LCA 5103/95
CA 6119/95
CA 6120/95

1. Tova Deshet
2. Lili Rachmani
3. Simcha Morad

v.

1. Shalom Eliyahu
2. David Eliyahu
3. Avraham Eliyahu
4. Tova Eviger
5. Janet Icot
6. Adv. Haim Givati (Formal Respondent)

The Supreme Court Sitting as a Court of Civil Appeals

[May 16, 1999]

Before Deputy President S. Levin and Justices E. Mazza, Y. Türkel

Facts: The deceased left a will devising his estate to his sons, to be distributed among them only after the death of their mother. The sons renounced their gift under the will and, together with their mother and sister (who had not been provided for in the will), sought to inherit their intestate share by law. The executrices of the will objected.

Held: Justice Levin, with Justice Turkel concurring, held that the sons' renunciation was clearly designed to frustrate the condition set by the will for their inheritance, namely that they would inherit only

after their mother's death. As a legal act, renunciation is subject to the good faith requirements and public policy considerations set by the Contract Law and other laws external to the Inheritance Law. The sons' renunciation was done with a lack of good faith or contrary to public policy and is therefore invalid. Justice Mazza held that the law does not recognize an intent to disinherit an heir unless such intent is clearly and unambiguously stated in the will (distinction between exclusion and disinheritance). A beneficiary has a right to renounce, and an heir has a right to benefit from such renunciation. Because the testator did not expressly state his intention to disinherit his wife and daughter, they had a right to inherit following the renunciation.

Appeals granted by majority opinion, against the dissenting opinion of Justice E. Mazza.

Basic Laws Cited:
Basic Law: Human Dignity and Liberty, ss. 3, 8.

Israeli Legislation Cited:
Inheritance Law, 1965, ss. 1, 2, 4, 6, 6(a), 6(b), 15, 17, 41, 42, 42(a), 43, 49, 50, 51(d), 54, 54(a), 67.
Contract (General Part) Law, 1973, ss. 39, 61(b).

Israeli Supreme Court Cases Cited:
[1] LCA 3154/94 *Asi v. Asi*, IsrSC 49(2) 250.
[2] CA 765/87 *Chesler v. The Estate of Ofel Mendel Israel, decd.*, IsrSC 43(3) 81.
[3] CA 4372/91 *Sitin v. Sitin*, IsrSC 49(2) 120.
[4] CA 245/85 *Engelman v. Klein*, IsrSC 43(1) 772.
[5] CA 2698/92 *Yona v. Edelman*, IsrSC 48(3) 275.
[6] CA 202/85 *Kleina-Bik v. Goldberg*, IsrSC 41(2) 757.
[7] CA 122/86 *Shapir v. Klivensky*, IsrSC 44(1) 738.
[8] CA 119/89 *Turner v. Turner*, IsrSC 45(2) 81.
[9] CA 1212/91 *Keren LIBI v. Binstock*, IsrSC 48(3) 705.
[10] CA 724/87 *Calpha (Gold) v. Gold*, IsrSC 48(1) 22.
[11] CA 196/85 *Rosenfeld v. Salant*, IsrSC 39(4) 550.
[12] CA 449/88 *Oferi v. Perlman*, IsrSC 45(1) 600.

[13] CA 8034/95 *Maor – Petroleum Company v. John*, IsrSC 52(4) 97.

Israeli District Court Cases Cited:
[14] CC (CC) 1310/91 *The Trustee-in-Bankruptcy for Shmuel Avni v. The Estate of Rachel Avni, decd.* [unreported].
[15] PC (CC) 3056/67 *Yemini, In the Matter of the Will of Binyamin (Ben Yehoshua*), *decd.* [unreported].

English Court Cases Cited:
[16] *Banks v. Goodfellow* (1870) 5 Q.B. 549.
[17] *In re Wynn, decd. v. Goodfellow* 1 W.L.R. 237 (Ch. D.).

Canadian Court Cases Cited:
[18] *Re Jacques* (1985) 16 D.L.R. (4th) 472.

Israeli Books Cited:

[19] 1 S. Shilo, *Perush Lichok Hayerusha, 1965 [Interpretation of Inheritance Law]* (1992).

Israeli Articles Cited:
[20] P. Shifman, *Histalkut Mitzavaa-al-tnai Lishem Akifat Hatnai [Renunciation of a Conditional Will for the Sake of Circumventing the Condition]*, 23 Mishpatim 527 (1994).
[21] G. Tedeschi, *Vitur al Hayerusha Vachalifot [Waiver of Succession and The Alternatives*], 34 Hapraklit 5 (1981-1982).

Foreign Books Cited:
[22] A.R. Mellows, *The Law of Succession* (5th ed. 1993).
[23] J.S. Barlow et al., *Wills, Administration and Taxation: A Practical Guide* (6th ed. 1994).
[24] H.S. Theobald, *On Wills* (15th ed. 1993).
[25] 1 W.J. Williams, *On Wills* (7th ed. 1995).

Foreign Articles Cited:
[24] J.A. Heaton, *The Intestate Claims of Heirs Excluded by Will: Should 'Negative Wills' Be Enforced?* 52 U. Chi. L. Rev. (1985) 177.

Jewish Law Sources Cited:
[A] Responsa Rosh, Rule 78:3.

JUDGMENT

Deputy President, S. Levin

The Facts

1. The deceased, Obadiah (Abdallah) Abraham Ezra Eliyahu, passed away on August 8, 1987. He was survived by his wife, three sons, and one daughter. The deceased left a witnessed will dated January 13, 1987, stating that it was being made pursuant to the Inheritance Law, 1965. The will also stated that it was "also made in accordance with all the requirements of Jewish religious law." Under clause 3 of the will, the deceased left all his possessions "without exception" and "subject to the following provisions" to his sons. Clause 4 of the will stated:

> 4. I hereby expressly and unambiguously provide that my aforementioned sons shall receive their aforesaid share in my estate, only after the death of (my wife), and under no circumstances before such time.

In clause 5 of the will, the deceased wrote that "[t]o this end" he appoints appellants in CA 6119/95, Mrs. Tova Deshet and Lili Rachmani, to act as the estate executrices "prior to its distribution between my aforementioned sons and after the death of their mother as aforesaid." The estate executrices were released from the obligation to provide any bond and were meant to receive payment in return for their duties as determined by the court.

After the death of the deceased, the sons filed notices of renunciation according to which they renounced all their rights "which originated in the will only."

2. Appellants, the estate executrices, petitioned for probate. PC (PAPP) 85/93. The sons submitted opposition to the probate. PC (PAPP) 86/93. At the same time, the sons filed a motion for an inheritance order in respect of the estate of the deceased. The motion named the deceased's wife and children as the lawful heirs of the deceased. PC (PAPP) 394/93. The wife's affidavit of renunciation was attached to the motion. According to this affidavit, the wife renounced 3/40 of her share of the estate in favor of each of her children. The deceased's sister, Mrs. Simcha Morad, also requested an inheritance order. Her motion named Mrs. Morad and her sister, Mrs. Haviva Katan, as the sole heirs of the deceased (PC (PAPP) 338/93), arguing that the sons had renounced their share of the estate, and the deceased had disinherited the wife and the daughter from the estate. The sons submitted opposition to her motion. PAPP 916/93 in PC 338/93. The daughter also submitted a motion requesting a declaration that, following the sons' renunciation, she and the wife were the heirs by law or, in the alternative, were entitled to inherit together with the sons. PAPP 1809/94; PAPP 142/94. All the actions and motions were consolidated.

The Be'er Sheva District Court ruled that the sons' renunciation was valid. As a result of this renunciation, the Court held that the provisions of the will were void, including the provision that delayed bequeathing the rights in the estate until after the wife's demise. The will should not be construed in a manner that would disinherit the wife and the daughter from the estate. The estate should be distributed among the wife and the four children of the deceased, in light of the wife's renunciation. In this manner, each of the deceased's heirs would receive one fifth of the estate.

The estate executrices objected to the District Court's judgment by submitting a motion for leave to appeal (LCA 5103/95) and an appeal (CA 6119/95). The deceased sister also filed an appeal. CA 6120/95. All these actions argued, in essence, that the sons' renunciation was invalid. At the very least, it was alleged, the

renunciation could not nullify the provisions of the will, under which the sons would not inherit their share of the estate while the wife was still alive. The estate should therefore be administered by appellants.

Provisions of Law and Issues in Dispute

3. We will first cite the relevant provisions of the law, then analyze the substantive issues in dispute between the parties.

Section 1 of the Inheritance Law, 1965, sets forth the principle of the immediate transfer of an estate. It provides:

> "Upon a person's death his estate passes to his heirs."

Section 2 stipulates:

> "The heirs may inherit either by law or under a will."

Section 6 of the law states as follows:

> "6 (a) After the testator's death and as long as the estate has not been distributed, an heir may renounce all or some of his part of the estate, or all or some of a legacy to which he is entitled under a will…
>
> (b) If a person renounced his part of the estate, then – to the extent that he renounced it – he is deemed never to have been an heir; renunciation cannot be in favor of any other person, except in favor of the testator's spouse, children or sibling.
>
> (c) Renunciation by a minor or by a person declared legally incompetent requires the Court's approval.
>
> (d) A conditional renunciation is void.

Section 15 of the law provides that "[i]f a person was disqualified from inheriting, or if he renounced his part of the estate, other than in favor of the testator's spouse, children or sibling, then his part shall be added to the other heirs in proportion to their parts."

Section 43 of the law determines as follows:

> 43 (a) The testator may prescribe that an heir inherit when a condition has been met or at a certain time.
>
> (b) If the condition was not met or the time had not arrived before the testator's death, then the estate shall be administered by an estate executor until the condition is met or until the time arrives or until it becomes clear that the condition can no longer be met …
>
> (c) If the testator did not prescribe who shall inherit when it becomes clear that the condition can no longer be met, then the heirs by law shall inherit.

Section 50 provides that if a will's beneficiary renounces what is due to him or her other than in favor of the testator's spouse, child, or sibling, and if the testator did not name another beneficiary who would take his or her place, then the testamentary provision in his or her favor becomes void. Section 54 of the law provides that a will is to be interpreted according to the testator's presumed intention. It further determines that where a will is subject to different interpretations, "the interpretation that renders it effective shall prevail over that which renders it void."

It appears to me that there are three main issues in dispute between the parties. First, according to existing law, may the heirs renounce their share of the estate under the will? Can renunciation take place before the condition stipulated in clause 4 of the will has been fulfilled? In the latter case, the said share is a future or

conditional right only. Second, what are the legal consequences of renouncing a right under a will in order to bypass a condition stipulated in the will, so that the renouncer may inherit by law, without meeting the condition? This question will be examined both according to the "internal" provisions of the Inheritance Law as well as in accordance with the "external" law, *viz.* reasons contained in the general law, such as public policy considerations or the claim that the renunciation was not made in good faith. Third, what are the consequences of the aforesaid renunciation in terms of the rules for distributing the estate between the heirs? The need to decide this third issue will naturally only arise if it transpires, after resolving the first two issues, that the heirs' renunciation of their share under the will is valid and effective.

4. Among the main issues in dispute between the parties, I have not included two additional matters which I was able to resolve without difficulty. In brief, these were as follows:

(a) The learned judge in the lower court was not prepared to infer any conclusion in our case from the testamentary provision which stated that the will was made in accordance with the provisions of Jewish religious law. It is true that the judge was presented with an expert opinion regarding the treatment of renunciation in Jewish law. According to this opinion, the renunciation was not valid. At the same time, however, the expert admitted on cross examination that there were other opinions on this matter. I have examined appellants' complaints concerning the reasoning of the District Court in this regard, and I am satisfied that these are grounded in law. Such complaints are therefore dismissed.

(b) It was argued – and this was in fact the first claim submitted – that appellants have no standing to submit this appeal. Not only was this claim not raised in the court of first instance, but appellants in fact do have an interest, as the long arm of the deceased, in upholding the provisions of the will. Moreover, the provisions of the

will expressly confer on them a concrete duty to manage the deceased's assets, so long as they have not been transferred to the sons. This issue is unlike that which arose in LCA 3154/94 *Asi v. Asi* [1]. That case held that a person possessing an "indirect benefit" under a will through an heir or beneficiary lacks standing to oppose an inheritance order or an order of probate under section 67 of the law. This has no bearing on the standing of the estate executor.

The Legality of Renunciation – Renunciation of a Future or Conditional Right

5. Legal scholars are divided on this issue. According to Prof. Shilo, until the condition has been fulfilled or the time has arrived for receiving the beneficiary's share, that person is not regarded as an heir. As such, he or she may not renounce his or her "right," which is merely a protected expectation. S. Shilo, *Perush Lichok Hayerusha, 1965 [Interpretation Inheritance Law]* [19], 392-94. He finds support for his approach in various provisions of the law. These include section 51(d) which provides that a person who becomes entitled to an asset "at a later date" is entitled to the income from that asset earned only beginning at the date at which the person becomes entitled. This contrasts with the opinion of Prof. P. Shifman, in his article, *Histalkut Mitzavaa-al-tnei Lishem Akifat Hatnei [Renunciation to Circumvent a Condition]* [20], which was adopted by the learned judge. Prof. Shifman argues that the law makes no distinction between a person whose entitlement in an estate is absolute and immediate and a person whose entitlement is conditional and postponed. Both may renounce immediately upon the death of the deceased. In support of his approach, Prof. Shifman cites section 42 of the law, in which the legislature recognized the renunciation of the second heir in a will providing for successive heirs, even before the condition establishing the second heir's right is fulfilled. I am not sure that the references to the aforesaid sections of law can help resolve the issue at hand, because the legislature was not consistent in these sections, or because it sought to use them to

make provisions for specific issues. Substantively, there are two ways of viewing the issue in question. Because of the conclusion I will reach, as shall be explained *infra*, I do not need to resolve this matter. I shall therefore leave the question to be resolved on another occasion.

The Legality of Renunciation – Application of the "Internal" Law

6. The law does not force a person who has inherited part of an estate to accept that part. A beneficiary is entitled to renounce the share bequeathed to him or her, as stipulated in section 6 of the law. In return for the deceased's freedom to bequeath those assets which form part of his or her property rights, the heir also has the freedom to "reject" his or her entitlement by way of renouncing those assets. However, an heir may not renounce an obligation which is imposed on him or her and which deviates from the "active" areas contained in his or her share. Nor may his or her act of renunciation injure any third party rights. In other words, the beneficiary under a will is entitled, under the laws of inheritance, to renounce what he or she has been given; he or she may not, however, renounce what he or she has not been given. For example, if the deceased left a house to her son, while also requiring him to pay a sum of money to her daughter, the son may not avoid paying the sum to his sister by renouncing the house. This is because the daughter is entitled to the payment from him in any event. A.R. Mellows, *The Law of Succession* [22] 421. It follows that the renunciation must be substantive and not merely formal. *See also* CA 765/87 *Chesler v. Estate of Ofel Mendel Israel, decd.* [2] at 87:

> It is true that a person cannot bequeath property which does not belong to him or her. Logic dictates, however, that if the beneficiary wishes to circumvent a provision in the will which obligates him or her to transfer part of his or her property to a third party, he or she must also

> relinquish those assets to which he or she is entitled under the will. In other words, a beneficiary may not select only those provisions of the will which are comfortable for him or her. The choice is to accept the will as a whole or to reject it as such.

Renunciation Intended to Circumvent a Condition of the Will and to Enable the Renouncing Party to Inherit His or Her Share by Law, without Complying with the Condition

7. In Israeli and foreign legal literature, the opinion is nearly uniform: an heir by law may renounce his or her share under a will, even where such renunciation allows him or her to circumvent a condition contained in the will. Through that renunciation, the opinion goes, the heir inherits by law, and is thus exempt from fulfilling the condition. *See* Shilo in his aforesaid book [19] 398-99; Shifman in his aforesaid article [20] 527; Mellows in his aforesaid book [22] 421; the Uniform Probate Code, para. 2-801 at 180; J.S. Barlow, L.C. King, A.G. King, *Wills, Administration and Taxation: A Practical Guide* [23] 311. In the above circumstances, I am prepared to concede that the laws of inheritance pose no obstacle to renunciation whose goal is to circumvent any of the conditions of the will. At the same time, as shall be later clarified, here we address only the freedom to renounce under the laws of inheritance. It is a totally different question as to whether renunciation will be invalid according to other laws which complement the laws of inheritance, such as using the freedom of renunciation not in good faith or in circumstances which would be contrary to public policy. I will deal with these issues presently.

The Legality of Renunciation – Application of the General Law

8. It is decided case law that section 6 of the Inheritance Law does not bar an examination into the validity of renunciation under the substantive law. *See e.g.* CA 4372/91 *Sitin v. Sitin* [3] at 130:

> [S]ection 6 only sets forth the *procedures* governing renunciation … and the circumstances in which this path may be taken – as long as the estate has not been distributed (sect. 6(a)) and the share of the renouncing heir has not been charged (sec. 7(a)). The section does not, however, outline circumstances, if any, in which the renunciation will be regarded, in terms of the substantive law, as an unjust violation of the rights of third parties held with respect to the heir.
>
> Where the circumstances indicate that the rights of reliant parties risk being violated, the status of the heir who has elected to forgo his or her inheritance will then be examined within the framework of the relevant general laws – *viz.* the laws of bankruptcy, whether the debtor was declared bankrupt; the laws of contract; the laws of collateral; and even, in special cases, under the laws this court has established regarding joint ownership of property between spouses. CA 4372/91 *Sitin v. Sitin* at 129-30 (Shamgar, P.).

On the foregoing basis, the Court examined the case of a renunciation made with the intent of concealing assets from the creditors of the renouncing party, including his wife. *Id.* (at the end of judgment). *Cf.* CC (CC) 1310/91 *Trustee-in-Bankruptcy for Shmuel Avni v. The Estate of Rachel Avni, decd.* [14]. There, the renunciation was invalidated because it was performed with a lack of good faith, through an abuse of legal proceedings. The theory at the base of these laws is that renunciation is considered a "legal act" within the meaning of section 61(b) of the Contracts (General Part) Law, 1973. Prof. G. Tedeschi, *Vitur al Hayerusha Vachalifot [Waiver of Succession and Alternatives]* [21]. As such, the provisions of the law governing "legal acts" apply to the renunciation, including the good faith use of a right, as well as provisions concerning abuse of legal proceedings and public policy,

even beyond the provisions of section 39 of the aforesaid law. See CA 245/85 *Engelman v. Klein* [4] which used public policy criteria to evaluate a term which disinherited a beneficiary from a will.

In the case at hand, there is no doubt that the sons' renunciation frustrated the deceased's wish for his assets to be transferred to the sons only after the death of their mother. As we have already explained, even where the act of renunciation is recognized by law, it is still incumbent upon us to examine its validity under the general law. A conflict of values arises here between the deceased's right to decide what will happen to his property after his death and the freedom given to an heir according to law or under a will to frustrate this right by renunciation. We must examine the interests of the deceased, on the one hand, and of the sons, on the other. This will enable us to find the point of balance between these two values. Once we reach a conclusion on this matter, we will need to evaluate whether there are sufficient grounds to invalidate the renunciation, because it was not done in good faith, because it abused a right, or because of public policy considerations.

The Deceased's Right to Decide How to Dispose of His or her Property v. the Freedom of Renunciation – Balance of Interests

9. The law accords significant weight to the deceased's right to decide how to dispose of his or her assets after death. This is true even to the extent of disinheriting heirs-in-law of their rights under the laws of intestacy. Thus, for example, section 54(a) of the law provides that "[a] will is interpreted according to the testator's presumed intention …" When the Supreme Court has examined the validity of a term purporting to disinherit a beneficiary from a share in the estate, in addition to examining the considerations to rebut the disinheritance term, it has evaluated the considerations upholding this term. *See* CA 245/85 *supra* [4] at 785-86:

> … On the one hand, the following considerations are to be noted in support of granting validity to a disinheritance provision: First, this gives expression to

> the principle of respecting the testator's last will and testament. This is sound legal policy which merits implementation. It is a distinguishing mark of the laws governing succession. It acts as the yardstick for the interpretation of various provisions of the Inheritance Law … Second, through the disinheritance provision, the deceased protects those interests which are dear to him or her, such as the unity of the family, his or her good name and other matters which the testator seeks to protect through this provision. It is in the interests of society to enable the testator to utilize such protective mechanisms … The disinheritance provision preserves the privacy of the family unit …

Thus, for example, in CA 2698/92 *Yona v. Edelman* [5] at 279, the Court stated that "respect for the wish of the testator, even if he imposes conditions in his will, is a value in need of protection, and an heir who wishes to inherit his or her share of the estate must also comply with the preconditions imposed on him or her before being entitled to his or her share."

The court, in its capacity as such, is often asked to take action to protect the wish of the testator as expressed in his will. In *Re Jacques* (1985) [18], for example, one of the heirs sought to renounce her share under the will. The court was asked to address the issue of what should happen to the share of an heir who had renounced her share in the estate. The court stated as follows:

> I have not been referred to any authority in which the doctrine of acceleration has been applied in such a way as to frustrate the apparent intent of the testator.
>
> …The basic obligation of the court … is to ascertain, and give effect to, the intent of the testatrix as expressed by the terms of the will. *Id.* at 476.

10. The testator's right to dispose of his assets as he wishes after his death has now received constitutional force by virtue of section 3 of Basic Law: Human Dignity and Liberty [right to property – ed.], and this right may not be violated, except within the bounds set by the limitation clause in section 8 of the law. It is true that a beneficiary reserves the right to "reject" a bequest under the will by the act of renunciation. However, where the effect of such renunciation is to frustrate the wish of the testator by annulling a reasonable term included in the will, we must evaluate whether, under the circumstances, there are any legal grounds for invalidating the renunciation. In this regard, in my opinion, we must strike a balance between the testator's right to dispose of his assets as he wishes following his death and the beneficiary's right to reject the "share" given to him or her. Needless to say, the balance between these two considerations will always be done in the context of the particular circumstances of the case in question.

Shilo's book [19], at 395-96, describes a case decided by the Tel-Aviv-Jaffa District Court. PC (CC) 3056/67 *Yemini, In the Matter of the Will of Binyamin (Ben Yehoshua*), *decd.* [15]. In that case, in his will, the deceased devised the sum of one lira to all of his heirs by law – his sons – while leaving the whole of his residuary estate to a fund whose beneficiaries were the grandchildren. The fund was meant to provide them with loans and gifts subject to extremely onerous conditions: provided they preserved a religious lifestyle, ate only kosher food, honored their elders and hung pictures of their grandparents in the large guest room of their home. Despite the heirs' opposition, the court upheld the will. The author of the book raises the question as to whether the provisions of the will could have been invalidated on the grounds that they were contrary to the public welfare, because they constituted an attempt to have the dead rule over the living. Let us imagine, on the above mentioned facts, that the will had been written in favor of the sons, including the same onerous conditions, and that the sons had renounced the will in order to circumvent these conditions and to

become heirs by law, in order to free themselves from any precondition. Let us further assume that the will did not violate any public policy *per se*. Can there be any doubt that we would rule that the sons are not entitled to frustrate the wish of the deceased by utilizing the vehicle of renunciation? Alternatively, let us imagine a case in which, in his will, a testator devises all of his estate to his only son; and the will further establishes that the son shall take only 10 years from the date of the testator's death. Would we allow such a son to renounce the will and to become an heir by law, by circumventing the condition stipulated in the will? The case before us does not differ in any fundamental respect from the above-mentioned examples. In light of the murky relations which characterized the deceased and members of his family, the deceased preferred to disinherit his wife and his daughter from the estate and to suspend the delivery of his assets to his sons until after the mother had died. There is no legal impediment inherent in the deceased's considerations. The deceased made reasonable use of the property and constitutional right to decide how to dispose of his assets after his death. I do not think that the sons, under the circumstances of our case, made proper use of the renunciation, by seeking to frustrate the wishes of the deceased and to circumvent the condition he imposed, in order to receive their intestate share by law.

11. Israeli case law has used the doctrine of good faith (or abuse of legal proceedings) in order to examine whether there are grounds for invalidating the renunciation by heirs of their share under a will. CA 4372/91 *supra* [3]; CC (CC) 1310/91 *Trustee Over the Assets of Bankrupt, Shmuel Avni v. Estate of Rachel Avni, decd.* [14]. However, so far, the said doctrine has been used only in connection with the non-good faith use of a right, insofar as it relates to third parties such as creditors. I see no reason to limit the application of this doctrine only to these cases, especially when it has become commonplace as a tool for examining the conduct of an heir. *See e.g.* CA 2698/92 *supra* [5]; CA 202/85 *Kleina Bik v. Goldberg* [6]. A condition restricting the right of a beneficiary under a will may not

deviate from the testator's reasonable use of his property right. In such case, no validity should be accorded a renunciation whose sole aim is to thwart his wishes and to remove a reasonable precondition from the gift bequeathed by will.

We can attain the above outcome through the legal device of failing to exercise a right in good faith, under section 39 of the Contracts (General Part) Law or through invalidating renunciation as being contrary to public policy. See CA 4372/91 *supra* [3] for a discussion of the considerations involved in choosing the particular legal underpinning on which the invalidation rests. Whichever vehicle is used, the renunciation at the core of the appeals in question should be invalidated.

In light of my conclusion, I am not required to examine the third issue which might have arisen in this case. This is the question of the effect of the renunciation in terms of the distribution of the estate between the heirs. It goes without saying, therefore, that, in my opinion, the question as to whether or not the deceased disinherited his wife and daughter from the estate does not arise.

The appeals should therefore be granted, because the renunciation was not performed in good faith or because it violates public policy.

I would therefore grant the appeals, annul the decision of the District Court, and rule that the renunciation is invalid and that the will in its original version remains intact.

Justice E. Mazza

1. My learned colleague, the Deputy President, saw no need to address in his opinion the issue of whether it was possible to interpret the deceased's will as including a provision regarding the disinheritance of his wife and daughter from the estate. At the same

time, once it has been proven that the sons of the deceased renounced their entitlement under the will with the aim of frustrating the wish of the testator, he reaches the conclusion that, for reasons grounded in laws external to the Inheritance Law, the renunciation should be invalidated. With all due respect, I personally am of the opinion that the question of whether the deceased used his will to disinherit his wife and daughter from his estate has a direct bearing on the validity of the deceased's sons' renunciation of their entitlement under the will. Based on my reasons for resolving these two questions – the issue of the will's interpretation and the issue of the validity of the renunciation – I will suggest that the appeals be denied. In reaching this conclusion, I will need to resolve two further issues, which my colleague, the Deputy President, saw no need to address: the effect of an heir's renunciation on the rights of the other heirs and the rule for renouncing a future or conditional right.

2. The District Court was in doubt as to whether the deceased's will disinherited his wife and daughter from his estate. The estate executrices alleged that the disinheritance of the wife and the daughter was to be inferred from the bequeathment provisions in his will. These provisions left nothing to either of them. In addition, the disinheritance of the wife could also be inferred from the provision in the will which stated that his sons would receive their share of the estate "only after the death of (his wife), and in no circumstances before such time." The Court rejected this approach for three principal reasons. Its first reason was based on the wording of the will. The Court pointed out that the deceased did not expressly state in his will that he was disinheriting his wife and daughter from the estate. The Court regarded the failure to include an express statement of this sort in his will as a "thunderous silence" which effectively shed light on the deceased's intention not to expressly exclude his wife and daughter. The judge's second reason was based on evaluating the presumed intention of the testator, given the circumstances surrounding the making of the will. These indicated a rupture in the relationship with the deceased, not only on the part of the wife and daughter, but also on the part of his three sons. This rupture vacillated in terms of its severity. As a result of the rupture,

the Court found it difficult to conclude from the circumstances that the deceased specifically intended to exclude his wife and daughter. The Court's third reason was that, based on the evidence, no definite conclusion could be drawn on the issue of whether the deceased would have excluded his wife and daughter from the estate even if he had known that the sons would renounce their rights under the will in the future.

3. I believe the District Court was justified in its conclusion that there was insufficient basis to find that the deceased had in fact excluded his wife and daughter from his estate. To justify this conclusion, I need look no further than the learned judge's first reason: because the deceased did not expressly state in his will that he was excluding his wife and daughter from the estate, no intent to exclude them should be ascribed to him. From the fact that they were not included in the will as heirs of his estate, the conclusion can indeed be drawn that the testator's presumed wish was for his wife and daughter not to inherit. However, the failure to include the wife and daughter in the will does not prove that the testator had resolved to disinherit them. It merely attests to his decision to exclude them from their share of the estate, in the event, and only in the event, that the estate would be devised according to his will. However, an heir's exclusion from a will cannot override the right of beneficiaries to renounce their shares under the will, the inevitable consequence of which is the distribution of the estate between the heirs by law. In order to nullify the entitlement of an heir by law to inherit his share of the estate after he or she renounces, the testator must expressly state in his will that he wishes to disinherit the successor. I would like to expand a bit on this point.

Exclusion v. Disinheritance

4. The exclusion of an heir and the disinheritance of an heir are not synonymous. A will which is drafted such that the testator refrains from granting a share of his estate to any of his heirs by law or grants the heir only a small part of the share to which he or she would be entitled by law, negates or detracts from the heir's share.

By so doing, the testator excludes (i.e. he cuts off or removes) the heir, in whole or in part, from the heir's share under the rules of intestacy. The disinheritance of an heir is a different legal act. By disinheriting an heir, the testator imposes an absolute prohibition on the heir benefiting from any part of his estate. Disinheritance, as distinct from exclusion, cannot be implied; it cannot simply arise as the natural corollary of the bequeathment provisions of the will. It must be explicit. The main difference between exclusion and disinheritance is that the former does not preclude the right of the excluded heir to return to the circle of heirs by law – in general or to receive his or her full share. This could occur as a result of the renunciation by a beneficiary of his or her legacy under the will; the annulment of any of the testamentary provisions; the existence of an asset not disposed of by the testator; or due to an event which prevents the distribution of the estate according to the provisions of the will. By contrast, an heir who has been disinherited loses his or her right to inherit; the right is rendered null and void. A disinherited heir only returns to the circle of heirs if there are justifiable grounds for invalidating the entire will, or at least a justifiable ground for invalidating the disinheritance provision itself.

There is also immense practical significance to the exclusion of an heir. However, this applies only where none of the will's beneficiaries exercises his or her right of renunciation and where there are no grounds for annulling any of the testamentary provisions whose renunciation may return the excluded heir to the circle of heirs. Take a case of a father of three who bequeathed his estate to two of his heirs only, leaving nothing for the third heir. Provided that none of the beneficiaries renounces his share, in whole or in part, in favor of the brother who was excluded from receiving a share in the estate, and provided the court decides to ratify the will – in the absence of any opposition to its ratification or in the absence of any ground not to ratify it – the practical outcome is that the testator's estate will indeed be divided up according to his will, between two of his three sons. However, in making a will in favor of two out of three sons, the testator does not deprive those sons to whom he bequeathed his estate of the right of renunciation, including

renunciation in favor of the third son. Moreover, he does not negate the right of the third son to whom no bequest was made to inherit by law, whether as a result of the renunciation by any of the beneficiaries or whether for any other reason preventing all terms of the will from taking effect. Thus, for example, if any of the entitled sons were to predecease the testator without leaving descendants, the testamentary provision in favor of the relevant beneficiary would lapse, and his designated share would be divided up between the heirs by law. Sec. 49 of the Inheritance Law; CA 122/86 *Shapir v. Clivensky* [7]. The same would apply in the event that any of the beneficiaries under the will is found to be disqualified from inheriting. Sec. 50 of the law.

5. The Inheritance Law does not discuss the exclusion or disinheritance of heirs. However, the testator's ability to deprive an heir by law of his or her share, whether in whole or in part, derives from the provisions of sections 1 and 2 of the law. According to section 1:

> Upon a person's death his or her estate passes to his or her heirs.

And section 2 provides that:

> The heirs inherit by law or under a will; inheritance is by law, except to the extent that it is under a will.

The rule is therefore that a person's estate passes to his or her heirs by operation of law. If the testator left a will, then his estate will be devised to the will's devisees. In such case, the right of the heir by law lapses only where the provisions of the will dictate as much. It follows that if the testator bequeathed only part of his estate, the beneficiaries will take that part bequeathed to them, while the residuary estate will be distributed to his heirs by law. If the testator devised part of his estate to a person who was not his heir by law, or if he devised, to any of his heirs by law, gifts which exceeded their own entitlements by law, the shares of other heirs will be

negated or reduced. The terms of such a will have the effect of excluding an heir by law from his or her share, whether in whole or in part. However, this type of exclusion is merely the natural consequence of the bequeathment provisions of the will. It cannot therefore be assumed that the testator intended to deprive the heir of any right to inherit a share of the estate which may exist because of an asset which the testator forgot at the time the will was made or on account of a renunciation by any of the devisees.

The Implications of an Heir's Renunciation of His or her Share under the Will

6. The testator has an absolute right to stipulate, in his will, how his assets will be disposed after his death. On the other hand, each of the beneficiaries under the will has a free choice – whether to realize his or her share or to renounce it. He or she is also entitled to renounce the share in order to avoid having to perform an onerous condition that the testator imposed on the share. CA 119/89 *Turner v. Turner* [8] at 86. At times, renunciation by a beneficiary of a will directly affects the entitlement of the heirs by law and or at least its scope. A beneficiary's renunciation of his or her share under the will may be either unqualified or in favor of the testator's spouse, children or sibling. *See* end of section 6(b) of the Inheritance Law. An heir's renunciation of all or some of the legacy to which he or she is entitled under a will may benefit all those heirs who inherit by law. This may include the renouncing party, provided he or she would inherit by law and has renounced his or her entitlement under the will, not the right to inherit in general. Alternatively, the heir's renunciation may be in favor of the testator's spouse, children or sibling, even where the testator has excluded these heirs by giving instructions for devising the whole of his estate without including such heirs as beneficiaries under the will. The exclusion does not deprive such heirs of the right to realize their entitlement to a share of the estate by virtue of the renunciation. It follows, therefore, that a devisee's right of renunciation and the heir's right to have the renunciation work in his or her favor take preference over respecting the wishes of the testator.

The following should also be noted: even if the testator bequeathed his estate to two (or more than two) beneficiaries, devising a gift to the second heir, if the first heir has not inherited, the first heir is entitled to renounce all or part of his or her share in favor of the testator's spouse, children, or sibling. In so doing, the first heir may negate or reduce the share of the second heir. See section 41 of the law which governs the case of substituted heirs. It would appear that even a will naming successive heirs, as defined in section 42 of the law, will have a similar result unless the testator made it a condition of his will that the first heir's renunciation would entitle the second heir to inherit. The reason for this is that in the absence of any special condition for entitlement, the second heir will inherit, as stated in section 42(a), "after the first has inherited." When the first heir renounces his or her share, he or she is no longer an heir who "has inherited." This is made clear by section 6(b) which states: "he or she is deemed never to have been an heir." The testator may make it a condition of his will that the renunciation of the first heir would benefit the second heir. However, this would not prevent the distribution of the estate to heirs-by-law, in the event that the second heir decides, when his or her time to inherit arrives, to renounce his or her share of the estate as well.

7. On the subject of renunciation by an heir under a will – I see no reason to distinguish between renunciation of an immediate and absolute right and renunciation of a future or conditional right. I concur with the approach of Prof. Shifman in this regard. I believe that the right of renunciation is also available to a person to whom the testator has granted a right in his will which cannot yet be realized because of a time requirement or a precondition that has not yet been fulfilled. *See* Shifman in his above mentioned article [20]. This conclusion is also mandated by section 6 of the Inheritance Law, which permits an heir to renounce his or her share of the estate, without distinguishing between an heir with an immediate and absolute right and an heir with a future or conditional right. The need to verify the rights of the heirs as soon as possible further corroborates this conclusion. The heir has a right of renunciation,

according to section 6, so long as the estate has not been distributed. It is clear that if making renunciation of a future or conditional right dependent on the arrival of a specific time or on the fulfillment of a condition to realize the entitlement would create delays and ambiguities in the inheritance process and in the distribution of the estate. Such delay would serve no purpose. Since the renouncing party, to the extent he or she has renounced his or her share, is deemed never to have been an heir *ab initio*, there is no reasonable justification for preventing him or her from renouncing the share, even if the time has not yet arrived or the condition for realizing the entitlement has not been fulfilled.

Express Disinheritance – Why Is This Necessary?

8. Section 6(a) of the Inheritance Law permits renunciation by a beneficiary under a will, while the end of section 6(b) stipulates that "renunciation cannot be in favor of any other person, except in favor of the testator's spouse, children, or sibling." The sole purpose of these provisions is to balance between the testator's right to bequeath his estate in the manner he wishes, and the right of the testator's heirs in general and of his close relatives in particular to inherit by law. The need for this balance stems from the realization that the right to inherit by law accrues to an heir by virtue of the law, and the testator's will constitutes an intervention of the natural order. Moreover, section 1 of the Inheritance Law states that "[u]pon a person's death his or her estate passes to his or her heirs." This principle reflects the social consensus regarding people's tendencies to leave their estates to their nearest relatives. In the case of *Banks v. Goodfellow* (1870) [16], Chief Justice Cockburn noted that heirs have a natural right to inherit, and the testator has an ethical duty to satisfy their expectations:

> Independently of any law, a person on the point of leaving the world would naturally distribute among his or her children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to

> him by law. Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his or her death his or her effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law. *Id. at 563*.

CA 1212/91 *Keren LIBI v. Binstock* [9] expressed similar sentiments:

> Without diminishing the significance of other policy considerations concerning the distribution of a deceased's estate – a policy which is expressed in these and other provisions of law – the distribution of an estate between heirs in the manner set forth in the Inheritance Law derives from that innate human instinct; the extent of distribution of the estate between the heirs themselves is meant to reflect society's consensus concerning the wish of the "average" person. *Id.* at 723-24 (Cheshin, J.).

9. Moroever, in CA *Calpha (Gold) v. Gold* [10], the Court considered the ramifications of disinheriting an heir on his or her status as an heir and relationship with the other heirs.

> There is no dispute that the disinheritance of one of the children under the will not only leaves him or her without any means of economic support. It may also result in the creation or perpetuation of feelings of jealousy and even hatred between the siblings. In many cases, disinheritance is a complex consequence of murky relationships between a parent and his or her child. The responsibility for this may lie either in the disinheriting parent or in the disinherited child.

> Generally, both parties are partially responsible. And, still, disinheritance *per se* is not unlawful or impossible. Even if we were to attempt to judge it according to any particular ethical code, and we reached the conclusion that in such and such circumstances it is unethical – this would not be sufficient. *Id.* at 38 (Malz, J.).

I find support for my approach in these words. Owing to the special injury to an heir caused by his or her disinheritance – injury which is not only material but also emotional and ethical – it is justifiable to predicate the testator's ability to disinherit an heir upon an express condition to this effect. It would not satisfy me if the testator had merely included a provision to leave out any of his heirs by bequeathing them the sum of "one shekel" unless he also stated his express desire to disinherit the heir.

10. It thus follows that a will in favor of one particular person does not deprive the heirs by law of their right to inherit, in the event that the said person renounces his or her entitlement under the will. If the testator wishes to disinherit an heir absolutely from the right of inheritance afforded to him or her by the laws of intestacy, in such a manner that under no circumstances will the said heir inherit any part of the estate, the testator must express this wish unambiguously in his will. It is decided precedent that the very existence of a will is dependent on the bequeathment provisions contained therein. A will containing only a disinheritance provision – a "negative will" – is not a will. *Shapir v. Klivensky*, *supra* [7]. By contrast, a will which includes bequeathment provisions may also include disinheritance provisions.

As an aside, I would add that several cases have come before the court raising questions about the validity of an heir's disinheritance and its effect on the rights of the other heirs. In these cases, in resolving the question of the validity of the disinheritance provision, the Court was asked to examine factual issues: the testator's mental state and the influence it had on his decision to disinherit his family (*see e.g. Keren LIBI v. Binstock*, *supra* [9]); the

testator's motives for disinheriting two of his six children (CA 196/85 *Rosenfeld v. Salant* [11]); and the question of the validity of terms incidental to the disinheritance which the testator included in her will (*Calpha (Gold) v. Gold*, *supra* [10]). It should be added that no conclusion can be drawn in this regard obligating or expecting the testator to give reasons in his will for the decision to disinherit, provided that the disinheritance provision itself is clear and unambiguous.

A Look at Comparative Law

11. It should be noted that the law in the case at bar is situated at a point at which English law and U.S. law part company. Under English law, a will containing a disinheritance provision will be valid subject to two conditions. These are that the testator must have expressly stated in the will his intent to disinherit and that, aside from the disinherited heir, the testator has at least one more heir who will inherit his estate. On the basis of this approach, which from a theoretical perspective is regarded as an "implied gift" to the other lawful heirs, the Court upheld a will which consisted of two short sentences:

> I, Olga Wynn, revoke all previous wills today 9th January. 1981. I hereby wish that all I possess is not given to my husband Anthony Wynn. *In re Wynn, decd.* (1984) [17] at 239.

This implies that, under English law, the testator is estopped from disinheriting *all* his heirs in his will, but that if he disinherited only some of his heirs of their share and did so expressly, his will is valid, even if it did not include any bequeathment provisions. *See* H.S. Theobald *On Wills* [24]:

> A clause declaring that none of his next-of-kin shall take any part of his estate under his will or on his intestacy is nugatory and does not prevent them from taking on intestacy. But if the clause excludes one or

> some only of the next-of-kin, it operates as a gift by implication to the others of the share of those who are excluded. *Id.* at 801

In contrast, under the prevailing law in the United States, a disinheritance provision in a will has no force. Furthermore, the only way a testator can prevent his lawful heirs from receiving their share of his estate is by drafting a will which disposes of all his assets. From this it follows that an heir by law is entitled to take his or her share in those assets of the estate which the testator did not bequeath to another person. Even if the testator expressly directed in his will that he was disinheriting that heir from his or her right to inherit by law, his direction is not binding. The main reason for this approach is that disinheritance provisions in a will violate the right of the heirs to duly inherit the assets of the estate which the testator did not bequeath in his will. *See* J.A. Heaton, *The Intestate Claims of Heirs Excluded by Will: Should 'Negative Wills' Be Enforced?* [26] at 181.

12. Our law, like English law but unlike American law, recognizes the testator's power not only to disinherit an heir by bequeathing his share to another heir, but also to expressly disinherit an heir. The difference between our law and the English law is the fact that our law does not recognize a "negative will" which contains only a disinheritance provision. A will, under our law, must include bequeathment provisions. The knowledge that the testator has heirs other than those who were disinherited does not fill the gap in such provisions. We should pay attention, however, to the clear distinction in American law recognizing a positive bequest in favor of one person but not recognizing a negative provision to disinherit another person. This distinction supports my approach. No intent to disinherit any of the heirs can be derived from a bequest in favor of one person only. I propound the following rule of interpretation: in the absence of an express disinheritance provision in his will, no intent can be attributed to a testator to disinherit his heir from everything; only an express term of disinheritance can override renunciation which operates in favor of the disinherited heir. Indeed, the testator is fully entitled to dispose of his estate as he sees fit, and

he is entitled to deprive an heir by law of all or some of his or her share. However, if he failed to express in his will his intent to disinherit the heir, no such intent will be attributed to him. The guiding principle in the interpretation of wills is, indeed, the testator's intent, and where no such intent can be presumed from the will, we must examine whether it can be implied by the circumstances. *See* section 54 of the Inheritance Law. However, we cannot use the circumstances of a will to presume that the testator intended to disinherit. Moreover, the normal rule is that the court will give no validity to the *presumed* wish of the testator. It will only recognize a wish that receives overt and clear expression in the will. Justice Or made this point:

> By adopting this position, we are following the rule which guides us in matters of inheritance. I refer to the "commandment to carry out the wishes of a deceased"… This rule was this court's guiding light when it wished to avoid undesirable consequences, in which procedural defects were liable to obstruct giving effect to the wish of the deceased. This rule does not mean that the court will create a will for a deceased person who did not do so himself, solely with the intent of giving expression to the presumed intent of the deceased … But where the deceased has made explicit provisions in his or her will, these should be executed wherever possible. Therefore, the exception set forth in CA 122/86 *Shapir v. Clivensky* [7], according to which a "negative will" which is purely disinheriting in essence does not constitute a will, must be construed narrowly, similar to the English law. Such an interpretation is also likely to lead to the conclusion that where there are negative disinheritance provisions as well as positive bequeathment and succession provisions, the entire will is valid. In that case, all provisions of the will must be complied with – both the inheritance and the disinheritance provisions. CA 449/88 *Ofri v. Perlman* [12] at 607/

To these words we can add that a will which contains a bequest to one heir, but does not contain an express provision to disinherit another heir, can attest at most to the presumed wish of the testator, a wish which has no significance.

A Disinheritance Provision of a Will Overrides Any Silence in the Bequeathment Provisions and Any Renunciation by Beneficiaries

13. In wills containing a provision disinheriting one or more heirs by law, one of six typical scenarios is possible. I will mention these while at the same time pointing out what appears to me to be how the Court would rule in each of the first five scenarios. The sixth scenario is the only one which raises difficulty. I will therefore not reach the issue of the proper ruling in that case.

(a) The testator leaves the whole of his estate to named beneficiaries in his will. None of the beneficiaries renounces and none of the disinherited heirs contests the will's validity. There is no doubt that this is a simple case: the court will validate the will and its provisions will be executed.

(b) At the request of an interested party, the court decides to invalidate the will or the disinheritance provision. This, too, is a straightforward case. If the entire will is invalidated, the estate will be distributed among the heirs-by-law according to their intestate shares. If only the disinheritance provision is invalidated, the disinherited heirs will be entitled to their intestate shares by law, to the extent the bequeathment provisions of the will enable it.

(c) The bequeathment provisions of the will do not dispose of all of the testator's assets. Therefore, those assets about which the testator left no instructions will be distributed among his heirs by law, with the exception of the disinherited heir. This means that the disinheritance provision excludes the disinherited heir from the circle of heirs who can inherit assets not mentioned in the will.

(d) The bequeathment provisions of the will dispose of all the estate's assets, but some of the beneficiaries renounce their share of the estate or their legacy under the will. In this case, the shares of the renouncing parties will be distributed among the heirs by law, with the exception of the disinherited heir. Renunciation in favor of the disinherited heir (if this is the testator's spouse, child or sibling) is of no avail. The testator's instruction to disinherit will prevail, and renunciation in his or her favor will be construed as a general renunciation, which operates only in favor of all the other heirs.

(e) Some of the bequeathment provisions in the will were invalidated by the court. As a result, once the valid bequeathment provisions are executed, the remainder of the estate will be distributed among the heirs by law, save for the disinherited heir.

(f) The will contains no bequeathment provisions, either because it was drafted in this manner *ab initio*, because all the bequeathment provisions were invalidated by the court, or because all the will's beneficiaries gave notice of an undefined renunciation. In each of these cases, we appear to be dealing with a "negative will." We have already seen that the difference between our law and English law is that even where the testator has heirs by law who are not the disinherited heirs, Israeli law does not recognize a will that does not contain bequeathment provisions. From this rule, it follows that in each of the aforesaid three types of cases, the validity of the will's disinheritance provision will also be negated. I, personally, would reconsider this law, at least in relation to cases of the first and third types. For a case in which the court invalidates the bequeathment provisions of a will, there may be room to assume that, had the testator known that his bequeathment provisions were void, he would have refrained from making the disinheritance provision. However, this assumption is not valid for cases of the other two types. For cases of the first type: there is no dispute that if the testator instructed in his will that he was disinheriting one of his heirs and that his estate should therefore be distributed according to the laws of intestacy, his will would not be regarded as "negative,"

even though the bequeathment provision did not add anything. If that is the case, what is the point of invalidating a will which from the outset contained only a disinheritance provision?

It can similarly be asked, for cases of the third type, why invalidate a disinheritance provision in a case in which all beneficiaries to whom the testator granted legacies in his will have renounced their shares? It is true that, under section 50 of the Inheritance Law, renunciation by a beneficiary, not in favor of the testator's spouse, child, or sibling, results in the testamentary provision in his or her favor becoming void. Therefore, renunciation by all beneficiaries empties the will of all of the bequeathment provisions. However, as distinct from the other two types of case, in this case the will has become "negative" solely due to the renunciation by the beneficiaries. In this state of affairs, there is good reason, in my opinion, to validate the disinheritance provision. If we do so, the beneficiaries' renunciation of their legacies under the will would result in the intestate distribution of the estate among the heirs by law, save for the disinherited heir. Even if the beneficiaries have renounced all their shares in the estate, the disinherited heir will not take; if there is no heir, the state inherits by law pursuant to section 17 of the Inheritance Law. It is doubtful whether such development is possible under English law, where the Crown is not recognized as an heir by law and the transfer to the Crown of an estate without heirs is done only *bona vacantia*. *See* I W.J. Williams, On Wills [25] at 479.

The above mentioned questions and further additional questions invited by the sixth scenario I shall leave for further examination. However, from the description of the first five cases which I discussed, I would like to propose a theory which I think should be adopted as a matter of law. I propose that a valid disinheritance provision in a will that has been probated should prevail over the silence of the bequeathment provisions in a will, and should be immune to the normal consequences of renunciation by the heirs. This implies that the disinheritance provision totally blocks the possibility of the disinherited heir returning to the circle of heirs.

From the General to the Specific

14. In the case at issue, the deceased made a will in which he excluded his wife and daughter from their share of the estate. Had the sons not renounced their legacies under the will, the two would indeed not have been entitled to take any part of the estate. But the sons' renunciation returned their mother and sister, as well as themselves, to the circle of heirs [distributees – ed.] under the laws of intestacy. I agree that the sons' renunciation was intended not just to benefit their mother and sister. It was also intended to circumvent the onerous condition imposed by their deceased father regarding their gifts, namely that they would receive their shares under the will only after their mother's death. But the fact that the deceased included an onerous term in his will did not deprive his sons of the right to renounce their shares under the will. Earlier I concluded that in the absence of an express disinheritance provision in the will, there is no room to attribute to the deceased an intent to disinherit his wife and daughter, but rather merely to exclude them. In light of this conclusion, I see nothing untoward by the fact that the sons' renunciation of their entitlements under the will returned their mother and sister, as well as themselves, to the circle of heirs by law. However, had the deceased included an express provision in his will to disinherit his wife and daughter, the sons' renunciation would not have sufficed to return them to the circle of heirs by law. The deceased did not do this, and in my opinion there is no basis to assume that he would have done so, even had he known that his sons intended to renounce their shares under the will, with the aim of frustrating it. As I have attempted to explain, the disinheritance of an heir results in serious injury, not only material but also emotional and ethical, to the disinherited heir. It is not at all clear that a testator who decides to exclude any of his heirs would also be prepared to disinherit him.

15. The Deputy President considers that the sons' renunciation should be invalidated on the basis of external laws, due to their use of the right of renunciation in bad faith and in circumstances that

violate public policy. In my opinion, this thesis does not require resolution. However, beyond what is necessary, I would point out that in principle I find it difficult to adopt my colleague's approach. It is quite true that Israeli case law has not recoiled from making use of the doctrine of good faith in the past, or the principle of the abuse of a right, in order to examine whether there is room to invalidate an heir's renunciation of his or her share under a will. However, this has only been done in cases when it became clear that the use of the right of renunciation was intended to violate third party rights. In *Sitin v. Sitin* [3], President Shamgar describes circumstances in which the court will deem it appropriate to examine the validity of the renunciation in light of the motives of the renouncing heir. He stated as follows:

> The motives of the renouncing party are not relevant to an examination of the validity of the renunciation in terms of the provisions of the Inheritance Law. However, where the renunciation is characterized by deception or intent to injure reliant parties, the court must conduct an in-depth examination of the circumstances of the act outside of the Inheritance Law, in order to ensure that the law does not give its blessing to the injury of said parties. The provisions of the law are not designed to provide cover for the applicant to infringe on the rights of the claimants against him. Such an act would be an abuse of legal rights and may therefore be annulled.
>
> If we examine the language of section 6 of the Inheritance Law in light of this approach, we reach the following conclusion: [S]ection 6 only sets forth the *procedures* governing renunciation governing renunciation (an affidavit filed with the Court) and the circumstances in which this path may be trodden – as long as the estate has not been distributed (section 6(a)) and as long as the share of the renouncing heir has not

> been charged (section 7(a)). The section does not, however, outline circumstances, if any, in which the renunciation will be regarded, in terms of the substantive law, as an unjust violation of the rights of third parties held with respect to the heir.
>
> Where the circumstances indicate that the rights of reliant parties risk being violated, the status of the heir who has elected to forgo his or her inheritance will then be examined within the framework of the relevant general laws – *viz.* the laws of bankruptcy, whether the debtor was declared bankrupt; the laws of contract; the laws of collateral; and even, in special cases, under the laws this court has established regarding joint ownership of property between spouses. *Id.* at 129-130.

My colleague, the Deputy President, wishes to extend the expansion of the said doctrine, in a manner that would invalidate a beneficiary's renunciation of his or her legacy under a will, where such renunciation would traverse the wish of the testator. I personally am not convinced that such an expansion is feasible, if only because every renunciation by a beneficiary of his or her share under a will constitutes, in practice, a transgression of the testator's wish. This would apply whether such renunciation is beneficial to the renouncing party or whether it only benefits other heirs. It seems to me, *a priori*, there should be recourse to a law external to the Inheritance Law only in those cases in which it is necessary to protect an interest which is itself entrenched in the external law, and where the inheritance laws themselves are unable to provide a response to the said interest.

16. For the above reasons, I conclude that the appeals should be denied.

Justice J. Turkel

1. I concur in the opinion of the Deputy President, S. Levin, his reasoning and the verdict he rendered. I would just add one note to emphasize the reasons which I regard as important.

2. In approaching the adjudication of the disputes between the sons of the deceased and the estate executrices, I am cognizant of two factual assumptions:

(A) The deceased's wish as expressed in his will was that his wife would not inherit him, only his sons.

(B) The sole objective of the sons' renunciation of the legacy that was bequeathed to them under the deceased's will was to reach a result, by resorting to guile, that would mean annulment of the will in its entirety, and in any event, annulment of the wishes of the deceased, as if they had never existed.

3. There would seem to be no clearer and more explicit expression of the deceased's wish than the provision in his will: "my said sons shall receive their aforesaid share in my estate, *only after the death of their mother… and under no circumstances before such time*" (my emphasis – Y.T.). The well-known and accepted rule is that the wishes of the testator are to be respected. Therefore, the deceased's wishes as expressed in his will should be respected and upheld.

In my eyes, the use of a contractual provision or a provision of law other than for the purpose for which it was intended falls within the bounds of a lack of good faith and abuse of a right. *See* my judgment in CA 8034/95 *Maor – Petroleum Company Ltd. v. John* [13] at 113. The same applies in the case at hand. The renunciations by the sons were not made in good faith, and they constitute an abuse of a provision of law. This is because they make use of the provisions of section 6 of the Inheritance Law not for the sake of an honest and genuine form of renunciation of their legacy under the

will or of their share of the estate. The renunciations are a mere sham whose sole goal is, in effect, to annul the will, so that they can later come back and benefit from parts of the estate in a way that does not accord with the wishes of the deceased.

I think the approach of the greatest scholars of Jewish law to such stratagems can be deduced from the use they made of the meta-principle, "And you shall do that which is right and good," in the context of a stratagem designed to circumvent the law regarding rights in neighboring property:

> …[W]hoever wishes to cheat and to disregard the regulations of the Sages of the Talmud and to trick his associate – the Sages in their cunning trapped him and stood in his way in order to frustrate his evil designs. And we can learn one thing from another; for the Sages of the Talmud did not manage to cover every future manifestation that every new day brings, but those coming after them follow in their footsteps and liken one thing to another.

See Responsa Rosh, 78:3.

This approach is also appropriate for the issue in question, in which the sons attempt to make use of the provisions of section 6 of the Law in order "to cheat" [evade – ed.] the rule that the wishes of the testator must be obeyed. The doctrine of good faith – or the abuse of a right – under section 39 of the Contract Law (General Part) affords us with a tool "to thwart their counsel and to annul their evil thoughts."

4. I would point out that my colleague, the Deputy President, held that the renunciations could also be invalidated by recourse to the principle of "public policy." I doubt that this course is suitable in this matter. It is not easy to dismiss the claim that public policy considerations in fact support not cutting off a widow from her share of the estate.

5. Because my conclusions are primarily based on the special facts of the case at hand, I see no need to take a stance on the interesting discussion of the issues raised by my learned colleague, Justice Mazza, in his opinion. This discussion can be conducted when the time arises.

Decided, by a majority, according to the opinion of Justice S. Levin, against the dissenting opinion of Justice Mazza.

Under the circumstances, no party was ordered to bear costs.

May 16, 1999