both worlds, the appellant continued to reside in the apartment jointly owned by himself and his lawful wife in Holon. Every evening he slept there without being intimate with his wife in case that would harm the divorce suit he had presented to the Tel Aviv Rabbinical Court in August 1957. For the same reason, as we shall see, he also kept from his wife the fact that he had bought an apartment in Tel Aviv.

The parties differ as to precisely when they began to have sexual relations but both admit that they had such relations: the respondent even became pregnant by the appellant and had an abortion paid for by him.

3. In August 1958, about two months after the appellant had registered the apartment in the name of the respondent, the latter began to become estranged from the appellant, after having decided that she could no longer expect her lover's divorce. She proceeded to act with great effect by simply changing the lock of the apartment and barring him access to it. I

will not go into the details of the cooling of their relationship but merely note a curious fact which the learned judge found to be the last straw that broke the camel's back:

> "He put in" she said in evidence, "a very large table which almost fills the room. The table was for a miniature railway. That's his hobby. We had first agreed that after the wedding he would put such a table on to the balcony but not in my room. It hurt that he did not ask me" and so on. The witness Klinger said "I remember that the incident which led to the break in the parties' relationship was in connectionwith the plaintiff's hobby, a miniature railway."

To complete the picture, let me add that the appellant divorced his wife at the end of 1960 and married another woman in 1961. The respondent herself married the second respondent in 1959 and took him into the apartment bought by the appellant. She divorced the second respondent after the action was commenced and for that reason the latter has no longer any standing or interest in the subject matter of the appeal before us.

4. A few weeks after the relationship between them was broken off, the appellant commenced an action against the respondent in the Tel Aviv-Yaffo District Court. His main claim was for a declaration that ownership of the apartment was his. He argued that the registration of the apartment was made on the express condition that if for any reason she did not marry him, she would vacate the apartment and transfer it back to him. The respondent's defence was *inter alia* that the agreement on which the appellant relied was unlawful and could not serve as a cause of civil action. The learned judge regarded this as the only plea he needed to consider and he accepted it and dismissed the claim. The appellant is appealing against the judgment.

5. Two questions present themselves to us in this appeal, (a) was the parties' agreement, when the apartment was registered in the respondent's name, lawful or unlawful: (b) if it was unlawful how does that unlawfulness affect the appellant's claim.

I shall begin by saying - what is known to all - that the terms "illegal" or "immoral" are identical twins, which have been used simultaneously and dealt with together in English case

law for close on 200 years. Every immoral contract is illegal in every sense and aspect of that notion - *Jones v Randall* (9). *Pearce v Brooks* (10). *Upfill v Wright* (11). *Shaw v D.P.P.* (12). We can therefore abandon the term "illegal" altogether and examine the case before us from the standpoint of its morality or lack of morality.

6. In my opinion the agreement between the appellant and respondent over the registration of the apartment was absolutely immoral. And it was so, whether the consideration for the apartment was the sexual relations between parties for months before registration or the intended lawful marriage upon the appellant divorcing his first wife, and all the more so if both served as the consideration.

7. As to the first alternative, there is not one iota of doubt in my mind that in the moral conception of Jews in Israel and abroad extra-marital sexual relations are improper and vile, whether with a prostitute or with a concubine even of the highest rank. Purity of family life has always occupied a prominent place among Jews, and relations with a prostitute or a concubine do not safeguard the family. Observe how Jews normally behave. Does concubinage figure in the life of the Jewish people in the cities of Israel or elsewhere? How many such pairings can we find? It is true that family morals have somewhat declined in modern times and pairings of this kind are not frowned upon quite as they were in past generations but no one can say that the stigma attaching to extra-marital relations has been completely removed. Even those who indulge in such relations cannot rid themselves of the uncomfortable pangs of conscience and the feelings of aversion which frequently visit them.

I do not believe that the progress of mankind lies along the route of freedom from the restraints of the marital bond. Only when children grow on trees will such salvation take place. As long as the child needs its mother's breast and the mother a companion to help her in the difficult task of rearing offspring, the family will not cease and pass from the world. Human society cannot exist without vigil once over its primary cell, the family. Concubinage and "free love" - free to cease - cannot take the place of lawful marriage for they are evanescent, they are overtaken by "a miniature railway" and replaced by a change of locks, as we have well seen in the present case.

8. The fact that the Israeli legislature recognizes the existence of "the reputed spouse" does not attest to the moral rehabilitation of concubinage. The safeguards which a number of laws provide for such a spouse are financial and nothing more, compensation for the material sacrifice made to the other during the subsistence of their relationship. I venture to assert, although I have no evidence, that the legislature mainly had in mind the female "reputed spouse", who is usually the victim of the male instigator. "It is the way of a man to go in search of a woman but it is not the way of a woman to go in search of a man "(*Kidd*. 2B). Only for fear of being suspected of sexual discrimination did the legislature extend the safeguard to the male "reputed spouse"; to this day we have not heard of a claim made in court by such a male.

9. As for the second alternative, a promise of future marriage was in fact the consideration here for the registration of the apartment. I think that an agreement of this kind, when one party is still married to another spouse, is also immoral. I am close to saying that in certain respects it undermines the foundations of family life even more. A little "arithmetic" helps to demonstrate the point. If Reuven the husband of Leah is permitted to engage himself to marry Rachel after divorcing Leah, then by the same token, logically and equitably, he may, whilst still married to Leah, engage to marry Bilhah after divorcing Rachel and to marry Zilpah after he divorces Bilhah. In other words, he may arrange for a kind of "alternate harem" of a number of women as absolute "re-insurance" against some breakdown in his sexual life. And precisely the same thing may be done also by a married woman, for why should she be worse off? Such agreements, even if restricted to one alternative spouse, clearly take from marriage its monogamous character and return it to the age of polygamy which has been forbidden to Jews for over nine centuries or to the age of polyandry which is regarded immoral by all peoples other than primitive tribes in Tibet, the Himalayas or Sumatra.

Conditional engagement with another woman cannot but widen the yawning rift between a man and his lawful wife, as the present case demonstrates. The appellant ceased to have relations with his wife in January 1975. He made the acquaintance of the respondent in May-June of that year and soon afterwards in August, took divorce proceedings. His dual residence in Tel Aviv and Holon, his concealment of his mistress's apartment, was that not

done to forestall the financial claims of his wife? Can such conduct be termed "moral"? I can hardly imagine how such a triangular marriage is other than tainted.

Whilst under Israeli law marriage is not a sacrament. it nevertheless has no place for libertine and licentious behaviour or for "marital" liaisons behind the back or against the wishes of an existing spouse. That is what I suggested above when I said that a married man's conditional engagement with another woman is from one aspect far less moral than the cohabitation of unmarried people.

I have therefore reached the conclusion that the agreement between the appellant and the respondent is immoral in every respect and therefore unlawful.

10. I now approach the second question, the effect which the immoral agreement has upon the claim for retransfer of the apartment.

The basic rule *a propos* unlawful contracts is *ex turpi causa non oritur actio* and the complementary in *pari delicto melior est conditio defendentis.* The result is that when both parties are equally "at fault", the plaintiff cannot rely either on an illegal contract in order to enforce it or on its illegality in order to avoid it. *Ipso facto* the defendant must succeed, even though, as Lord Mansfield said in *Holman v Johnson* (13) (at p. 120):

> "The objection that a contract is immoral or illegal...sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff by accident, if I may so say. The principle of public policy is thus: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* of the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So

> if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *fortior est conditio defendentis."*

Similar observations have been voiced by American judges. Where a person seeks the enforcement of a contract which is contrary to the public benefit or one prohibited by public law, the court will refuse its assistance to either party but leave things as they are; in refusing assistance The court does not act in favour of one of the parties or in order to preserve the rights claimed by him but out of its respect and regard for public welfare and the laws of the country: *Smythe v Evans* (14) cited in *McManus v Fulton* (15) at p. 698 and Salimond Williams, *The Law of Contracts (2nd ed.)* pp. 345-46, illustrates the rule as follows:

> "If, for example, in an illegal contract for the sale of goods the seller were to deliver the goods and sue for the price, the buyer would be entitled to plead that the contract was illegal and void. So if the buyer had paid the price in advance and the seller refused to deliver the goods, the seller would be similarly entitled to the same plea. But if the seller, not being able to get the price, were to sue the buyer for return of the goods, the buyer could plead that they were delivered to him under a contract of sale; and the only reply of the plaintiff would be that the contract could not be relied on by the buyer because it was illegal and therefore void. But this reply is excluded by the rule in question. The plaintiff will not be permitted to establish his claim by any such replication, for it amounts to a reliance on the illegality of a transaction to which he is a party."

11. The conclusion that emerges from the foregoing is that in the present instance the plaintiff cannot succeed in his claim, since in order to do so he must necessarily rely on the conditions he stipulated on making the agreement and that agreement was in every possible respect invalid, as I have explained. I also feel that "it sounds ill", as Lord Mansfield pointed out, that one party at fault (the male plaintiff) should suffer loss, whilst the other party at

fault (the female defendant) should reap gain. I am aware of the criticism levelled against the above rule by scholars, among them J.K. Grodecki, "*In pari delicto*" (1958) 71 L.Q.R. 265 ff., but what is to be done? English case law has not changed its position on illegal contracts. Elsewhere (in *Jacobs v Kartoz* (3)) I referred to the opposite position taken by Jewish law on "sinful" contracts and I pointed out the interesting distinctions which Jewish law draws. In my opinion, it would be right for the Israeli legislature to adopt in this area the recognized principles of Jewish law. So long, however, as it does not, and we continue along the path hewn by English Common Law, we have no choice - notwithstanding its bitter aftertaste and its ill-sounding effect
- but to follow English case law as set out above.

12. Accordingly, in my opinion, the appeal should be dismissed. I would not impose costs on the appellant because of the respondent's complicity in the immoral agreement.

WITKON J. I have had the opportunity of reading the judgments of my honourable brethren, Silberg J. and Cohn J., and I join in the conclusions of Cohn J., although I am not at one with him in all his reasons.

The learned judge who heard the case in the District Court, saw two grounds for holding that the parties' agreement was immoral and void. First, it was, in his opinion, an agreement to have extra-marital sexual relations. Secondly, the agreement involved a promise of marriage whilst one of the parties was married to another. Silberg J. relied on these two reasons for the invalidity of the agreement.

In my respectful opinion, the first ground is irrelevant. It is true that the apartment in question served the parties for having intercourse; they lived there as husband and wife for several months. But the apartment - or more precisely the shares representing its ownership - were not registered in the respondent's name for that purpose. Registration was effected out of the parties' wish to make for themselves a common home on their lawful marriage after dissolution of the appellant's existing marriage. There is no reason to assume that the appellant agreed to register the apartment in the name of his lover for the purpose of intercourse alone. For that purpose he might have allowed her to live there as a licensee at will instead of as owner. It follows that in order to succeed in his claim to ownership of the

apartment, the appellant has no need to rely on any agreement to have extra-marital relations. This detail- like many other "piquant" details concerning the couple's life in the apartment - is immaterial to the claim itself, and we may or, as it appears to me must, ignore it.

There remains the second and important ground for invalidating the agreement. It raises a serious social problem which has exercised many people in other countries as well. But before I deal with it, I wish to dissociate myself from the view of Cohn J. that even if the agreement is found to be immoral and contrary to public policy, that is not enough to defeat the appellant's claim. In Cohn J.'s opinion, this claim does not depend on the fulfilment of the immoral promise of marriage but on its revocation; when the respondent refused to marry the appellant the sting was removed from any agreement between them and the latter had to retransfer the property she groundlessly occupied. It seems to me, with all respect, that the parties' agreement to enter into marriage is the basis for the cause of action, without which it does not arise. Just as the court would not entertain the woman's claim for damages for breach of promise (if invalid as such), so the man will not be heard to plead that the woman's breach of the agreement to marry has removed all foundation for the registration of the apartment in her name.

Accordingly, the question is whether the agreement on which registration of the property in the respondent's name was based is an immoral agreement and contrary to public policy because at the time it was made one of the parties was married to another. This question Silberg J. answered affirmatively and Cohn J. negatively, and both in their abundant learning brought support from Jewish law. I take no part in this debate on the *Halakhah,* not only because I hesitate to intervene between such outstanding scholars but because I cannot believe that public opinion is reflected in the law and rules relating to conditional betrothal, *Halitzah* and conversion. The vast majority of our people does not find in such rules any inspiration regarding the problem confronting us here. If the ordinary reasonable person were asked or the views of the progressive public consulted as to the "morality" of the given agreement*, we* would receive, not surprisingly, a number of differing and contradictory answers, as various as those that would be forthcoming on this delicate subject among other people and in other countries. These answers and opinions would reflect the outlook of the person questioned, his education, his temperament and character,

his entire spiritual and intellectual make-up. The notion of betrothal and conditional betrothal is unlike the notion of a promise of marriage that occupies us here. A man who promises to marry a woman, in the modern understanding, does not betroth her, and the effect of the promise or of its breach is unlike that of betrothal. Hence, whatever the source inspiring a modern Israeli in his view on the instant question, the rule cited by Cohn J. will not, in my opinion, provide the answer.

Furthermore, when the question - which is in truth more sociological than legal - is put to us, we as judges are enjoined to give expression and effect not to our private views but to what appears to us to reflect public opinion, and that means the opinion of the progressive and enlightened section of the public of our time and place. That public may possibly have its own outlook, not identical with that of other peoples, and it need not be said that in such event we would only be guided by the viewpoint of our public. But it seems to me that our public wishes to regard itself as part of the family of enlightened nations and share with them those values which mould the thinking of the entire civilized world. I think therefore that only rarely will any gap be revealed between our people's outlook on such values and the outlook common in other communities in the world. I have already said about the institution of marriage (in *Skornik v Skornik* (4) at p. 180) that it is of a universal character and that betrothal under Jewish law is not exceptional. I would hesitate to find among the ideas common among us something specific which does not accord with those universal notions.

That is shown by the differences between my learned brethren. Both treat of the significance of the marriage institution as it appears to them in the light of the rules of Jewish law and both arrive at contrary conclusions. My learned brother, Cohn J., finds in the lenient approach of Jewish law an indication that marriage is not to be regarded as a sacrament but as a contract like any other which can be revoked at the wish of the parties without particular difficulty. It seems to me, with all respect, that this is not the entire picture and that one must not overlook (among other things) all the stringencies of Jewish law regarding dissolution of the marriage tie when one side - mainly the man - does not consent to the delivery of a bill of divorce. Moreover, although it is true that Jewish law does not make it difficult for spouses to part, when the marriage has broken down and they agree to be divorced, I would not infer from this that Jewish law manifests an approach to

the marriage institution different from that common in other countries. On the one hand, in most countries, including those where the population is largely of the Catholic religion which denies divorce, civil divorce is recognized and the courts do not obstruct but assist in loosening the ties of marriage when the spouses are united in their desire to separate, and a solution is found to the problem presented by children. On the other hand, even among those people who do not lay stress on the "sanctity" of marriage the institution is not treated lightly; and it is also regarded among them as a condition of high significance, created by formal ceremony with attending moral (if not religious) rights and obligations that penetrate every corner of life. If that is to be called "a contract" - and even the English employ this term innumerable times in connection with the marriage covenant - it is a contract *sui generis.* Nonetheless I do not think that a comparison of our marriage laws with those current in England (or in other countries where monogamy prevails and divorce is available) will bring us closer to a solution of our problem. The same basic premise obtains, that in moral and social contemplation marriage is an institution with roots deeply implanted in man's consciousness, the lynch pin of human society.

But the trouble is that this positive approach to the marriage institution, which we share without difference of principle with other civilized people, does not suffice to give an unambiguous answer to our question, as is clear from the varying views that have emerged among us, a situation in which English judges have also found themselves when considering the perplexities of the matter, to which I shall soon turn. The question, it will be recalled, is whether it is immoral for a married person to make an agreement with another, with the intention of marriage to that person, after dissolution of his existing marriage. The question of "morality" is not a question of "pure" law. The judge who must decide finds himself in a difficult position. As I have already said, the task of the judge is to represent progressive public opinion but he does not possess the tools to ascertain it for certain. In truth it must be said that there may indeed be differences of opinion on the question, and it is not impossible that one or the other approach is necessarily more or less "moral". It seems to me that the source of the bewilderment lies in two matters. The first is that it is difficult to affirm or disaffirm an agreement of this kind in *abstracto;* not in every instance and in all circumstances can it be found morally defective. Secondly, whoever disallows an agreement for its immorality must do so at the expense of another worthy principle, *pacta sunt servanda.* The party who relies on a defect in his promise in order to rid himself of it does

not do so out of pure motives. In most cases the "guilty" party is found to benefit. The rule that the court must avoid enforcing defective agreements operates generally in favour of such a party and enables him to add wrongdoing to his "guilt". Hence the doubt about the fairness of the rule as a whole and the tendency of the courts today to limit its application.

When the question arose in 1936-37 in England in *Fender v Mildmay* (8) - a claim for damages for breach of promise given whilst the defendant was still married to another woman - counsel for the plaintiff did not deny the existence of the rule, that such a promise is contrary to public policy, but he argued, successfully, that the rule is inapplicable where the promissor has already obtained a decree *nisi* in a suit for divorce. The rule that a woman who has been promised marriage by a married man cannot sue for breach of promise (unless she was unaware that he was married) appears in all the textbooks on English Contract law (see, e.g. Cheshire & Fifoot, the *Law of Contract* (1960) 310). It has also been received in the United States (see *Williston on Contracts,* vol. 6, para. 1743). In fact, however, the rule is not very old. An agreement of this kind is not found among those agreements that impair marriage, listed in *Stephens* Commentaries (ed. E. Jenks. 1908) vol. 2, p. 92, or in Anson's *Law of Contract* (1906) p. 223. In 1908, however, two cases came before the courts, in which a person was sued for breach of promise to marry after the death of his wife and in both the action was dismissed: *Spiers v Hunt* (5) and *Wilson v Carnley* (6). The judges gave different reasons. Some thought that such a promise would encourage sexual relations between a man and his fiancee or even arouse in him a desire to kill his wife. Others thought that such a promise was incompatible with the duty of faithfulness existing between spouses.

When *Fender v Mildmay* (8) came before the House of Lords in 1937, some of the judges regarded it as being without precedent (so Lord Wright at p. 423); the difference between this case and those mentioned above was that here the promise was to marry not after the death of the wife but after divorce and the promise was made when a decree *nisi* had already been granted. Opinion was divided among all the judges who heard the case. Hawke J. and the majority in the Court of Appeal did not find it proper to depart from the rule laid down in *Wilson v Carnley* (6), whilst to most of the Lords the fact that the promise was made after the decree *nisi* so distinguished the cases. As I have indicated, that fact was enough for the majority to treat the promise lawful and valid; everything else they said was

obiter. But if we examine the reasons given by the majority, principally Lord Atkin, it is clear that they were not satisfied with the rule itself. Unhesitatingly they rejected the reason for invalidating a promise of this type, that it tended to encourage sexual relations or might move the man to kill his wife. On the other hand, they did not doubt the fact that as long as *consortium* between married couples existed, betrothal to another must necessarily impair the marriage tie, the moral ideal inherent in it and the legal duty of mutual love and faithfulness. However, in the view of the majority, after the grant of a decree *nisi*, the cohabitation of the spouses was no longer a reality.

This limitation - that the spouses' relations after a decree *nisi* are changed - does not rest on any ground other than a realistic approach to the problem of broken marriages, when all hope of restoring marital harmony has gone. The defect, if at all, of a promise of marriage to another at this point was considered by Lord Atkin vis-a-vis the danger of offending against the principle that a person must observe his obligations, and he found that the latter is to be preferred. He thought that after a decree *nisi* there is no longer, in the vast majority of cases, anything that might be saved. Again, the clear implication of his observations is that it is not the decree nisi which is the decisive turning point in the spouses' life but the deterioration of their relationship which led them to seek divorce. Nothing remains of the marriage, so Lord Atkin infers, except its outward trappings and he denies altogether a rule of public policy which impugns an agreement for the reason alone that it is inconsistent with another agreement. It is apposite to stress here the view of the minority judges, mainly Lord Russell. He analyses the then current English divorce law and shows most persuasively that in fact no difference exists in situation before and after a decree *nisi*. Apart from the duty of *consortium*, the mutual obligations of the spouses do not change; an act of adultery occurring between decree *nisi* and decree absolute remains an act of adultery with all its legal consequences. Lord Russell emphasizes indeed the fact that the majority arrived at the view they took not because of any special importance attaching to the decree *nisi* but for more general reasons, the source of which was their willingness to recognize a new ground for defeating agreements for "public policy" reasons and to come to the assistance of a person who has broken his promise when it is clear that at the time he made it nothing remained of the marriage bond except its external form. Lord Wright in-fact admits (at p. 433) that many of his arguments would apply even where the spouses have only separated, the more so after a divorce petition has been presented, but he did not think

that any certainty of result flowed from these preliminary stages and that the situation only really crystallized upon the grant of a decree *nisi*.

In this country divorce is not decreed by two stages, *nisi* and absolute. The learned District Court judge expressed the interesting view that the position in England after decree *nisi* and before decree absolute is similar to that in Israel after Decree of divorce and before delivery of the bill of divorce. In my opinion, this comparison cannot be drawn. In the present case it was found as a fact that marital harmony between the spouses had not existed for many years. Although when the appellant promised to marry the respondent, he had not even petitioned for divorce, such a petition had already been pending for a year when in 1958 the apartment was registered in the respondent's name. At this point alone, it seems to me, is it important for us to decide our attitude on the validity or invalidity of the parties' agreement. If we follow the realistic approach taken by Lord Atkin, as I understand his judgment, I would say that at this point the relations between the appellant and his wife had been shaken to their foundations and there no longer remained between them that bond of mutual love and faithfulness that could still be affected by his engagement with the respondent.

I have indeed been exercised by the question but have finally reached the conclusion that on an ultimate balancing of the pros and cons there is insufficient reason to invalidate the agreement. The English rule, as I have tried to show, does not rest on firm foundations and foremost judges have levelled objections at it. I favour their approach for its honesty and its adherence to reality. In bitter reality not every marriage fares well and when it reaches a crisis, it is difficult to speak seriously of the bonds of love and faithfulness between the spouses, which do not tolerate engagement with another after they have been severed. With this, I do not intend to justify the promise of a married person to marry another after obtaining a divorce. In most**,** if not all, cases there is reason for "faulting" the agreement. Good sense would demand that the existing marriage be brought to an end before the new engagement is entered into. But in so saying I am still very far from voiding the promise as something immoral and therefore illegal. So to do is only possible by sacrificing the doctrine of the sanctity of contract. It appears to me that this would be too high a price for the purpose, the value of which is not free of doubt. As is well known, a desirable and just result is for the most part not attained by avoiding the agreement. In such

a situation, the rule that "the agreement should benefit from the doubt" is operative. Accordingly I am also of the opinion that the appeal should be allowed.

OLSHAN P. I am of same mind as Witkon J. that our concern here is not with an agreement for extra-marital relations. That was not the purpose for which the apartment was registered in the respondent's name. Likewise I concur with the reservations of Witkon J. about the view of Cohn J. that even if the agreement is found to be immoral and contrary to public policy, that would not defeat the appellant's claim. The apartment was registered in the respondent's name with the appellant's consent in accordance with the agreement between them. The appellant sought to cancel that registration because the respondent had broken the agreement, in other words, in reliance on an implied term of the agreement that upon a breach by the respondent she would have to retransfer the property. If the agreement were illegal, the appellant's claim would be defeated.

I have wrestled with the question whether the agreement should be regarded as being illegal. I could not close my eyes to the weighty reasons for granting the appeal but in the end the balance came down on the side of the conclusion reached by Silberg J.

I will mention one of many reasons.

Not infrequently in marital relations it may occur when the wind of change affects, one of the spouses and disrupts domestic harmony and divorce proceedings are even commenced, that reconciliation may take place - either under the influence of the rabbinical judges or of members of the family and the like. An agreement, however, of the present kind may prevent such a possibility, since it creates a situation where the husband who made the agreement can no longer resile. In other words, the husband had engaged with another to destroy his marriage bond with his wife. In this regard, the agreement widens the breach between the spouses and may undermine their family life - an institution recognized by society as one of the foundations of social existence. I do not think that such an agreement is in accord with existing public morality.

BERINSON J. I join in the opinion of my learned friend. Witkon J., and for the reasons he has given this appeal should be granted.

Appeal granted (Olshan P. and Silberg J. dissenting)

Judgment given on May *15, 1963.*