[HIGH COURT OF AUSTRALIA.]

PSALTIS . . . . . Appellant;
Defendant,

AND

SCHULTZ . . . . . Respondent.
Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Sydney, *Aug.* 20.

Melbourne, *Oct.* 25.

Latham C.J., Dixon and Williams JJ.

Marriage—Breach of promise—Married woman—Promise made after decree nisi but before decree absolute—Contract—Mistake—Enforceability of promise—Public policy—Jury—Answers to questions—Common Law Procedure Act 1899 (*N.S.W.*) (*No.* 21 *of* 1899), *ss.* 116, 260.

A promise made by a person, after a decree nisi for dissolution of the marriage of the promisee had been pronounced but prior to its being made absolute, to marry the promisee is not contrary to public policy and is valid even though the agreement between those parties did not include a condition that the marriage was not to take place until the decree nisi had been made absolute and notwithstanding the absence of knowledge by one or both of the parties that a decree absolute was still required.

A promise to marry without any time mentioned is a promise to marry within a reasonable time upon request.

Fender v. *St. John-Mildmay*, (1938) A.C. 1, discussed.

Decision of the Supreme Court of New South Wales (*Full Court*): *Schultz* v. *Psaltis*, (1947) 48 S.R. (N.S.W.) 148; 65 W.N. (N.S.W.) 40, affirmed.

Appeal from the Supreme Court of New South Wales.

In an action brought by her in the Supreme Court of New South Wales, Jessie Boyd Schultz claimed from George Victor Psaltis damages in the sum of £1,000. The cause of action as alleged in the declaration was that "the plaintiff and the defendant agreed to marry one another and a reasonable time for such marriage has

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elapsed and the plaintiff has always been ready and willing to marry the defendant yet the defendant has neglected and refused to marry the plaintiff."

The defendant pleaded that he did not promise as alleged and denied the allegation that the plaintiff had always been ready and willing to marry the defendant.

Liberty therefor having been granted by the Court with the consent of the defendant's attorney, the plaintiff, on 28th February 1947, filed an amended declaration in which, as further amended at the hearing of the action, it was declared in the first count that before and after the making of the promise thereinafter alleged the plaintiff was a person who had been previously married and in respect of whose said previous marriage a decree nisi had been pronounced by the Supreme Court in its matrimonial causes jurisdiction not to be made absolute until the expiration of six months after service thereof but the decree nisi had not been made absolute and thereupon the plaintiff and the defendant agreed to marry one another after the decree nisi should be made absolute and from the time of the making of such agreement until the time when the defendant wrongfully refused to perform and broke his promise as thereinafter alleged the plaintiff was always ready and willing to marry the defendant when the said decree nisi should be made absolute yet the defendant thereafter and before the making absolute of the decree nisi wrongfully wholly broke put an end to and repudiated his promise and refused to be bound by the same and wrongfully exonerated and discharged the plaintiff from being willing to perform the said agreement on her part.

In the second count the plaintiff repeated the allegations of the first count down to and including the words " had not been made absolute " and said that thereupon the plaintiff and the defendant agreed to marry one another subject to and after the taking by her within a reasonable time of any necessary steps and the happening within a reasonable time of any and all events which might be or become necessary so to be taken or to happen to enable the marriage to be lawfully celebrated and from the time of the making of such agreement until the time when the defendant wrongfully refused to perform and broke his said promise as thereinafter alleged the plaintiff was always ready and willing to perform the said agreement on her part yet the defendant thereafter and before the said reasonable time had elapsed wrongfully wholly broke put an end to and repudiated his said promise and refused to be bound by the same and wrongfully exonerated and discharged the plaintiff from being willing to perform the said agreement on her part.

In the amended declaration the plaintiff claimed damages in the sum of £2,000.

By his pleas the defendant (i) denied the allegations and each of them contained in the first count down to and including the words "when the said decree nisi should be made absolute" and also the allegations contained in the second count down to and including the words "to perform the said agreement on her part" where first appearing, (ii) denied the breach alleged in both counts, and (iii) to the second count pleaded that the plaintiff did not within a reasonable time take necessary steps to enable the marriage to be lawfully celebrated in that she did not take steps to secure the making absolute of the decree nisi nor was the decree nisi made absolute within the said reasonable time.

At the hearing it was mutually arranged by counsel for the parties that the last-mentioned plea should not be relied upon and by consent it was struck out.

The decree nisi had been pronounced on 31st August 1945 by the Supreme Court of New South Wales in its matrimonial causes jurisdiction in a suit brought against the plaintiff by her husband. Although the decree could have been made absolute at the end of February 1946 it was not made absolute until 12th December 1946, on an application made by the husband.

The contract sued upon was alleged by the plaintiff to have been made about the middle of February 1946, and to have been repudiated by the defendant in July 1946. The action was commenced on 6th August 1946.

Evidence was given by the plaintiff that the defendant proposed marriage to her and she consented. He told her that there were some formalities which would have to be fixed up about her divorce and that she should see about it, and she said she would do that. Subsequently sexual intercourse took place on several occasions between them and a child was born. The plaintiff said in cross-examination that she was divorced but knew that there were some formalities that had to be fixed up before she could again marry. She said that she thought that after the period of six months had expired she would be free to marry, but that she would have to get some papers from the Divorce Office to show that she was divorced before she could again marry. There was evidence that the defendant refused to marry the plaintiff, and his case at the trial of the action was that he had never promised to do so.

At the trial of the action there was no proof of any express term in the agreement that the defendant would marry the plaintiff after the decree nisi had been made absolute or within a reasonable

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time after the plaintiff had taken the necessary steps for that purpose.

The trial judge directed the jury that, in the circumstances existing at the date of the alleged agreement, it was necessary, in order that the agreement should be valid, that, in the absence of an express term, it should be an implied term of the agreement that the marriage was to take place when the decree was made absolute. His Honour said that such a term was implied by law if the fact was that at the time when the promise was made both the parties to it knew that one of them was unable to or was not free to marry until a decree absolute was made. The onus was on the plaintiff to satisfy the jury by a balance of evidence that the defendant at the time when he made the alleged promise believed that some further matter or step remained to be taken in connection with the divorce proceedings against the plaintiff before they could marry. His Honour further said that the second question which he proposed to put to the jury was important because unless both parties knew that there was some impediment at that time in the way of their marriage it would be quite impossible to imply a term in the contract that the marriage was to take place if and when that impediment was removed.

The following questions were submitted to the jury :—

1. Did the defendant promise to marry the plaintiff ?
2. If so, did the plaintiff and the defendant then believe that something further remained to be done in connection with the divorce proceedings against the plaintiff before they could marry ?
3. Damages ?

The questions were answered by the jury as follows :—

1. Yes—by majority.
2. No.
3. £500.

The parties agreed that the trial judge should discharge the jury and be at liberty to enter whatever he thought was the appropriate verdict on the answers so given by the jury. A verdict was entered for the defendant on the first and second counts and judgment given accordingly.

An appeal by the plaintiff to the Full Court of the Supreme Court was allowed, the verdict and judgment entered for the defendant was set aside and judgment was entered for the plaintiff on the first count in the sum of £500 (*Schultz* v. *Psaltis* (1)).

From that decision the defendant appealed to the High Court.

(1) (1947) 48 S.R. (N.S.W.) 148 ; 65 W.N. (N.S.W.) 40.

Shand K.C. (with him *Zeims* and *Duffy*), for the appellant. This is a case of mutual mistake. Both parties acted upon an assumption which proved to be false. The parties made an agreement expressly conditional upon the existence at the time of the supposed state of facts. That state of facts being non-existent, the agreement destroyed itself. It followed, having regard to the jury's answer to the question, that the contract did include a tacit condition to this effect. The existence of a certain state of things must go to the very root of the matter, that is, to the whole of the consideration (*Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (*Ltd.*) (1)). The parties thought they were free to marry. It must be presumed that the parties intended to marry within a reasonable time irrespective of any impediment. In view of the ignorance of the parties as to the respondent's legal disability the contract would tend to induce a bigamous marriage, that is, immorality. The respondent was unaware of her legal disability therefore it cannot be said that she bound herself to remove it. Nor can it be implied that the legal disability would be removed by her within a reasonable time of her becoming aware that that disability existed. In the absence of those implications the contract would tend to conflict with public policy (*Wild* v. *Harris* (2)). Important facts are that both parties were unaware of any legal disability to the alleged proposed marriage and that that ignorance "is likely to lead to injurious action" (*Fender* v. *St. John-Mildmay* (3)). Regard must be had not only to whether the contract was lawful when made (*Spiers* v. *Hunt* (4) ; *Wilson* v. *Carnley* (5)), but also to whether its tendency was against public policy. In the circumstances, the evidence does not disclose the existence of a binding agreement. The agreement, if made, was based upon certain conditions assumed by both parties to exist but which in fact did not exist. The mistake as to the capacity of the respondent to marry was a vital one which went to the root of the contract. The pronouncement of the decree nisi does not terminate the status of husband and wife. Notwithstanding such a pronouncement that status may never terminate as the result of divorce proceedings (*Turner* v. *Kelly* (6)). The respondent has not proved readiness and willingness on her part to perform the agreement as she was not in a position lawfully to marry the appellant at the time when he repudiated the agreement.

(1) (1867) L.R. 2 Q.B. 580.
(2) (1849) 7 C.B. 999, at p. 1005; [137 E.R. 395, at p. 398].
(3) (1938) A.C. 1, at p. 21.
(4) (1908) 1 K.B. 720, at pp. 723, 727.
(5) (1908) 1 K.B. 729.
(6) (1913) 13 S.R. (N.S.W.) 444, at p. 450; 30 W.N. 95, at p. 96.

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Louat (with him *Bannon*), for the respondent. Whether there was evidence to support either or both counts depends upon whether the terms of those counts are to be implied by law into the promise and acceptance. The trial judge was in error in leaving the second question to the jury. The question whether the parties knew of the status of the respondent was irrelevant. The occasion for implying a term arises when the circumstances on which the implied term operates were unknown to the parties at the time of the contract. If the parties knew of the circumstances their failure to advert to the matter would show that the implication of the term was contrary to their intention (*Dahl* v. *Nelson, Donkin & Co.* (1), per Lord *Watson*; *Mackay* v. *Dick* (2)). In any event there was not any necessity for the implication of a term because a simple contract to marry is to be performed within a reasonable time having regard to all the circumstances. The fact that the respondent had not obtained a decree absolute was one of those circumstances, and it was material on this view whether the parties knew of it or not. The contention that the respondent's status made it impossible for the contract to be performed within a reasonable time was never raised for the appellant, and could not be raised, because his repudiation of the contract occurred before it could be suggested that a reasonable time had expired (*Frost* v. *Knight* (3)). As the law now stands the circumstance that one of the parties has obtained a decree nisi but not a decree absolute has no effect on the validity of a promise to marry (*Fender* v. *St. John-Mildmay* (4)). That decision disposes of any argument, on the present facts, founded on *Spiers* v. *Hunt* (5) and *Wilson* v. *Carnley* (6). Although there was an express term in *Fender's Case* (4) that the marriage was to take place after the decree absolute the decision did not turn on this aspect. By analogy, a contract to import goods would be valid notwithstanding that the parties had not at the time of the contract obtained a licence to import and were as yet unaware of the necessity for such licence. The form of the second question to the jury, taken with the jury's negative answer, merely established that the incompleteness of the respondent's divorce was not known to both parties. The answer left open three possibilities—that both of them were ignorant, or that the respondent was ignorant, or that the appellant was ignorant. It follows that there was no foundation in the finding of the jury for the defence of mutual

(1) (1881) 6 App. Cas. 38, at p. 59.
(2) (1881) 6 App. Cas. 251, at p. 263.
(3) (1872) L.R. 7 Ex. 111.
(4) (1938) A.C. 1.
(5) (1908) 1 K.B. 720.
(6) (1908) 1 K.B. 729.

mistake. Unless the mistake was mutual the validity of the promise was unaffected (*Wild* v. *Harris* (1)). Where a contract can be performed either in a legal or an illegal manner, the law presumes against illegality, and it is necessary to show that the party suing had the intention to break the law (*Waugh* v. *Morris* (2)). It is not now open to the appellant to contend that the contract to marry was avoided by mutual mistake. The trial was conducted by the appellant on the footing of a complete denial of any promise, and the defence of mutual mistake would have been inconsistent with this. If that defence had been raised the trial would of necessity have taken a different course. Rulings would have been given by the trial judge, and directions and questions left to the jury, which never became relevant. In these circumstances that issue cannot be raised now (*Varawa* v. *Howard Smith & Co. Ltd.* (3)).

Shand K.C., in reply.

Cur. adv. vult.

Oct. 25.

The following written judgments were delivered :—

LATHAM C.J. In this action Jessie Boyd Schultz sued George Victor Psaltis for damages for breach of promise of marriage. She was a married woman. Her husband on 31st August 1945 obtained a decree nisi for divorce against her. The promise to marry upon which the plaintiff sued was made in the middle of February 1946. On 29th July the plaintiff's solicitors wrote to the defendant claiming performance of his promise, and on 1st August the defendant's solicitor replied denying any promise to marry. The plaintiff issued the writ in the action on 6th August, alleging a promise to marry within a reasonable time, and relying upon the defendant's repudiation of his promise as a cause of action : *Hochster* v. *De La Tour* (4). In November the plaintiff took proceedings for prematernity expenses against the defendant, and it was then discovered that the decree nisi had not been made absolute, though it might have been made absolute upon the application of either the plaintiff or her husband at any time after the end of February 1946—*Matrimonial Causes Act* 1899, s. 23. The decree was made absolute on 12th December 1946 upon the application of the husband. In February 1947 the plaintiff's declaration was amended. The first count of the amended declaration alleged a promise to marry after the decree nisi should be made absolute, and the second count

(1) (1849) 7 C.B. 999; [137 E.R. 395].
(2) (1873) L.R. 8 Q.B. 202, at p. 208.
(3) (1911) 13 C.L.R. 35, at pp. 60, 61, 79, 95, 96.
(4) (1853) 2 El. & Bl. 678; [118 E.R. 922].

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alleged a promise to marry subject to and after the taking by the plaintiff within a reasonable time of any necessary steps to enable the marriage to be lawfully celebrated.

At the trial *Owen* J. directed the jury that the general rule was that an agreement to marry made between two persons, one or both of whom were then married, was against public policy and would not be enforced by the courts. There was, however, an exception (see *Fender* v. *St. John-Mildmay* (1)) where a decree nisi for divorce had been made against one of the parties. In that case a promise to marry expressly after the decree should be made absolute had been held to be enforceable. His Honour said that if both parties knew that there was an impediment in the way of the plaintiff marrying it would be possible to imply a term in their agreement that the marriage was to take place only when the decree was made absolute, but that unless both parties knew that there was such an impediment such a term could not be implied. Accordingly his Honour left the following three questions to the jury :—

" (1) Did the Defendant promise to marry the plaintiff ?

(2) If so, did the Plaintiff and the Defendant then believe that something further remained to be done in connection with the divorce proceedings against the plaintiff before they could marry ?

(3) Damages ? "

The answers of the jury were as follows :—

" (1) Yes—by majority.

(2) No.

(3) £500."

The parties agreed that his Honour might discharge the jury and that he should be at liberty to enter whatever he thought was the appropriate judgment on the verdict which the jury had given. His Honour applied the *Common Law Procedure Act* 1899, s. 116, which provides that in all cases of variance between the proof and the record on the trial of any action the court or judge, instead of causing the record or document on which the trial is proceeding to be amended at the trial, may direct the jury to find the fact or facts according to the evidence ; and, further, that the court shall, if it appears to the court that the variance was immaterial to the merits of the case and such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the rights and justice of the case. The verdict of the jury did not support either of the promises alleged in the counts of the declaration as amended. There was therefore a variance

(1) (1938) A.C. 1.

between the proof and the record and the section became applicable. His Honour regarded the negative answer to the second question as excluding the possibility of implying a term that the marriage should not take place until after the decree nisi had been made absolute. He was of opinion that a simple promise to marry a person who was still married, though a decree nisi for divorce had been made, was not enforceable if the promise contained neither an express nor an implied term that the marriage was to take place after decree absolute, and he therefore gave judgment for the defendant.

Upon appeal to the Full Court it was held by *Jordan* C.J. that *Fender* v. *St. John-Mildmay* (1) had decided that a promise to marry made by a party in the position of the plaintiff was not contrary to public policy, that in the present case it could be legally performed—all the plaintiff had to do was to make an application, which she could make at any time, for the decree nisi to be made absolute. *Davidson* and *Street* JJ. concurred in the view that the plaintiff was able to make herself capable of marrying lawfully within a reasonable time of the promise, and accordingly the Full Court directed that judgment be entered for the plaintiff for £500 damages. The defendant now appeals to this Court.

The relevant general rule is that a promise by a married person to marry another who knows that the promisor is married is void. Such a promise involves a continuance of marriage to one person and of betrothal to another, and is therefore inconsistent with the marriage obligation of loyalty to the other spouse. Thus a promise to marry after the death of a wife is void (*Spiers* v. *Hunt* (2); *Wilson* v. *Carnley* (3)). But the decision in *Fender* v. *St. John-Mildmay* (1) has introduced an exception to the general rule, viz.—a promise by a married person made after decree nisi for divorce to marry another person after the decree should be made absolute is valid. In that case the promise to marry was made expressly subject to the decree nisi being made absolute. In the present case the only finding of the jury is that a promise to marry was made after a decree nisi had been made, but with no reference to the time at which the marriage was to take place. A promise to marry with no time mentioned is a promise to marry within a reasonable time.

The rights of the parties must be determined upon the answers of the jury to the questions submitted to them by the learned trial judge. Those answers show that the jury did not accept the

(1) (1938) A.C. 1.
(2) (1908) 1 K.B. 720.
(3) (1908) 1 K.B. 729.

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evidence of the plaintiff that the defendant told her, and therefore knew or believed, that she would have to get some papers from the Divorce Court before she could remarry. The answer of the jury to the second question establishes that it was not the case that both parties believed that it was necessary to do something further before the woman could remarry. This answer leaves open the possibilities that one only of the parties so believed, or that neither of them so believed. Upon the findings of the jury it cannot be said that it was proved that either party thought of the necessity of getting the decree nisi made absolute.

If, however, the answer of the jury to the second question can be interpreted as meaning that at the time when the promise was made both parties believed that they were free to marry lawfully, then it can be argued (as it was argued) for the plaintiff that the fact that the parties did not advert to a particular contingency is just the ground upon which in some cases the courts have added a term by implication to a contract. Is there adequate ground, upon the basis that both parties believed that they were free to marry, for implying a term that the marriage should take place only after decree absolute? If such a term can be implied, this case would become identical in all relevant particulars with *Fender's Case* (1). But such an implication can properly be made only if it is so obvious that it "went without saying"—"so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course'" (*Shirlaw* v. *Southern Foundries* (1926) *Ltd.* (2)). In my opinion no such assumption with respect to the suggested implied term can be made in this case. It must, I think, be purely a matter of speculation as to how the defendant (believing, as supposed, that the plaintiff was quite free to marry him) would have acted if he had been told that the woman was only half-way through divorce proceedings and still had a living husband. It appears to me to be as likely that he would have drawn out of his intended marriage as that he would have said: "Of course we will marry, but only after decree absolute."

Upon the findings of the jury the case should be considered upon both of the two hypotheses which the findings leave open:—(1) promises to marry made by a man and a woman who both think that both parties are free to marry, but where the woman in fact is only part way on to such freedom by having had a decree nisi for divorce made against her; (2) promises to marry made when one

(1) (1938) A.C. 1.

(2) (1939) 2 K.B. 206, at p. 227.

or other, but not both, of the parties believe that a decree nisi would have to be made absolute before they could marry. The decision in *Fender's Case* (1) shows that there is nothing unlawful in such promises on the ground of public policy. All the arguments which were raised in the present case with reference to public policy were dealt with fully in *Fender's Case* (1). It is true that in that case both parties knew that it was necessary for the decree to be made absolute before they could marry. But, so far as public policy is concerned in relation to the institution of marriage, the absence of knowledge by one or both parties that it was necessary to obtain a decree absolute can make no difference where, if the facts had been known, the promise to marry would have undoubtedly been lawful. What *Fender's Case* (1) decides is that when both parties who exchange promises to marry know that there must be a decree absolute before marriage is lawfully possible, the promises are binding. If the promises are lawful when the parties know of this removable impediment, it is difficult to suggest any reason why promises made in identical circumstances, except that there is no such knowledge, should be held to be unlawful. Accordingly, I am of opinion that the main contention for the defendant fails.

It was argued that the defendant was entitled to judgment on the ground of mutual mistake—that he promised to marry a woman whom both he and she believed to be a marriageable person, and that she was not a marriageable person. I have already said that in my opinion the answer of the jury to the second question does not establish that both parties had this belief. In my opinion there are other answers to this contention, but it is sufficient to say that no case of mistake was made on the pleadings and that there is no finding of the jury which can be relied upon to support this contention.

It was also argued that the plaintiff had not shown readiness and willingness to marry because willingness included capacity to marry, and she had issued her writ before she was in a position to marry. But the defendant repudiated the promise before performance had become due, and the plaintiff was thereupon entitled to bring her action. As already stated, she was able at short notice to put herself in the position to perform her promise lawfully.

In my opinion the appeal should be dismissed.

DIXON J. As sometimes happens a nice point of law has been brought to the surface of an unedifying contest between unmeritorious suitors by the findings of a jury. It remains as the residual

(1) (1938) A.C. 1.

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question governing the liability of the defendant to the plaintiff. At this stage the merits, and the facts upon which the merits depend, may be disregarded and the problem stated in the abstract.

Is an unqualified contract to marry enforceable against a bachelor by a married woman against whom a decree nisi for dissolution of marriage had been pronounced before the contract was made but had not been made absolute ? To be enforceable must it be qualified by a term that the decree shall first be made absolute ?

To the abstract question three facts should be added which are special to the case. First at the time when the promise of marriage was given only two or three weeks of the period remained at the expiration of which the decree nisi might be made absolute. Secondly the plaintiff, the promisee, believed that her divorce was complete and that she was entitled to re-marry and she informed the defendant, the promisor, that she was divorced. Thirdly the defendant repudiated the contract and the plaintiff issued her writ before the decree nisi was in fact made absolute. It was made absolute before the trial on the application of her husband, the petitioner in the suit for dissolution.

The law is that a contract to inter-marry is invalid if, at the time it is made, one of the parties is to the knowledge of the other married, and this is so notwithstanding that the contract between them is that they will marry when the existing marriage is dissolved by death or is dissolved or annulled by decree (*Spiers* v. *Hunt* (1); *Wilson* v. *Carnley* (2); *Skipp* v. *Kelly* (3); *Siveyer* v. *Allison* (4)).

But a contract to inter-marry between parties, one of whom is married, is enforceable by the other if at the time when the contract was made the latter was unaware of the fact (*Wild* v. *Harris* (5); *Millward* v. *Littlewood* (6)). " Here the ground of liability is either estoppel, or better, implied warranty to perform the promise lawfully " : Sir *Frederick Pollock, Principles of Contract,* 12th ed., p. 266, note 68, basing his statement on the observation of *Phillimore* J. in *Spiers* v. *Hunt* (7). In such a case " the promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and he has broken that promise at the time of making it " (*Millward* v. *Littlewood* (8), per *Parke* B.).

A decree nisi for dissolution makes all the difference. The marriage of course subsists until decree absolute but the considerations are gone which invalidate a contract to marry after the

(1) (1908) 1 K.B. 720.
(2) (1908) 1 K.B. 729.
(3) (1926) 42 T.L.R. 258.
(4) (1935) 2 K.B. 403.
(5) (1849) 7 C.B. 999 [157 E.R. 395].
(6) (1850) 5 Ex. 775 [155 E.R. 339].
(7) (1908) 1 K.B., at p. 723.
(8) (1850) 5 Ex., at p. 778 [155 E.R., at p. 340].

existing marriage ends. Accordingly if, after decree nisi and before decree absolute, either the petitioner or the respondent to the suit enters into a contract to marry when the decree has been made absolute, that contract is enforceable by or against him or her. That is the result of the decision of the majority of the House of Lords in *Fender* v. *St. John-Mildmay* (1). There the promisor was the respondent in the suit for dissolution. But the proposition decided by the House of Lords was general, namely that a promise made by one spouse, after a decree nisi has been pronounced, to marry a third party after the decree has been made absolute is valid and enforceable (see (2)). But general as the proposition is, in terms it extends only to the case where according to the intention of the contract the marriage was to take place after decree absolute.

In the present case the promise was, or the promises were, general and no such condition was intended, because the parties believed that the prior marriage of the plaintiff had been dissolved. On the part of the plaintiff this must be taken to be due to ignorance of the legal necessity of making the decree nisi absolute : on the part of the defendant to her statement to him that she had been divorced. A general promise of marriage amounts to a contract to marry within a reasonable time upon request (*Harrison* v. *Cage* (3)).

It is true that the cases deciding that a promise of marriage is enforceable against a married person at the instance of a promisee who believed that the promisor was free to marry do not include a case where the promisee knew that the promisor had been married but supposed the marriage had been dissolved. They appear to have been cases in which the innocence of the promisee arose from a belief that the promisor never had been married. But the distinction does not seem material. Here the defendant believed, it must be assumed, that the plaintiff was free to marry and she, owing to the like belief, so represented.

It would have made no difference to the parties at that stage if they had known of the necessity of having the decree made absolute before the wedding ceremony. She would have taken the steps necessary : cf. s. 23 of the *Matrimonial Causes Act* 1899 (N.S.W.) and *O'Connor* v. *O'Connor* (4). Her innocent misrepresentation of her status has not been relied upon for a plea, equitable or otherwise. At the time of his anticipatory breach the defendant was not aware of her mistake if that matters. But in any case he might have had difficulty in the circumstances of this case in showing materiality and inducement.

(1) (1938) A.C. 1.
(2) (1938) A.C., at pp. 9, 26, 37.
(3) (1698) 1 Ld. Raym. 386 [91 E.R. 1156].
(4) (1942) 60 W.N. (N.S.W.) 13.

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The plaintiff's readiness and willingness to perform the promise on her part were put in issue. That involves a question requiring close consideration. It may be said that the quotations from Sir *Frederick Pollock's Principles of Contract*, 12th ed. (1946), p. 266, note 68, and from *Parke* B., *Millward* v. *Littlewood* (1) which have been set out, mean that when an unqualified promise to marry is given by one party to another in general terms, it implies a warranty, essential to the contract, that he or she is then and there legally capable of marrying without awaiting any further event or contingency.

To be ready and willing to perform a contract a party must not only be disposed to do the act promised but also have the capacity to do it. But the tenor of the promise will show when and how the act is to be performed and it is to that time and mode of performance that the capacity and disposition to fulfil the promise are to be directed. It is enough that he is not presently incapacitated from future performance and is not indisposed to do, when the time comes, what the contract requires. It is here that a distinction arises between the case of a promise given to a third party by a husband or wife whose marriage is not in process of dissolution and one given by a husband or wife for or against whom a decree nisi has already been pronounced. In either case, supposing the parties to contract on the footing that neither has the status of a married person, the mutual promises are to be interpreted as obliging them to marry within a reasonable time determined with reference to the actually free position of the one and the supposedly free position of the other (see Serjeant *Mannings' Note* (*a*) 1 to *Wild* v. *Harris* (2)). But in the former case the promisor is incapacitated from the beginning from fulfilling his or her engagement except by the barest chance, namely the immediate death of the other spouse, a chance which *ex hypothesi* the promisee did not bargain to depend on for performance. In the latter case however the party may be in a position to marry within a reasonable time although the time is fixed as reasonable as for persons free from the beginning to marry. She may be in a position to do so notwithstanding that something remains to be done to obtain her full freedom. That appears to have been the position between the present plaintiff and defendant. They did not contemplate an immediate marriage when the promises were first exchanged. Within a fortnight from that time, or little more, the period expired for making absolute the decree nisi. Either party to the suit for dissolution might then have applied.

(1) (1850) 5 Ex., at p. 77 [155 E.R., at p. 340].

(2) (1849) 7 C.B., at p. 1004 [137 E.R., at p. 398].

The defendant did not obtain a finding that the plaintiff was not ready and willing to marry him and on the facts he does not seem to have been entitled to such a finding.

The considerations to which I have adverted will dispose of the contention that the promise of marriage, the contract, sued upon was void on the ground of mistake. There was no mistake by one party known to the other as to the terms intended. There was no mistake by the plaintiff as to the identity of the defendant, only as to the existence in her of an absolute, instead of an inchoate, freedom to marry. The object or subject matter of the transaction was beyond mistake; it was intermarriage. The nature of the contract was not affected by the impediment to be removed before there could be performance.

Mr. T. H. Tylor concludes an important study of the General Theory of Mistake in the Formation of Contract 1948 *Modern Law Review*, vol. 11, p. 257, by saying that for no contract to come into existence through fundamental error, the mistake must be as to the identity of the other party—as opposed to his attributes; as to the substance of the subject matter—as opposed to its qualities: or as to the nature of the transaction—as opposed to its terms. It is apparent that the present case is not of any such description.

Again the contract was not incapable of performance legally. A contract based upon the supposition that proceedings for dissolution of marriage are completed does not necessarily involve a promise to go through the ceremony of marriage although the proceedings are never completed. It may include or involve a promise to marry within a time that does not permit of the completion of the proceedings judicially to dissolve the marriage. But that is another matter and it has been dealt with. If the stipulated time allows of the removal of the impediment, there is no illegality necessarily involved in a marriage in strict pursuance of the contract. The question comes down in the end to one of public policy.

It is against public policy, as it has been held, for a married person, while the marriage is intact, to promise marriage to a third party if and when the existing union is dissolved, whether by death of the other spouse or judicially. But it is not against public policy, if by decree nisi there has already been an inchoate dissolution. The reason is to be found in the change in the matrimonial relations of the parties to the suit when a decree nisi is pronounced and in the imminence of the change of status that the decree absolute will produce. The parties are relieved from most of the duties and obligations attending the marriage, though the status remains and incontinence is still adultery. "A decree nisi puts an

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end to the whole content of the marriage contract, leaving only the shell, that is, the technical bond " : *per Greer* L.J. *Fender* v. *Mildmay* (1). The contrast between cases in which a husband during the lifetime of his wife promises to marry another woman on the death of his wife and cases in which after decree nisi, he promises another woman to marry her when the decree is made absolute is insisted upon by Lord *Atkin* in *Fender* v. *St. John-Mildmay* (2).

In the first case his Lordship thought that " there is real substance in the objection that such a promise tends to produce conduct which violates the solemn obligations of married life. . . . If the moral ideal and the legal obligation are expressed in the promise to love and to cherish it may well be doubted whether they can exist unimpaired in the presence of a betrothal to another. . . . But let us consider how far the normal obligations and conditions of marriage continue in ordinary circumstances after decree nisi. They have disappeared : there is no *consortium*, and the parties are living apart : they owe no duties each to the other to perform any kind of matrimonial obligation : the custody of the children has been provided for by the court : the maintenance of the wife, if petitioner, is similarly provided for : the petitioning spouse has said : 'I have done with you.' In these circumstances what possible effect can a promise to marry a third person have by way of interference with matrimonial obligations ? " (3). Speaking of the latter case Lord *Wright* said : " If realities are to be looked at and not mere form, by the Court, as the Court did in regard to judicial separation, the marriage is at an end, and the parties are entitled to provide for their future, at the end of the period fixed for the decree absolute, when by English law they are entitled to marry again. How can the public interest in regard to marriage be prejudiced if the innocent petitioner then desires to enter into an engagement, conditional on the decree absolute, for a fresh marriage ? " (4). So far the reasoning of *Fender* v. *St. John-Mildmay* (5) is applicable alike whether the promise of marriage is made either expressly or impliedly conditional upon the pronouncing of a decree absolute or is general importing only marriage upon request within a reasonable time. But a point made in *Fender* v. *St. John-Mildmay* (5) is that the promise was to do a perfectly lawful act. " From the point of view of law it ought to be remembered as an essential factor in this discussion that by

(1) (1936) 1 K.B. 111, at p. 117.
(2) (1938) A.C., at pp. 15-17.
(3) (1938) A.C., at pp. 16, 17.
(4) (1938) A.C., at p. 46.
(5) (1938) A.C. 1.

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. To me 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 its fulfilment do nothing, and are not induced by the promise to do anything, contrary to the public interests" (per Lord *Atkin* (1)).

It is at this point that the question again arises whether the contract between the parties did mean the performance of the ceremony of marriage whether the decree had been made absolute or not. In a sense it is a simple case of the parties supposing that a condition had been fulfilled which they treated as necessary but which remained to be fulfilled and could be fulfilled before the time for performance. Without fulfilment of the condition performance would be not only unlawful, it would be impossible. Fulfil it and there would be no difficulty. Why in these circumstances should the contract be interpreted as one to do the act, be it lawful or be it unlawful ? The true intent of the parties was to avail themselves of the completion of the divorce to marry lawfully. Their erroneous supposition that nothing more was needed to complete it, leaves them in the position of parties encountering or discovering an uncontemplated requirement which must be fulfilled before performance is possible, but which can be so fulfilled.

An actual intention to make performance depend on the making absolute of the decree nisi cannot be attributed to the parties, for they were unaware that it was necessary. But an actual intention is not the only means by which the operation of their agreement is ascertained.

"The very purpose of implied terms is to supplement the defective actual intention of the parties by filling up *lacunae* and making the necessary provision for *casus omissi*. By necessary implication is meant such an implication as is necessary to give efficacy to the contract by so supplementing its express terms as to make it a workable and complete agreement in such manner as the parties would presumably have themselves adopted had the question been brought to their minds and been made the subject of express provision at the time when the contract was made. The law attributes to parties by this process of interpretation the intention which as reasonable men they must necessarily have formed and expressed on the making of the contract if the matter had then been called to their attention. The intention so attributable to them is imported

(1) (1938) A.C., at p. 17.

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into the contract by the law as an implied term thereof" (*Salmond and Williams* on *Contracts*, (1945) pp, 39, 40).

To imply that each party shall take all lawful steps required for the solemnization of a valid marriage between them is almost inherent in their engagement. Such an implication may properly be made. Under it the plaintiff became bound, if she could, to complete by decree absolute the dissolution of her former marriage. Provided that she could do so within the reasonable time measured in accordance with the supposition of the parties at the time of the promise that they were free people, there would seem to be no reason why the contract should not be so performed and no reason why it should be regarded as tainted with illegality or as contrary to public policy.

It follows from the foregoing that the contract was enforceable. The defendant's anticipatory renunciation of course relieved the plaintiff from any necessity thereafter of fulfilling conditions precedent in respect of which she was not already in default.

For the defendant appellant a contention was advanced to the effect that under the findings of the jury there was a variance between the contract declared upon and that upon which by the judgment of the Full Court she had recovered.

The answer given in the Full Court by *Davidson* J. was that s. 116 of the *Common Law Procedure Act* enabled the Supreme Court to give judgment according to the right and justice of the case. I see nothing unsatisfactory in this view. A combination of ss. 116 and 260 of the *Common Law Procedure Act* seems to warrant the course taken by the Full Court.

In my opinion the appeal should be dismissed with costs.

WILLIAMS J. This is an appeal by the defendant in an action in which he is being sued by the plaintiff for breach of promise of marriage. In the middle of February 1946, the date of the alleged promise, the plaintiff was a married woman but the Supreme Court in its matrimonial causes jurisdiction had made a decree nisi for dissolution of the marriage on the suit of her husband. As the decree nisi was made on 31st August 1945, and the period after which an application could be made to make it absolute was the usual period of six months, less than one month of this period was still unexpired at the date of the promise. The plaintiff gave evidence that at the time of the promise the defendant told her that there were some formalities which would have to be fixed up about her divorce and that she should go down to the Divorce Court and get some papers and she said that she would do so. On

29th July 1946 the plaintiff's solicitors wrote to the defendant stating that she would proceed against him unless he fulfilled his promise to marry her. On 1st August 1946 the defendant's solicitors replied stating that the defendant most emphatically denied any agreement to marry the plaintiff. The period of six months had then expired but no application had been made by either the husband or the plaintiff to have the decree nisi made absolute. The decree nisi was not made absolute until 12th December 1946 when it was made absolute on the motion of the husband.

The plaintiff issued the writ in the action on 6th August 1946. The declaration at first contained the usual count that the plaintiff and defendant agreed to marry one another; and a reasonable time for such marriage had elapsed, and the plaintiff had always been ready and willing to marry the defendant yet the defendant had neglected and refused to marry the plaintiff. But the plaintiff subsequently amended the declaration by deleting this count and substituting two fresh counts, the first alleging an agreement to marry after the decree nisi should be made absolute, and the second alleging an agreement to marry subject to and after the taking by the plaintiff within a reasonable time of any necessary steps and the happening within a reasonable time of any and all events which might be or become necessary so to be taken or to happen to enable the marriage to be lawfully celebrated.

At the trial the learned judge left three questions to the jury—(1) Did the defendant promise to marry the plaintiff? (2) If so, did the plaintiff and the defendant then believe that something further remained to be done in connection with the divorce proceedings against the plaintiff before they could marry? (3) Damages? The jury answered the first question in the affirmative and the second question in the negative. In answer to the third question the jury assessed the damages at £500. The parties then agreed that his Honour might discharge the jury and be at liberty to enter whatever he thought was the appropriate verdict on their answers. His Honour said that, in his opinion, mutual promises of marriage between two persons, one of whom was then married, were prima facie void as being against public policy. He said that there was an exception to the general rule where at the time of the promise a decree nisi had been made for the dissolution of the marriage, provided that it was a term of the agreement to marry that it was to be performed after the decree had been made absolute. He said that such a term would be implied by law in the contract if both parties knew of the impediment at the time of their agreement, but that it followed from the second answer of the jury that

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no such term could be implied in the present case. The defendant was therefore entitled to a verdict on the first and second counts and there must be judgment accordingly.

The plaintiff appealed to the Full Supreme Court of New South Wales. In separate judgments the Full Court (*Jordan* C.J., *Davidson* J. and *Street* J.) held that the agreement to marry was not unlawful, that it was capable of being performed in a lawful manner, and that whilst it was still capable of being performed in a lawful manner the defendant repudiated his obligations under it. The Chief Justice pointed out that no point was taken throughout the trial that the necessity for obtaining the decree absolute prevented the contract from being performed within a reasonable time, and that this was not surprising seeing that the agreement was alleged to have been made in the middle of February and the decree absolute could have been obtained at the end of that month. The Full Court therefore allowed the appeal with costs, set aside the verdict and judgment for the defendant and entered judgment for the plaintiff on the first count for £500.

The defendant has appealed to this Court from the order of the Full Supreme Court. It is evident from the answers of the jury that they must have accepted the plaintiff's evidence only to the extent that the defendant promised to marry her, both believing she was divorced and then free to marry, and that the jury did not accept her evidence that at the date of the promise they both believed that she was not completely divorced and that something further had to be done before she could marry the defendant. The evidence did not therefore sustain the counts in the amended declaration, but s. 116 of the *Common Law Procedure Act* 1899 (N.S.W.) provides that in all cases of variance between the proof and the record on the trial of any action the court, instead of causing the record or document on which such trial is proceeding to be amended at such trial, may direct the jury to find the facts according to the evidence. *Davidson* J. relied on this section in agreeing that judgment should be entered for the plaintiff on the first count.

Mr. *Shand* submitted that on the jury's findings there was no evidence to support either count of the declaration but I did not understand him to press this submission strongly. In any event the substantial issue of fact was whether the defendant had promised to marry the plaintiff and I agree with *Davidson* J. that this is a case in which the section should be applied if the plaintiff is entitled to succeed on the answers of the jury.

The four submissions pressed by Mr. *Shand* were (1) that the evidence disclosed that there was mutual mistake as to the existence

of facts material to the contract found by the jury; (2) that this contract was void as being against public policy in the sense that it tended to cause immorality and crime; (3) that it was void as being a contract to procure an illegal act; (4) that the plaintiff had failed to establish readiness and willingness to perform the contract as she was not in a position lawfully to marry the defendant at the time when her rights crystallized by his repudiation.

There is, in my opinion, no substance in the first submission. On the findings of the jury it must be assumed that both parties believed that the plaintiff was divorced. But before a contract can be invalidated on the ground of mutual mistake, the mistake must be as to a fact at the root of the contract. Here there was no such mistake. The root of the contract was the agreement to marry. There was no mistake as to the subject matter of the contract or the identity of either party. The defendant knew that he was marrying a woman who had been married. The only mistake was that the parties both believed that the plaintiff was free to marry at the date of the promise. But this mistake was not material to the making of the contract. It related entirely to the immediate ability of the plaintiff to perform the contract. It did not in any way affect the reality of the consent of the parties.

The other three submissions can be disposed of together, the crucial question being whether a promise to marry is void *ab initio* when it is made by a married person whose marriage has reached such a stage of dissolution that divorce proceedings have been taken and a decree nisi for dissolution of marriage has been made. There is no statute which makes such a promise unlawful. It can only be void on the ground that it is contrary to public policy. In *Fender* v. *St. John-Mildmay* (1), Lord *Atkin* said that this doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable. Its effect on the validity of promises to marry has been discussed in a number of recent cases. The leading case is, of course, *Fender* v. *St. John-Mildmay* (2). The House of Lords did not express any final opinion whether *Spiers* v. *Hunt* (3) and *Wilson* v. *Carnley* (4) were rightly decided. Assuming that they were rightly decided (and they are supported by the remarks of Lord *Dunedin* in delivering the judgment of the Privy Council in *Skipp* v. *Kelly* (5)) the only case in which it has been held that a promise to marry is void on this ground is where the promisor is to the knowledge of the promisee a married person.

(1) (1938) A.C., at p. 12.
(2) (1938) A.C. 1.
(3) (1908) 1 K.B. 720.
(4) (1908) 1 K.B. 729.
(5) (1926) 42 T.L.R. 258.

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The contract under discussion in *Fender* v. *St. John-Mildmay* (1) was a promise by a married person against whom a decree nisi had been made to marry immediately the decree nisi had been made absolute. But the basis of the decision is that after a decree nisi there is no ground of public policy which prevents a married person making a fresh promise to marry. Lord *Atkin* said " But let us consider how far the normal obligations and conditions of marriage continue in ordinary circumstances after decree nisi. They have disappeared: there is no *consortium*, and the parties are living apart: they owe no duties each to the other to perform any kind of matrimonial obligation: the custody of the children has been provided for by the court: the maintenance of the wife, if petitioner, is similarly provided for: the petitioning spouse has said: 'I have done with you.' 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. . . . from the point of view of law it ought to be remembered as an essential factor in this discussion 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 " (2). Lord *Thankerton* said " it is conceded that public policy prevents the enforcement of a promise of marriage by a married person to a third party made prior to the decree nisi, but the appellant maintains that the principle no longer applies after the decree nisi is pronounced " (3). Lord *Wright* said " the order nisi in truth determines the status of the parties though its final operation is suspended and it is subject to a contingency " (4). . . . " But it is obvious that in truth and in substance there is no longer any marriage. There is no longer any matrimonial home, no *consortium vitae*, no right on either side to conjugal rights " (5).

In my opinion there is no objection on the ground of public policy to a married person making an unconditional promise to marry after a decree nisi has been made. It is not a contract in the performance of which there will be generally any tendency to do wrong. The contract itself is lawful and it can only become unlawful if it is entered into for an unlawful purpose, that is to say, if it is a

(1) (1938) A.C. 1.
(2) (1938) A.C., at pp. 16, 17.
(3) (1938) A.C., at pp. 23, 24.
(4) (1938) A.C., at p. 45.
(5) (1938) A.C., at p. 46.

contract to marry before the decree nisi is made absolute. It is to be noted that in *Spiers* v. *Hunt* (1) the contract expressly provided that the marriage should take place after the death of the defendant's wife, whereas in *Wilson* v. *Carnley* (2) there was no express provision when the marriage should take place. But *Vaughan Williams* L.J. evidently thought that such a term should be implied because he said, " The question in this case is whether a promise made by a married man during the lifetime of his wife to marry some other woman, presumably after his wife's death, because he could not do so in her lifetime, can be enforced " (3). It would seem to follow that in the case of a promise to marry by a married person whose divorce has proceeded to the stage of a decree nisi to the knowledge of the promisee, a term should also be implied that the marriage should not take place until the decree nisi has been made absolute. But it is to my mind immaterial that the promisee does not know that the decree has not been made absolute. Each party to the contract must be ready and willing to marry the other. Readiness and willingness include ability to perform the contract. But the contract is a contract to marry in a reasonable time upon request. The plaintiff was never requested by the defendant to perform the contract. If she had been so requested, she would have been entitled to reasonable notice, and she would have been a person who was ready and willing to perform the contract if she had been able to obtain the decree absolute in the meantime. But the contract was repudiated by the defendant before any such request and therefore before the time for performance had arrived, and this entitled the plaintiff to treat the contract as discharged and to sue immediately for damages for breach of contract (*Frost* v. *Knight* (4)).

For these reasons I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *McCaw, Moray & Johnson.*
Solicitors for the respondent, *Gilbert M. Johnstone & Co.*

J. B.

(1) (1908) 1 K.B. 720.
(2) (1938) 1 K.B. 729.
(3) (1908) 1 K.B., at p. 733.
(4) (1872) L.R. 7 Ex. 111.