C.A. 191/51

LEIB SKORNIK

v.

MIRIAM SKORNIK

In the Supreme Court sitting as a Court of Civil Appeal
[February 19, 1954]
Before Olshan D.P., Agranat J. and Witkon J.

Family law - Husband and wife - Civil marriage according to law of domicile - No religious ceremony - Validity of marriage - Private International Law - Maintenance - Local law - Jewish law.

The parties were married in Poland on April 2, 1948, according to civil law, without a religious ceremony. They were at that time Polish citizens who were domiciled in Poland, and they remained domiciled in that country after their marriage. They immigrated to Israel in 1950 and thereupon became stateless. Thereafter the husband instituted action against the wife in a District Court for the return of effects or payment of their value, and the wife counterclaimed for maintenance. It was held in the District Court that, in accordance with the principles of international law, the law to be applied in regard to the validity of the marriage was Polish law, and that the law to be applied in regard to the husband's liability for maintenance was Jewish law; that a valid marriage had been contracted; that the claim - based as it was on the Civil Wrongs Ordinance, 1944, - could not be maintained, and that the wife was entitled to maintenance.

The husband appealed.

HELD: Per Olshan D.P.

(1) That whether the law to be applied regarding the validity of the marriage was Polish law or Jewish law, a valid marriage had been contracted, as the presumption in favour of such a marriage had not been rebutted.

(2) Semble, that the District Court had been entitled to apply private international law, and that it had correctly decided that the validity of the marriage was to be determined in accordance with Polish law.

Per Agranat J.

(l) That the District Court had correctly applied the principles of private international law, and that the validity of the marriage was to be determined in accordance with Polish law.

(2) That since the operative facts which constituted the cause of action of the claim all took place in Israel, such claim must be dealt with in accordance with local law, and that having regard to the provisions of the Civil Wrongs Ordinance, 1944, the claim must fail.

(3) That the wife's right to maintenance was to be decided in accordance with Polish law but that the amount of maintenance to be payable, being a question of remedy, was to be decided in accordance with local law, namely, Jewish law.

Per Witkon J.

(1) That the principles of private international law take precedence over all other laws, that the validity of the marriage was to be determined according to Polish law, and that according to that law there had been a valid marriage.

(2) That the right to maintenance of a wife married under Jewish law must be applied in favour of a wife whose marriage is based upon foreign law which is recognised by local law, and

(3) (dissenting on this point from the opinion of Olshan D.P.) that if the validity of the marriage was to be tested by Jewish law, there was no reason for disturbing the finding of the District Court that that presumption in favour of such a marriage had been successfully rebutted by the husband.

Palestine cases referred to:

(1) *C.A.* 195/43 - *Gertrud Freyberger v. Otto Friedman ;* (1943), 10 *P.L.R.* 405.

(2) *C.A.* 122/44 - *Haim Cohen v. Rachel Ludmirer;* (1944), 11 *P.L.R.* 522.

(3) *C.A.* 119/39 - *Pessia Nuchim Leibovna Shwalboim v. Hirsh (Zvi) Swalboim;* (1940), 7 *P.L.R.* 20.

(4) *C.A.* 234/45 - *Ursula Tennenbaum v. Joseph Tennenbaum;* (1945), *S.D.C.* 431; (1946), 13 *P.L.R.* 201 *(on appeal).*

(5) *C.A.* 158/37 - *Leib Neussihin and Others v. Miriam Neussihin;* (1937), 4 *P.L.R.* 373.

(6) *C.A.* 11/41 - *Eliyahu Bichovski* v. *Nitsa Lambi-Bichovski;* (1941), 8 *P.L.R.* 241.

(7) *Probate* 290/45 - *Levin v. Goldberg and Another;* (1946), *S.D.C.* 320.

Israel cases referred to:

(8) *C.A.* 26/51 - *Shimon Cotic v. Tsila (Tsipa) Wolfsohn,* (1951) 5 P.D. 1341.

(9) *C.A.* 238/53 - *Aharon Cohen and Bella Bousslik v. Attorney-General;* (1954), 8 P.D. 4.

(10) *C.A.* 87/49 - *Zvi Levin* v. *Haya Naha Levin;* (1951) 5 P.D. 921.

(11) *C.A.* 100/49 - *Estate of Meir Miller, Deceased v. Rivka Miller;* (1951), 5 P.D. 1301.

(12) *C.A.* 98/47 - *Ernst Halo v. Alfreda Yohanna Halo (known as Alfreda Yohanna Lange) and Others;* (1948/49), 1 P.E. 195.

(13) S.T. 1/49 - *Aharon Rosenbaum v. Sheina Miriam Rosenbaum;* (1953), 7 *P.D.* 1037.

(14) *C.C.* M/48/201 - *Dr. Gershon Burg v. The Attorney-General;*(1919), 2 P.M. 24.

English cases referred to:

(15) *Spivack v. Spivack;* (1930), 142 L.T. 492.

(16) *Srini Vasan (otherwise Clayton) v. Srini Vasan;* [1945] 2 *All E.R.* 21.

(17) *Baindail (otherwise Lawson) v. Baindail;* [1946] 1 *All E.R.* 342.

(18) *In re Goodman's Trusts;* (1881), 17 *Ch.D.* 266.

(19) *Salvesen or Von Lorang* v. *Administrator of Austrian Property;* [1927] *A.C.* 641.

(20) *Pugh* v. *Pugh;* [1951] 2 *All E.R.* 680.

(21) *Brook* v. *Brook;* (1858), 3 Sm. & G. 481; 65 *E.R. 746; affd. H.L.,* (1861), 9 *H.L. Cas.* 193; 11 *E.R.* 703.

(22) *In re Paine. In re Williams, Griffith v. Waterhouse;* [1940] *Ch. 46.*

(23) *Conway v. Beazley;* (1831), 3 *Hag. Ecc.* 639; 162 *E.R.* 1292.

(24) *De Reneville v. De Reneville;* [1948] P. 100.

(25) *In re Luck's Settlement Trusts;* (1940) *Ch.* 864.

(26) *J. D' Almeida Araujo LDA. v. Sir Frederick Becker and Co. Ltd.;* [1953] 2 *All E.R.* 288.

(27) *Dean v. Dean;* [1923] P. 172.

(28) *The Colorado;* [1923] P. 102.

(29) *In re De Wilton; De Wilton v. Montefiori;* (1900) 2 *Ch.* 481.

(30) *Lindo v. Belisario;* (1795), 1 *Hag. Con.* 216; 161 *E.R.* 530.

Sheps for the appellant.
Marks for the respondent.

OLSHAN D.P. This is an appeal from a judgment of the District Court of Tel Aviv of October 12, 1951, dismissing a claim of the appellant which he had brought against the respondent for the return of effects, or payment of their value to the sum of approximately IL. 404.-, and allowing the counter-claim of the respondent for her maintenance.

Both parties resided permanently in Poland and were nationals of that country. On April 2, 1948, the parties were married in Poland according to civil law, without a religious ceremony. The learned judge held in his judgment that "the couple at first thought of living together in Warsaw, but since Poland had not yet been delivered from the scourge of 'key-money', and since they had already begun to think of leaving that country, they decided that for the time being they would each continue to live in his or her own birthplace - in the case of the appellant, the town of Chekhanov and in the case of the respondent, the town of Gleivitz near Katovitz, and that they would continue to see each other from time to time, which they did."

The couple came to Israel on March 17, 1950, with a view to settling here. It would appear that on reaching Israel they lost their Polish nationality and became stateless. The couple lived at first in an immigrants' camp, but afterwards they left the camp without providing themselves with a permanent place of residence.

According to the respondent, she agreed to leave the immigrants' camp because the appellant promised her to obtain a flat, and because of his argument that so long as they lived in an immigrants' camp he would be unable to find work. Some time after they left the immigrants' camp, quarrels broke out between the parties. According to the respondent, the appellant did find work, but refused to support her or to look for a place in which she could live, and caused her untold suffering. These quarrels brought the parties to court. In August 1950, the appellant lodged his claim and in September, 1950, the respondent filed her defence and counterclaim.

In connection with the claim and counter-claim, the question arose whether a marriage subsisted between the parties. It was submitted by the appellant that since the parties were stateless they were subject to Jewish law and that, in consequence, a marriage which had been celebrated, according to Polish law without "Hupa Ve-Kiddushin"[1], could not be recognised in Israel. The appellant also attempted to show that the marriage was not valid in Poland in the light of the facts of the case; but without success. The submission in law of the appellant set out above, became the real dispute between the parties, and is also the main problem in the appeal before us. If the marriage was valid, there was no basis for the appellant's claim - based as it was, in the opinion of the learned judge, on the Civil Wrongs Ordinance, 1944 - and he should be ordered to pay maintenance, while if the marriage was invalid, the claim was well-founded, and the counter-claim should be dismissed.

The question before us is: what law is applicable to determine the validity of the marriage?

The learned judge held, in a carefully reasoned judgment, that the marriage was valid, and that the parties are to be regarded as man and wife. The approach of the learned judge to the problem may be summed up very shortly. In accordance with the principles of private international law, the law to be applied regarding the validity of the marriage is the law under which the marriage was celebrated, that is to say, Polish law; the law to be applied regarding the appellant's liability for maintenance is Jewish law. In

[1] Hupa Ve-Kiddushin (sometimes referred to simply as Hupa or Kiddushin), the ceremony of sanctification under the canopy, the final stage of the Jewish marriage ceremony.

other words, it must be assumed that the parties are man and wife, and it must then be determined in accordance with Jewish law if the behaviour of the appellant towards his wife in Israel, which preceded the filing by her of the counter-claim, entitles her to maintenance under that law.

Before reaching the conclusion stated, the learned judge analysed the question of the validity of the marriage from the point of view of Jewish law in the following terms:

> "As against this, I agree that the parties never intended that their marriage, which is valid according to the personal law which applied to them during their residence in Poland, should be Kiddushin within the meaning of Jewish law. In the absence of other evidence, it is sufficient for me to quote from the evidence of the plaintiff and of the defendant on this subject. On page 2 of the record the plaintiff said: 'There were rabbis in Poland. I do not believe in God and no religious marriage therefore was celebrated.' And further, on the same page: 'I did not celebrate a religious marriage because such marriages mean nothing to me.' The defendant said on page 20: - 'I requested a Hupa, but he said there was no necessity.' I conclude from the evidence of the parties that there was nothing to prevent the celebration in Poland of a Jewish marriage, although it may have been impossible to dispense with a marriage by Polish law, but I do not believe the defendant, who sought to convince me that she, and to a lesser extent her husband, were in fact religious. In regard to this point I accept the version of the plaintiff without reservation, and I am satisfied that the parties gave no thought whatever to the Jewish religious aspect of their uni on. It was the intention of the parties to achieve the status of marriage in accordance with the provisions of Polish civil law, and of that law alone.
>
> Since the parties at no time intended to be married by Kiddushin according to Jewish law, that law will not regard their union as a marriage. The cohabitation of the plaintiff and the defendant cannot be regarded as cohabitation for the purposes of Kiddushin, though it

certainly was cohabitation for the purposes of marriage under Polish civil law.

There is no presumption to assist the defendant in her submission that it must at least be presumed that she has been married by Kiddushin according to Jewish law. From the point of view of Jewish law the parties have never enjoyed the status of a married couple."

In Jewish law there is a presumption, of which a hint is given above, to the effect that "a man does not indulge in sexual intercourse for the purpose of sin", and that there is, therefore, with cohabitation "an intention of marriage." In other words, when a man cohabits the law presumes that he has marriage in mind, and a bill of divorcement is therefore necessary to dissolve the marriage. This subject has been a bone of contention for many centuries between those who argue for a strict interpretation of the law and those who wish to be more lenient regarding the question whether a woman, who has not been married according to Jewish rites, does or does not require a divorce in order to marry some other person. According to those who take a strict view of the law, a divorce is necessary because of the presumed intention to marry by way of cohabitation. On the other hand, according to those who argue for the more lenient view, the woman does not require a divorce if there was no reason to believe that there was any intention to marry. In other words, those who take the strict view demand a divorce in the absence of a clear foundation for the belief that there was no intention of marriage, while those who argue for the more lenient view do not demand a granting of divorce where there is no evidence of an intention to marry. Both these schools of thought, however, recognise the presumption referred to, and the whole dispute relates only to the necessity for the granting of a divorce. Both schools require that a searching enquiry be conducted before giving a decision in any particular case, and it is very doubtful if they would rely on the evidence of a husband who appears before them as a party interested in setting the marriage aside. In the absence of any other evidence, it is doubtful if even those who take the more lenient view would agree to come to a decision purely upon the basis of the evidence of the husband interested in setting aside the marriage, who appears before them saying, "I do not accept the presumption, and you cannot therefore attribute to me any intention of marriage according to Jewish rites." After all, in Jewish law, as is well

known, a litigant is not a competent witness. Further, he puts himself in the wrong by denying a presumption which is one recognised by law. If, however, it be said that this is a matter which belongs to the law of evidence, and that in that respect the learned judge was not bound by Jewish law *(Cotic v. Wolfsohn* (8)), I doubt whether according to secular law also the learned judge would have been able to rely merely upon the evidence of the appellant (the plaintiff) in the absence of any other evidence.

It must not be forgotten that the question whether the absence of a Jewish form of marriage was intentional or due to an oversight, or because of an objection to the expression of a religious intention, is a question of fact, and that in this case additional evidence in support of that of the appellant - an interested party - was required, before the matter could be properly decided.

In speaking of the appellant (before the passage quoted above), the learned judge says: -

> "I am surprised to what depths he fell. He had heard from his lawyer that according to Jewish law - if it applies to the personal status of the litigant - his union with the defendant was not within the framework of a marriage at all. He had heard that Jewish law recognises cohabitation as a basis for marriage, and when a man and woman live together for some time and the reputation in the community is that they are husband and wife, there arises a presumption of a valid marriage. Thereupon he so lowered himself as to commit perjury before me and swear that at no time did he regard the defendant as his wife, but as his mistress. I do not, of course, believe one word of this. Let there be no misunderstanding whatsoever. The submissions which a litigant desires to make are a matter for his own conscience - if he has a conscience. The submission of the plaintiff that Jewish law - and Jewish law alone - applies to the personal status of the parties, and that according to that law they never enjoyed the status of a married couple, is a legitimate submission. I am about to deal with it in all seriousness. It is one thing to submit that a marriage which is valid at the place where it was celebrated is not

> recognised by the law which applies to their personal situation; it is quite another to give evidence which is a tissue of lies and which purports to lay down that from the outset, and from the subjective point of view of the parties or of one of them, there was no intention of a marriage even within the meaning of the law which applied at the place where the marriage was celebrated. I have no doubt that from the point of view of Polish law during the period of their residence in Poland, the parties contracted a valid marriage."

I do not quote the above passage in order to reach the conclusion that the marriage was also valid according to Jewish law, nor do I express any opinion on that point. The question of whether the respondent will or will not require a divorce should she wish to marry another man does not arise for decision in this case, since the respondent's claim is for maintenance. It is sufficient for me to say that whether Polish law applies or whether Jewish law applies there exists in the circumstances a presumption that the parties are man and wife, and in order that the appellant be relieved of his obligation to pay maintenance, it was for him to rebut that presumption, whether he relies upon Jewish law or upon Polish law. *Semper praesumitur pro matrimonio.* In *Spivak v. Spivak* (15), a Jewess who came from Poland brought a claim against her husband for maintenance. Her husband had lived apart from her in England for many years, and a question arose as to the validity of the marriage which had been celebrated in Poland. It was held that it is only in cases of bigamy that there is a duty upon the Crown to prove the validity of the first marriage beyond dispute, but that in a civil case, the presumption is sufficient. In quoting another authority, the learned judge said: "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary..."

It is my opinion that, in view of the presumption referred to that "a man does not indulge in sexual intercourse for the purpose of sin", and the conclusion, that there exists an intention to marry, to be drawn from that presumption, the same rule must be applied where a claim such as a claim for maintenance is brought before a civil court and the matter is governed by Jewish law. It seems to me that where a claim is brought in a civil

court, and that claim is one for maintenance, and it is clear from the facts that the parties are husband and wife, the court must apply the presumption relating to the validity of the marriage, unless it be proved by the defendant that according to the personal law which governs the case - be that Jewish law or some other law - the marriage is invalid. Should this not be established by the defendant, it is presumed that the personal law which applies recognises the validity of the marriage, and maintenance will be awarded in accordance with the provisions of the personal law.

It follows that even had the learned judge decided that Jewish law also applied to the "Polish period" during which the marriage was celebrated, he would have had to award maintenance. I wish to emphasize once more that we are dealing here with a claim for maintenance in a civil court, and not with the question whether the defendant will or will not require a divorce. In the case before us the respondent discharged the burden of proof which lay upon her. She proved that, on the facts, she is the wife of the appellant. She proved, with the assistance of the presumption referred to, that she is also his wife from the legal point of view - whether the law which applies is Polish or Jewish law - for the purposes of a claim for maintenance. On the other hand, the appellant did not succeed in rebutting the presumption relating to the marriage of the parties, either according to Polish law or Jewish law.

In giving an affirmative reply to the question whether the parties are man and wife, the learned judge applied Polish law, that is to say the law of the place where the marriage was celebrated, which is also the law of the matrimonial domicil, by virtue of which the parties acquired the status of a married couple.

Without going into detail, I would say the conclusion of the learned judge is correct. The validity of the status which a person has acquired for himself is determined by the law which applied at the time that he acquired that status. He does not lose that status by changing his place of residence or his nationality even though he may then fall within the operation of another law. Any other conclusion would be likely to cause serious injustice. For example, a Jewish couple, married under civil law, lives in one of the countries of the diaspora for many years, emigrates to Israel in order to settle there, and acquires Israel nationality; the husband dies, and his estate is to be divided according to

the law of succession to miri[1)] property, in respect of which a will does not operate. If it be said that the question whether the widow was the wife of the deceased should be decided according to Jewish law, it will follow that she would lose all rights to the inheritance - a situation which the deceased never conceived of during the whole of his life, whether in the diaspora or in Israel. On the other hand, a possible, though rare, situation might arise where a Jewish couple married in the diaspora according to religious rites alone, without fulfilling the civil requirements of the law of the country in which the marriage was celebrated. (Such cases may have occurred during the war in places under Nazi rule.) Suppose that couple emigrated to Israel. If the law to be applied is that of the matrimonial domicil at the time of the marriage, it would have to be held that the marriage was invalid as being contrary to the law of the State in which it was celebrated. It is possible, however, that in such a case other additional considerations would apply, so no hard and fast rule can be laid down to cover such a case.

The principal argument of counsel for the appellant, in attacking the decision of the learned judge relating to the application of Polish law to the question of the validity of the marriage, is that since the claim and the counter-claim were filed at a time when the parties were stateless, Jewish law was applicable regarding all the questions that arose, whether during the "Polish period", when Polish law applied, or the "Israel period", when the parties were stateless. It follows from this submission that if the defendant were, for example, a person who became an English national, then - because of the application of English law and the English rules of private international law which are included in that law - every incident in the life of such a person which created his personal status would not be judged according to domestic or municipal English law, but according to that law (the law of his domicil or the law of his previous nationality) which applied to him at the time of such occurrence. If, however, such a person became an Israel national, the religious law would apply to every such incident which occurred at any place and at any time from the date of his birth, for religious law is universal, and recognises no frontiers or limitations, nor does it include or recognise any private international law. In advancing this submission, counsel for the appellant relied upon a line of decisions from the period of the Mandate in which it was held that, according to

[1)] A category of land which, by law, cannot be devised by will.

Article 47 of the Palestine Order in Council, the personal law of a Palestinian Jew or stateless Jew is Jewish law, that is to say, the religious law. According to this argument, the authorities referred to purported to lay down that it is not the nature of the problem which arises between the litigants which determines the personal law of the defendant to be applied, but it is the nationality of the defendant (or the fact of his being stateless), at the time that he requires the assistance of the court, which determines which law is to be applied to all the problems that arise, without exception, and without consideration of the law which would have applied to the defendant at the time of his acquisition of the status, or of the creation of the cause of action, which is the subject of the matter to be considered by the court. In other words, if the defendant is a Jew who is stateless, and who is subject to Jewish law, and the question arises whether he is married, then if, according to Jewish law, his marriage is not to be regarded as valid, the court is obliged to hold that he is not married. The court should overlook the fact that according to the law which applied to the defendant at the time and place of his marriage, his marriage was valid. Counsel further submitted that since the court had reached the conclusion that, according to Jewish law, the marriage of the appellant was invalid, and since at the time of the bringing of the action Jewish law applied to him, the court could not rely upon Polish law and hold that he was married.

Having examined the precedents from the time of the Mandate, I have reached the conclusion that this submission - even to the extent that it is based upon the authorities referred to - is unsound.

In *Freyberger v. Friedman* (1). it was held by the Court of Appeal that Jewish law applied to a Jew who was stateless in matters of his personal status. The parties, who were previously Austrian nationals, settled in Palestine, and married at a time when they were stateless. They subsequently became divorced according to Jewish law. In applying the religious law it was held by the court that the divorce was valid, and that the bonds of marriage between the parties had been dissolved. The problem whether Jewish law also applied to the status which had been acquired by the defendant according to foreign law, at a time when such foreign law applied to him, did not arise.

In *Cohen v. Ludmirer* (2), Jewish law was applied to the defendant, a stateless Jew, in a claim brought against him in respect of the maintenance of a child. The child, however, had been born in Palestine at a time when the defendant was stateless, that is to say, at a time when, and place where, he was subject to religious law. Here, too, the problem with which we are dealing did not arise.

In *Shwalboim v. Shwalboim* (3), the court dealt with a claim for maintenance brought against a defendant who was a Palestinian national, and it was held that the claim was governed by Jewish law. In that case, too, the question of the effect of the foreign law which would have applied to the defendant before he became a Palestinian national, did not arise.

In *Tennenbaum v. Tennenbaum* (4), the respondent married his wife in 1937 at a time when he was a Czechoslovakian national. The parties were divorced according to Jewish law on January 19, 1940. Czechoslovakian law did not recognise the validity of the divorce which was effected outside Czechoslovakia. On March 1, 1940, the respondent married the appellant, who was then a German national, by Jewish religious rites. In view of the doubt which arose as to the divorce from his first wife - and also in regard to the validity of his marriage to the appellant - by reason of the foreign laws which applied to the parties, the respondent became naturalised on March 31, 1941, and on May 2, 1941, he again divorced his first wife before a Rabbi. Thereafter the parties appeared at the Rabbinate, and a "marriage of validation" was celebrated. On July 4, 1941, the appellant also became naturalised. Quarrels broke out between the parties, and the wife filed a claim for a declaration that she was not the wife of the respondent. The District Court held that the second marriage was invalid, but that since the law that applied to the parties in this instance was their personal law at the time when the claim was filed, and that was the religious law, the first marriage and divorce were valid, in spite of the fact that according to the foreign law which then applied to the parties, the divorce, and therefore also the first marriage, were invalid. In other words, it was held that Jewish law, which applied to the parties at the time of the filing of the claim, also applied retrospectively to acts performed by the parties at a time when they were subject to the foreign law.

Since the appellant in this case, his counsel submitted before us, was a Jew who was stateless, and was in no different position - from the point of view of the law which applied to him - from that of a Jew who is a Palestinian national, it follows that, by comparing this case with the decision referred to, Jewish law also applies to the Polish marriage, and that marriage is invalid. Since this is so, he further submitted, the learned judge erred in superimposing upon Jewish law the principles of private international law, and he should have held - in accordance with Jewish law - that the appellant was not married to the respondent, and should have dismissed her claim for maintenance. The Court of Appeal, however (in the *Tennenbaum* case), in confirming the conclusion reached in the judgment cited above, did not accept the opinion of the District Court and held explicitly: -

> "The next point for decision is, what law is to be applied. There is no question that the law applicable is the law governing the parties at the time of the marriage. In the case of the first marriage, this is either Czechoslovakian or German law. Evidence was led to prove that neither of these laws recognises a religious divorce made abroad, and therefore at the time of the marriage between the parties, the respondent must be considered to have been still married to his first wife. His first marriage to the appellant was therefore a bigamous one and was accordingly invalid... Now, on the same principle governing the first marriage, the law applicable as regards the second marriage certificate is Jewish law, because the husband was at that time a Palestinian subject." (Per Frumkin J., at pp. 204, 5.)

This judgment is certainly no authority for the view that the religious law, which applied to the parties at the time of the filing of the action, applies throughout - that is to say, also to what occurred in a period during which the parties were subject to foreign law.

In *Neussihin v. Neussihin* (5), a marriage was celebrated between the parties in Germany by religious rites but not in accordance with German civil law. Such a marriage was invalid in the eyes of German law. After the couple reached Palestine, they appeared by agreement before the Rabbinical Court which declared that they were married by Jewish

religious law, and handed them a certificate confirming this fact. A short time thereafter the parties acquired Palestinian nationality. After some years the husband died, and disagreements broke out between the heirs of the deceased and his widow as to the division of his miri property. It was contended by the heirs that the widow had at no time been the legal wife of the deceased, since the marriage was void according to German law at the time of its celebration in Germany. It must be pointed out that when the parties appeared before the Rabbinical Court their marriage was confirmed, but no ceremony of marriage was celebrated not even what was called in *Tennenbaum's* case (4) a "marriage of validation". it was held by the court that the question whether the widow had been the wife of the deceased must be decided according to Jewish law. But it would be wrong to think, as is submitted by counsel for the appellant, that it follows from this decision that the religious law which applied to the widow at the time of the bringing of the dispute before the Court, applied throughout - that is to say, to the period during which the law which applied to the deceased and his wife was German law. The court merely recognised the declaration of the Rabbinical Court, as to the status of the parties, as a decision given by a competent tribunal, and refused to act as if it were a court of appeal from the Rabbinical Court and set aside its decision because it had disregarded private international law. It also does not follow from the judgment cited that private international law is not to be considered in addition to Jewish law in a claim which is elucidated in a civil court. The following provision from section 23 of the Succession Ordinance, 1923, is quoted in the judgment referred to: -

> "23. For the determination of any question as to whether any person is a member of a class, or possesses a character or quality, whereby he is entitled to a share in a succession the civil courts shall apply the following rules : -
>
> (a) if the claimant is a Moslem or a member of one of the communities, the Moslem law or the law of the community shall apply;
>
> (b) if such claimant is a foreigner.... ."

Since the widow was a member of the Jewish Community and a Palestinian national at the time that the dispute was brought before the District Court, had the Court of Appeal held that the religious law to which the widow was subject at the time of the hearing of the dispute was also the operative law even in respect of the period during which she was subject to German law - as counsel for the appellant in the present case had submitted - that court would have had no need to rely upon the decision of the Rabbinical Court as to the status of the deceased and the widow. It could itself have decided the case by reference to religious law (which validates a marriage celebrated according to religious rites anywhere), relying upon section 23 of the Succession Ordinance, according to the construction placed on it by the appellant's counsel.

It seems to me that, up to this point, no support for the submission of counsel for the appellant can be found in any of the judgments referred to above. The two last judgments - the first directly and the second indirectly - support the point of view of the learned judge in the court below.

In *Levin* v. *Goldberg* (7), the deceased was a Palestinian national and a member of the Jewish Community. His widow, whom he married in Rehovot by Jewish religious rites in 1938, and his son, claimed the estate. The sisters of the deceased opposed this claim on the grounds that the widow had not been the lawful wife of the deceased, and that the son was not their legitimate child. On the facts proved, the widow had been married civilly to a Jew named Rosovsky in Paris in 1931. She had been divorced from Rosovsky in Riga at the beginning of 1938 by a judgment of the District Court of Riga, without having received a Jewish religious divorce. It was submitted by those opposing the claim that since, according to Jewish law, even a marriage by civil rites possesses some of the character of a religious marriage, the widow could not be divorced from Rosovsky save by a Jewish religious divorce. It followed that the widow, at the time of her marriage in Rehovot, was already married, and her marriage to the deceased, therefore, was invalid. The court heard the evidence of Rabbis as to the validity of the marriage in Paris according to Jewish law, and reached the conclusion that no marriage in Paris, valid according to Jewish law, had been celebrated and the widow, therefore, did not require a divorce from Rosovsky before her marriage to the deceased, and that her marriage to the deceased, therefore, was a valid marriage.

From this it may be submitted by counsel for the appellant that if, as is contended against him, the question of the validity of the marriage in Paris and the divorce in Riga is to be determined according to the foreign law which then applied to the widow, the court need not have based its conclusion regarding these matters on the principles of religious law. It follows that the religious law which applied to the widow at the time of the filing of the claim applied throughout, that is to say, also to the period during which she was subject to the foreign law.

It appears from the judgment, however, that the parties at no time raised this question, for in that particular case the result of applying the religious law or the foreign law would have been the same. This question might possibly have arisen had it been proved that according to the religious law the widow would have required a religious divorce before her marriage to the deceased. What is more, no appeal was lodged against the judgment referred to, and it must not be overlooked that that judgment was given after the judgment of the District Court in *Tennenbaum's* case (4) and apparently before the decision of the Appeal Court was published varying the judgment of the District Court in that case (see *Tennenbaum's* case (4)). It might also have been necessary to examine whether the Paris marriage was valid from the point of view of the religious law for another reason, namely, in order to determine the validity of the marriage celebrated in Rehovot according to the religious law, without any regard to the foreign law which applied to the widow at that time. Those who opposed the succession did indeed submit that the fact that according to secular law - in view of the principles of private international law - the widow was regarded as a divorced woman, was irrelevant, since, according to their contention, the Rabbi in Rehovot could not have celebrated a valid marriage had he known of the Paris marriage and of the fact that the widow had been divorced according to foreign law without receiving a bill of divorcement from Rosovsky. The marriage in Rehovot was therefore invalid, since it had been celebrated as a result of the non-disclosure of facts. In other words, their submission was that in regard to the religious marriage in Rehovot, one of the conditions required by the religious law, namely, the production of a bill of divorcement from Rosovsky, had not been fulfilled.

It might well be that the marriage in Paris had some of the aspects of a valid marriage from the religious point of view. We will not however, express an opinion here whether a civil court, in dealing with the division of the estate of the deceased, would have invalidated the marriage in Rehovot because of the absence of a divorce from Rosovsky, particularly when we take into account the fact that the widow had been divorced from him in Riga by a civil divorce, in accordance with the foreign law which applied to her at that time.

As I have already said, the learned judge in the present case decided the fate of the case by applying Polish law. He held, first, that a marriage subsisted between the parties, and he overruled the submission that it was necessary to decide this question according to the religious law as well, which began to apply to the parties when they settled in Palestine.

On this question the judgment reads: -

> "On pages 5, 6 and 7 of Dicey's work (6th edition) the learned authors explain that, for reasons of practical necessity, there is no escape from employing the principles of private international law where the particular transaction reveals one or more foreign elements, for if you close your eyes altogether to the foreign element, you are liable to judge the rights of the parties in such a way as to do injustice. In *Vasan v. Vasan* (16), Barnard J. said, at p. 23: 'To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and ...', and in *Baindail v. Baindail* (17), Lord Greene M.R. said, at p. 346 : 'The practical question in this case appears to be : Will the courts of this country, in deciding upon the question of the validity of this English marriage, give effect to what was undoubtedly the status possessed by the appellant (that of a married man in India) ? That question we have to decide with due regard to common sense and some attention to reasonable policy.' I do not wish to exaggerate the importance of these remarks. The English courts would

> certainly not disregard precedent in order to give effect to what appears to them to be reasonable policy."

To these comments I would add that the English courts will not assume the powers of the legislature which have not been given to them, in order to give effect to a policy which appeals to them, even were they to be convinced that they could not otherwise discharge their judicial duty and do justice between the parties.

The learned judge continues :

> "I have only quoted these passages in order to emphasize the principles which move the legislature and the Courts in the creation of the rules of private international law and the crystallization of those rules. It seems to me, for considerations of common sense and reasonable policy, that justice would not be done between the parties if the foreign element in the relations which gave rise to this case were not recognised, that is to say, if the rules of private international law were not employed."

I share the opinion of the learned judge that it would be impossible to do justice between the parties without having resort to the provisions of private international law. I am also of his opinion that "common sense and a reasonable policy" speak in favour of applying private international law side by side with the religious law, and particularly where there is a danger that by applying the religious law alone, the respondent would be deprived of a personal status which she had once acquired validly and lawfully.

The only problem is whether this "common sense and reasonable policy" find their place in the laws to which the courts of this country are subject.

The learned judge was alive to this problem, and made an attempt to discover this "commonsense and reasonable policy" in Article 47 of the Palestine Order in Council, as interpreted by him.

And this is what he says in his judgment: -

> "As is well known, English private international law bases itself upon domicil in matters of personal status, while Article 64 (ii) of the Palestine Order in Council bases itself upon the national law. Save for this distinction - albeit a fundamental distinction - I do not see why Article 47 of the Order in Council referred to need be interpreted as if it were completely detached from the body of principles of English private international law. The contrary is true. I am about to interpret that article as if it were grafted on to the body of English principles, so that as far as possible, and as far as may be required, the word 'domicil' shall connote the opposite of the word 'nationality'. In other words, I am about to apply the personal law, but I shall apply that law within those limits in which it must be applied according to the general principles of private international law, and no further. What is the law of personal status which is to be applied between parties, in accordance with Article 47? My reply is as follows: In regard to what transpired during the Polish period, the Polish law must be applied, and as to what transpired during the Israel period, the Jewish law must be applied. Nor is Jewish law at liberty to re-open transactions already concluded and to criticise a status which was acquired during the Polish period; for private international law in Israel does not consult Jewish law as to the validity of a status which was acquired in Poland."

The learned judge cites the English case of *Goodman's Trusts* (18). In that case a Polish woman died at a time when she was domiciled in England, and her personalty was to be distributed in accordance with English law. There were no heirs nearer than the descendants of the deceased's brother. According to the law of England of that time, only legal descendants - as distinguished from natural descendants born out of wedlock - were entitled to inherit. A certain woman, a daughter of one of the brothers of the deceased, appeared and claimed a share of the estate. The claimant was born in Amsterdam, Holland, out of wedlock, but after her birth her parents married in Holland at a time when they were domiciled in that country. According to the law of Holland

their marriage, celebrated at a later stage, operated to legitimate the daughter born before the marriage, while according to English municipal law, the later marriage could not operate to change the status of the claimant as an illegitimate child. The question therefore arose whether, for the purpose of the distribution of the estate, the claimant was to be regarded as the legal niece of the deceased, in accordance with the law of Holland, or as the illegitimate niece of the deceased, in accordance with the law of England. It was held that in order to determine the status of the claimant for purposes of the distribution of the estate, the law of Holland was to be applied, and not English law.

Cotton, L.J. said, at p. 291 : -

> "In support of this decision it was urged that in an English Act of Parliament the nearest of kin must be taken to mean those who by the law of England are recognised as nephews and nieces, that is, as legitimate children of the intestate's deceased brothers. This is doubtless correct... But the question as to legitimacy is one of status, and in my opinion by the law of England questions of status depend on the law of the domicil."

And further at p. 292 : -

> "If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, on his domicil of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere."

James, L.J., in the same case, said at p. 296 : -

> "According to my view, the question as to what is the English law as to an English child is entirely irrelevant... But the question is: What is the rule which the English law adopts and applies to a non-English child ? This is a question of international comity and international law.

According to that law as recognised, and that comity as practised, in all other civilised communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin - the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilized world ... the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations. England has been for centuries a country of hospitality and commerce. It has opened its shores to thousands of political refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world, and has by wise laws induced and encouraged them to settle in our parts. But would it not be shocking if such a man, seeking a home in this country, with his family of legitimated children, should find that the English hospitality was as bad as the worst form of the persecution from which he had escaped, by destroying his family ties, by declaring that the relation of father and child no longer existed, that his rights and duties and powers as a father had ceased, that the child of his parental affection and fond pride, whom he had taught to love, honour, and obey him, for whom he had toiled and saved, was to be thenceforth, in contemplation of the law of his new country, a fatherless bastard ? Take the case of a foreigner resident abroad, with such a child. If that child were abducted from his guardianship and brought to this country, can anyone doubt that the Courts of this country would recognise his paternal right and guardianship, and order the child to be delivered to any person authorised by him ? But suppose, instead of sending, he were to come himself to this country in person" [and settle there] "would it be possible to hold that he would lose his right to the guardianship of the child in this country... ? Can it be posssible that a Dutch father, stepping on board a steamer at Rotterdam with his dear

and lawful child, should on his arrival at the port of London find that the child has become a stranger ... ?"

From the point of view of the facts, the case of *Goodman's Trusts* (18) merely lays down a principle similar to the provision contained in section 23 of our Succession Ordinance. According to that provision, if the law which governs the distribution of the estate directs that, in the absence of closer relatives, the estate is to be divided between the nephews of the deceased, and the question arises whether a particular claimant is a nephew of the deceased, that question must be answered in accordance with the law of the community to which the claimant belongs. In other words, it is the personal law of the claimant, and not the personal law of the deceased which is to be applied. In the case of *Goodman's Trusts* it was the Dutch law of the claimant and not the English law which applied to the estate.) The observations of the learned judge which I have cited from the case of *Goodman's 'Trusts* are merely the grounds which induced them to follow the principle stated. It may be that the provision of section 23 of the Succession Ordinance, according to which the personal law of the claimant is to be applied when we have to decide whether he belongs to a class of persons who are entitled to participate in the distribution of an estate. was enacted for the same reason. But that case in itself provides no solution to the problem before us, namely, whether in every case in which our law refers us to the religious law, we may not apply the principles of private international law - when that course is necessary in order to do justice between the parties. Let us assume that an estate, consisting of mulk property, is about to be distributed in accordance with foreign law, and that a nephew of the deceased claims a share of the estate as an heir. According to section 23 of the Succession Ordinance and the principle laid down in the case of *Goodman's Trusts* (18), the question whether the claimant is a nephew of the deceased must be determined, not in accordance with foreign law which applies to the estate, but according to the law which applies to the claimant. If the law which applies to the claimant is the religious law, then the question will arise whether the religious law must be applied subject or not subject to private international law.

The difficulty here - as is pointed out by the learned judge in his judgment - is the existence of a conflict between secular law and religious law. The former is confined to matters arising within the borders of the State, or to nationals or residents of the State. It

is for this reason that secular law recognises and applies other laws which govern the personal status of a man before he settled in the State or became a national of the State. The latter law knows no bounds or limits and applies to a person from his birth until his death in all matters affecting his personal status, without any reference to the place where, or the time in which, an occurrence may have taken place.

The same problem may also arise in a case where the provision in section 23 of the Succession Ordinance is applied. In the case of *Goodman's Trusts* English private international law referred the court to the law of Holland, while here in this country it cannot be said that the religious law will refer the court to the foreign law under which the marriage which created the status of the plaintiff was celebrated.

The learned judge was therefore correct in attempting to look for a solution in Articles 46 and 47 of the Palestine Order in Council. It has already been said by Grinzweig J. (Prof. Ginossar) in *Burg v. Attorney-General* (14): -

> "In this connection it is appropriate to emphasize the word 'further' which appears in the opening portion of Article 47. In any event, Article 47 must not be interpreted as a provision standing alone. It must be read together with the earlier provision which leaves in force the law - including the whole of the Mejelle - as it existed in Palestine on November l, 1914. It seems to me, therefore, that Article 47 was not introduced in order to limit the scope of Article 46."

Articles 46 and 47 of the Palestine Order in Council both deal with the jurisdiction of the civil courts of the country respecting the laws which they are to apply in judicial proceedings. It was laid down by the legislature in Article 46 that the English Common Law and the principles of equity must be applied where no solution can be found in the Ottoman Law - which it left in force - or in ordinances enacted or to be enacted by the Palestine legislature. Private international law contained within English Common Law must also be taken to be included. When the same legislature comes to deal with problems of personal status in Article 47, it refers the court to the personal law. Article 47 is general in its terms. It does not define what is meant by the personal law, and it

draws no distinction between foreign nationals and Palestinian nationals or persons who are stateless. In regard to foreigners there is a later supplementary article, Article 64, which contains a specific provision that the personal law is the national law, that is the law of the nationality. The national law means the whole of that law, including private international law.

In regard to litigants who are not foreign nationals, however, Article 47 remains without any supplementary article such as Article 64. It was only during a later period that the court held that the personal law (within the meaning of Article 47) of Palestinian nationals, or of persons who are stateless, was the religious law.

I do not think that this is mere coincidence. When the legislature, in Article 64, applied to foreigners the law of their nationality, it knew that it was thereby also applying the private international law which is included within their national law. When, however, in Article 47, it applied the religious law to Palestinian nationals and persons who are stateless, it must be assumed that it knew that the religious law does not include the principles of private international law. The question that arises, therefore, is this: Did the legislature indeed intend to apply the religious law, and to exclude completely the application of the principles of private international law ? Had this been its intention, it is not clear why it did not choose the simpler and clearer method of laying down an unambiguous provision that in the case of foreign nationals the national law shall apply, and in the case of Palestine citizens or of persons who are stateless, the religious law shall apply.

It seems to me that this was not its intention. In applying the religious law, the legislature did not intend to deny the application of the principles of private international law. The contrary is the case. It would appear from the manner in which Article 47 is drafted that the intention was to leave the door open for the application of English private international law until the problem should be resolved by Ordinances or regulations to be enacted or framed by the Palestine legislature, for this is the language used by the legislature in Article 47:

> "The Civil Courts shall further have jurisdiction ...in matters of personal status... Such jurisdiction shall be exercised in conformity with any law, Ordinances or regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable."

It is interesting that the Article does not say "according to the religious law subject to any Ordinances etc. that may be applied", but says "...in conformity with any law, Ordinances or Regulations... and subject thereto according to the personal law..."

If we remember that Article 47 is not intended to derogate from Article 46, what is the interpretation of the words "in conformity with any law that may hereafter be applied", in addition to the words "in conformity with any law which may hereafter be enacted"? "That may hereafter be applied" means the existing law, or the law the existence of which had already begun. Must it not be said that Article 46, which includes the principles of English private international law, is also a law, as other statutes in the future - "that may hereafter be applied" ? The result is that for so long as the legislature has not regulated, by an ordinance or law as provided in Article 47, the application of the religious law in a matter in which a foreign element exists, resort must be had to Article 46 (which also includes private international law), that may hereafter be applied.

I wish to cite here the remarks of Silberg J. in *Cohen and Bousslik* v. *Attorney-General* (9), which seem to me indirectly to support my point of view.

This is what he said at p. 19: -

> "Yet, it is not only because of the different rules of evidence, but also because of the different approach to the substance of the case that the judgment of the civil court will not always be the same as that of the religious court, though both purport to deal with the matter according to Jewish law. One of the reasons for this is a different attitude towards the accepted principles of private international law, which require the recognition of the validity of legal acts done in the past, outside the territory of the State and under a foreign law, such as the national law of

> the parties or the law of their place of residence, and similar matters to be taken into consideration. The religious court regards itself as completely free from these "cramping" rules ; it extends the application of the religious law - *a priori* and unrestrictedly – to acts performed in the past by foreign nationals outside the boundaries of the State, and it is permitted so to do (see *Neussihin v. Neussihin* (5)); the civil court, on the other hand will, to some extent at least, take those rules into account, even if it deals with the matter, in principle, according to Jewish law."

It seems to me, therefore, that when the learned judge was faced with the problem whether the status of the parties as a married couple continued to exist, or whether it was destroyed by the application of the religious law, he was entitled - relying upon Article 46 - to hold, in accordance with private international law, that the bonds of marriage created according to Polish law continued to exist, at least for the purpose of resolving the dispute before him, since private international law refers the problem in the present case to Polish law.

Neither of the parties disputed the proposition that if the validity of their marriage was not to be determined according to the religious law. English private international law applied the law of the matrimonial domicil. that is to say. Polish law, and I see no reason to continue the argument on this point.

It will no doubt be asked what the position would be were the situation reversed, that is to say, if the parties had celebrated their marriage in the country from which they emigrated by religious rites alone, such marriage being regarded as invalid by the law of that country ? The answer may possibly be that since they chose to be married in accordance with religious law, which is a universal law, a court in this country would not be obliged to invalidate such a marriage, when considering an ancillary claim and the question arose incidentally whether the parties were married. It may be that in order to validate their status, we would have to apply the religious law. The problem is by no means a simple one, but there is no need to decide this point in the present case.

In short, it is my opinion that the appellant has not succeeded in this case in rebutting the presumption standing against him, and there I could have let the matter rest.

Out of respect, however, for the detailed and well-reasoned judgment of the learned judge, and the comprehensive arguments addressed to us by counsel for the appellant, I have thought it proper to deal with the question of the application of the principles of private international law.

Finally, counsel for the appellant submitted that the provisions of Polish law imposing upon the husband the duty of supporting his wife had not been proved.

It seems to me that this submission is unfounded. Even were the religious law to apply to the whole of the case, as counsel submitted, it would be for him to establish those features which would relieve the appellant of the obligation of maintenance, since the respondent has proved that she was deserted by the appellant. If Polish law applies to the question of the validity of the marriage, then the religious law again applies - as was held by the learned judge - to the question whether in the circumstances that were established by the respondent, the appellant is liable for her maintenance. Since the parties settled in this country and became subject to religious law, the question of whether the husband was liable for the maintenance of his wife whom he deserted should be decided by the religious law which applied to him at the time of the desertion.

I am accordingy of the opinion that the appeal must be dismissed, and the judgment of the court below confirmed.

AGRANAT J. I agree that the appeal must be dismissed for the reason mentioned in the second part of the judgment read by my colleague Olshan D.P.

The subject of the appeal is a claim by the appellant for the return of certain movable property in the possession of the respondent or payment of damages in the event of the non-return of this property, and a counter-claim by the respondent against the appellant for the payment of maintenance. It is clear that the determination of both

these claims depends upon the reply to a preliminary - to use an expression of my colleague Witkon J. - incidental question, namely, the question whether the civil marriage contracted by the parties outside this country is valid. The main facts, as found in the interesting and elaborate judgment of Cohen J. in the court below, are as follows: -

a) The civil marriage of the parties - and no other marriage ceremony was celebrated - was contracted in Poland on April 2, 1948.

b) The parties were at that time Polish citizens, and Poland was at that time their domicil. They also made Poland their domicil after the marriage.

c) The parties immigrated to Israel in 1950.

d) At the time of the filing of the claim and counter-claim the parties were stateless.

It must be pointed out that by virtue of section 2 (b) (2) of the Law of Nationality, 1952, which came into force after the judgment of the District Court in the present case had been delivered, the parties should have been regarded at the time of the hearing of the appeal as if they had been Israel citizens at the time when the claim was filed. This submission, however, was not argued before us, and counsel for both parties proceeded upon the assumption that their clients were at that time stateless persons. Since this is so, I shall proceed upon the same assumption, although my final conclusion would have been no different even had I regarded the parties as Israel citizens at the time when the claim was brought.

What law are we to apply in deciding whether the Polish marriage is valid or not ? It is clear that we must first consider the concluding portions of Article 47 of the Palestine Order in Council, which provides that the law to be applied is : "the personal law applicable". Since, however, the parties were, at all relevant times, foreigners - for a person who has no nationality is considered a foreigner within the meaning of Article 59 of the Order in Council - we are obliged to read the provision I have mentioned together with that contained in Article 64 (ii) of the Order in Council, which provides that "The

personal law shall be the law of the nationality of the foreigner concerned unless that law imports the law of his domicil. . .. ." It has, however, been held by our courts that the personal law of stateless Jews is Jewish law (see *Freyberger's* case (1), *Cohen's* case (2), and Levin's case (7)). I shall deal later with the question whether the basis of this ruling is that Jewish law is the religious law of stateless Jews - and is therefore their personal law - or whether the basis is that Jewish law is their "national" law.

Since the personal law of the parties at the time that their civil marriage was contracted was Polish law, and their personal law at the time when the claim was filed - as we assume - was Jewish law, the problem before us is confined at this stage to the question which date is to be taken into consideration, in order to decide which of the two laws mentioned above must be applied.

Nothing at all, however, in regard to this point, is mentioned either in the provision contained in Article 64(ii), or in Article 47. Since this is so, we have no option but to seek the reply to our question in Article 46 of the Order in Council, that is to say, in the common law - including the principles of private international law which are part of it. In this respect I differ from the opinion of my colleague Olshan D.P. that it is possible to find assistance in that portion of Article 47 which provides : "... such jurisdiction shall be exercised in conformity with any law, Ordinances, or Regulations that may hereafter be applied or enacted... ". That is to say, I do not think that these words - and in particular the expression "be applied" - enable us to apply the principles of the common law by virtue of Article 46. It seems to me that the intention reflected both by the expression "applied" and by the expression "enacted" - particularly in the light of the word "hereafter" which precedes both those expressions - relates to laws to be applied or enacted in the future by the legislature itself, as distinguished from existing laws applied by the court. The two words mentioned give a hint in fact of two different systems of legislation which the English legislature intended to apply to Palestine ; the one - to which the word "enacted" applied - is direct legislation for the purposes of the country ; the other - to which the word "applied" refers - is the application of existing English statutes, such as the application of the Copyright Act, 1911, by means of the Order in Council of 1924 (Drayton - Vol. III, p. 2499) ; also the Emergency Powers Defence Act, 1939, which was applied to Palestine by virtue of the Order in Council, relating to

Emergency Powers (Defence of the Colonies), 1939, (Official Gazette 1939, Supplement 2, pp. 649, 652, 656), and laws similar to these.

On one point, however, there was unanimity of opinion among the three judges who sat in *Bichovski v. Bichovski* (6), that is to say, in regard to the point that until that time no "law, Ordinances or Regulations" relating to marriage, save those provisions contained in the Order in Council itself, had been applied or enacted (pp. 246-9, 251 ibid.). It is true that since the establishment of the State, the Women's Equal Rights Law, 1951, and the Rabbinical Court's Jurisdiction (Marriage and Divorce) Law, 1953, have been enacted, but these two statutes do not deal directly with the problem with which we are concerned. The words "the general law applicable" in Article 47 remain, therefore, the decisive words. As I have intimated, this expression must be interpreted - in order to answer the question what is the critical point of time in regard to the application of the personal law - in accordance with the provisions of Article 46. This is so, however, only because of the well-established principle in our jurisprudence that where there exists a lacuna in the local law, the omission is to be filled by relying upon Article 46, that is to say, by applying the English Common Law. And the English Common Law means that law including the principles of private international law which are a part of it. It is clear that we must apply those principles, for the operative facts constituting the subject-matter of this case include a foreign element, namely, that the parties contracted a civil marriage in Poland, at a time when they were nationals of that country .

As is well known, under the common law matters of personal status are to be determined in England according to the law of the domicil. The law of the domicil, however, is also a man's personal law, no less than his national or religious law. *In Salvesen v. Administrator of Austrian Property* (19), Lord Phillimore said, at p. 670 : -

> "I have used the expression 'the law which determines the personal status' because there are countries which would refer to nationality rather than to domicil ; but the principle is the same."

In his article "The Recognition of Polygamous Marriages under English Law" (48 L.Q.R. 341), W. E. Beckett writes, at p. 352 :-

> "This expression is used as meaning that law which is applied to determine questions of status - it is, under English Private International Law, the law of the person's domicil….".

We are thus able to determine the critical time for deciding as to the personal law which applies in the *case* before us by comparison with the principle according to which the law of the domicil would be applied to such a case in England. If, according to English private international law, the law of the domicil at the time of the marriage is to be applied, we too shall apply the personal law which applied to them at that time, and if in England the law of the domicil at the time of the filing of the action is to be applied, we too shall apply the personal law of the parties at that date.

It is true that a distinction is drawn in England between the question whether the marriage is valid from the point of view of its form, and the question of its essential validity. In regard to the first question, the English courts apply the *lex loci celebrationis,* while the second question is determined by them according to the *lex domicilii.*

The question before us, namely, whether the civil marriage is valid, is - according to the prevailing view in England - a question of the validity of the marriage from the point of view of its form. In this respect however, we cannot rely upon the English principle which applies the law of the place where the marriage was celebrated, since the notion of the *lex loci celebrationis* must not be confused with the notion of the personal law - though there will sometimes be no real difference, whichever of these two laws is applied, as far as the final result is concerned. In regard to the distinction between the two conceptions referred to, see the remarks of Martin Wolf in his book on private international law, 11th edition, pp. 325-327). It seems to me, therefore, that I shall not go far wrong if I hold that we should apply those rules of private international law which would be applied by the English courts to the question of the essential validity of the marriage between the parties, or - to be more precise - whether the marriage is valid from the point of view of the capacity of the parties to contract a marriage.

Let me therefore define the question before us in these terms : when the Courts referred to apply the law of the domicile in order to determine whether the marriage is valid from the point of view discussed above, which point of time do they consider before deciding the law of the domicil which applies in the particular case where the parties have since changed their domicil ? Before I reply to this question, I wish to clarify more fully my approach to the problem before us.

I do not wish to be understood as holding that we have to decide whether the marriage is valid - from the point of view of form - according to the law applicable in England ; the question before us is not whether we must choose in this case between the personal law of the parties and the law of the place where the marriage was celebrated, and what English law would lay down in such a situation. The problem which arises is more restricted. It is well recognised that our law directs us to turn to the personal law of the parties in order to decide whether a civil marriage celebrated by the parties is valid - from all points of view. The only question which arises is which personal law is to be preferred and applied - the personal law of the parties at the time of the celebration of the marriage, or their personal law at the date of the filing of the claim. It is only for the purpose of determining the point of time - and for this purpose alone - that we turn, by way of analogy, to English private international law, since that law also refers us to the personal law in matters of status and marriage generally, save that in regard to the question of the validity of a marriage from the point of view of its form, English law, abandoning its general approach, applies the law of the place where the marriage was celebrated. As was said by Lord Greene in *Baindail's* case (17), at p. 345: -

> "The proposition would not be disputed that in general the status of a person depends upon his personal law, which is the law of his domicil."

The very basis of the application of the principle of the domicil or nationality of a person is the idea that questions of status are the concern of the country in which his life is centred, or the concern of the people to which he belongs (see Wolf, ibid, p. 103). This was emphasized by Pearce J. in *Pugh v. Pugh* (20), where he said, at p. 686 : -

"It must be remembered that personal status and capacity to marry are considered to be the concern of the country of domicil."

To sum up, for the purpose of furnishing the reply to the narrow question stated above, we draw, in our case, on the analogy of the general approach of English law in applying the personal law to matters of marriage.

In this regard it is a rule of English private international law that when dealing with the question of the essential validity of a marriage, the law to be applied is the law of the domicil of the parties at the time of the marriage. This rule will at least apply where the domicil of both husband and wife prior to the marriage was the same. There is ample authority on this point, and I would first refer to the authorities collected by Pearce J. in *Pugh's* case (20), such as:

(a) the dictum of Lord Campbell in *Brook v. Brook* (21) that : -

"...The essentials of the contract depend upon the *lex domicilii,* the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated" (ibid. at p. 684);

(b) the dictum of Lord St. Leonards in the same case that : -

"... a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid, if by contracting it, the laws of their own country are violated" (ibid. at p. 685) ;

(c) the dicta of Dr. Lushington in *Conway v. Beazley* (23) that:-

".... . the *lex loci contractus* as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicil ; and therefore a second marriage, had in Scotland on a Scotch

> divorce..... from an English marriage between parties domiciled in England at the times of such marriages and divorce, is null" (ibid at p. 687).

(d) In the same way, in the case of *in re Paine* (22), Bennett J. quotes with full approval, the same principle as stated in Hailsham, Vol. 6, p. 286, as follows: -

> ".... . the marriage must be a good and legal marriage according to the law of domicil of both contracting parties at the time of the marriage ..." ;

(e) and finally, are the dicta of Lord Greene in *De Reneville v. De Reneville* (24).

Applying this principle to our case, I reach the conclusion by analogy that the personal law according to which we must consider the validity of the civil marriage contracted between the parties in 1948 is their personal law at that time, that is to say - in view of what is provided by Article 64 (ii) of the Palestine Order in Council - the law of Poland. Since it is not disputed that according to that law civil marriages are valid from the point of view of their form, it follows that they must be regarded as valid in all places and at all times, for so long as the bond of marriage is not dissolved in a lawful manner or by the death of one of the parties. As was said by Scott J, in the case of *Luck's Settlement Trusts* (25) :-

> "Status is in every case the creature of substantive law : it is not created by contract, although it may arise out of contract, as in the case of marriage, where the contract serves as the occasion for the law of the country of the husband's domicil to fix the married status of the parties to the contract. Perhaps the most far-reaching characteristic of status,... is its quality of universality, both in the general jurisprudence of other nations and in Private International Law as applied by English Courts. The general principle of status is that, when created by the law of one

country, it is or ought to be judicially recognised as being the case everywhere, all the world over" (ibid, at pp. 890/891),

Importance must also be attached to the remarks of Lord Greene in *Baindail's* case (17) at p. 345 :-

"By the law of the appellant's domicil at the time of his Hindu marriage he unquestionably acquired the status of a married man according to Hindu law ; he was married for all the purposes of Hindu law, and he had imposed upon him the rights and obligations which that status confers under that law. That status he never lost. Nothing that happened afterwards, save the dissolution of the marriage if it be possible according to Hindu law, could deprive him of the status of a married man which he acquired under Hindu law at the time of his Hindu marriage..."

It follows that once the parties acquired the status of married persons in accordance with Polish law in 1948, that status remains in all places and at all times unless it be determined in some lawful manner, or by the death of one of the parties. Since that is so, no change in the personal law of the parties thereafter can deprive them of their status as married persons.

Before proceeding to the next question, I must make two comments. My first comment is this. There is room for the opinion - though I make no finding on the point - that the question whether the manner of celebrating the marriage is one of "form" or one of "essential validity" must be decided - since this is a question of "classification" - in accordance with the lex fori, that is to say, in accordance with the personal law of the parties at the time of the filing of the main claim and counter-claim, that is, Jewish law; and that according to that law, the failure to celebrate the marriage in accordance with religious rites is a matter that goes to the root of the marriage and is not merely a matter of form - particularly if the learned judge was correct in his conclusion that there is no basis, in the case before us, on the facts, for applying the presumption that "a man does not indulge in sexual intercourse for the purpose of sin." Martin Wolff shows in his book

(ibid. at p. 343), for example, that according to the outlook of the Catholic and Orthodox Churches, the laws of one or other of which constitute the personal law applied in matters of marriage in various countries, the obligation to celebrate a marriage by a religious ceremony is not, in fact, merely a matter of form, but is a matter which goes to the root of the institution of marriage. (See also the example cited by Dicey, 6th edition, p. 69, paragraph (d).)

As I have said, I myself do not hold that our matter is one dealing in fact with a question of "essential validity", and not with a question of form. Even if this case is to be regarded as dealing with a question of "essential validity" - which is a possible view - I am strengthened in my opinion that we should draw on the analogy of the English rule, according to which the validity of a marriage, from the point of view of its essential validity, should be determined by the personal law - that is to say, the law of the domicil of the parties at the time of the marriage; in other words, that in order to determine whether or not the civil marriage contracted by the parties in Poland in 1948 is valid or not, we must decide according to the personal law which applied to them at that time, namely, Polish law. Put differently, after paying due regard to the particular conception of the local law which governs matters of marriage - in this case, the Jewish law, which holds that the form in which persons contract a marriage is a matter affecting the very institution of marriage itself - even then we are directed, in accordance with the rule of private international law referred to, to prefer the provisions of the personal law of the parties at the time of their marriage, that is, the provisions of Polish law.

My second comment is this. The rule according to which the law to be applied to matters of personal status is the personal law of the parties, is concerned with those cases where that law is the national law of the parties, for it is the national law – including the principles of private international law - which is to be applied (see the case of the *Miller Estate* (11). There is no doubt that in most countries the national law of the parties at the time of the marriage - particularly if the question that arises relates to the validity in form - will refer us to the *lex loci celebrationis,* and it will then in any case be proper to apply that law to the particular matter. It is not in all countries, however, that the rules of private international law which there apply render it imperative to refer to the *lex loci celibrationis* when the question referred to arises in the courts. In other words,

there is the option in some countries of preferring the internal national law over the *lex loci celebrationis* for the purpose of validating a marriage contracted between the parties (see Wolf, ibid., pp. 340-341). In our present case - as I shall stress later - this whole problem does not arise, since the *lex loci celebrationis* and the national law of the parties at the time of the marriage are identical. I deem it proper, however, in order to make my own position clear, to point to the possibility of a divergence in some countries from the binding character of the rule which applies the *lex loci celebrationis* to the question here discussed, since a case may come before us at a future date in which the two are not the same, and even lead to different consequences in regard to the validity of the marriage.

Having held that the parties were and are married, the next question to be considered is their rights and obligations for the purposes of the claim and counter-claim. It is clear that the reply to this question demands a reply to a prior question, namely, which law governs each of the two claims. To this question there is no one comprehensive reply - it is necessary to consider each of the two claims separately.

(1) *The main claim.* It is clear beyond all doubt that since, according to the statement of claim, the operative facts which constitute the cause of action in this claim all took place in Israel, the claim must be dealt with in accordance with the local law, and after we have replied to the question dealing with the validity of the marriage, no question of private international law will again arise. It was not submitted to us by counsel for the appellant that the provisions of the Mejelle should be applied in this matter, and it is, therefore, the provisions of the Civil Wrongs Ordinance that will apply. That being the case, the provisions of section 9(1) of that Ordinance - as was held by the learned judge - prevent the appellant from succeeding in a claim for damages based upon an act committed by his wife during the period of the marriage. It follows that the judge correctly dismissed the main claim.

(2) *The counter-claim.* What is the law which governs this claim? The reply of the learned judge was that it is Jewish law, and this is what he said in his judgment: -

> "As far as the counter-claim is concerned, that is, the claim for maintenance, it is not disputed that the defendant had no cause of action

during the Polish period, and that if a cause of action exists it relates to the Israel period alone. Again, it is not disputed that for the purposes of the Israel period it is Jewish law which applies and the question is whether there is any reason why I should not recognise the Polish marriage for the purposes of a claim for maintenance under Jewish law... The award of maintenance to a wife in a proper case - a remedy recognised by Jewish law - is in no sense inappropriate in regard to the marriage contracted by the parties in Poland. I see no reason why Jewish law should not be consulted as to whether it would - according to its own provisions - recognise the remedy of maintenance to this defendant in the circumstances described in the counter-claim. The court need not concern itself with investigating the validity of that marriage, since such validity is postulated by the general law of the land, which determines this as a fact, having regard to Polish law, and by applying private international law. Jewish law is not required to give effect to a contract created by Polish law; what is required of it is to grant one of its remedies - if this be a suitable case - to the holder of a particular personal status. In other words, the only question addressed to Jewish law is this: What would you award to a married woman in such and such circumstances ? There is, therefore, no reason why I should not recognise the marriage between the parties for the purposes of the counter-claim for maintenance."

Mr. Sheps, counsel for the appellant, made a threefold criticism of this part of the judgment: -

(a) If maintenance is to be awarded according to Jewish law, then, in the light of the facts described in the Statement of Claim - including the fact that the parties celebrated their marriage by civil rites alone - the respondent cannot succeed in her counter-claim, since, according to Jewish law, maintenance cannot be awarded unless there exists a marriage celebrated according to religious rites.

(b) On the other hand, if the matter is to be determined by Polish law, such law has not been proved - neither its own provisions, nor the rules of its private international law.

(c) At the most, resort may be had to the principle of "the presumption of the identity of laws", for the purpose of determining the provisions of Polish law; but if this be so. then it follows that the provisions of Jewish law should be applied, which would not grant the counter-claim in view of the arguments set forth in sub-paragraph (a) above.

If I have understood these criticisms correctly, they are based in the main upon the submission that Jewish law should not be grafted upon Polish law in the circumstances of this case. In other words, when Jewish law is asked which law it would apply to facts such as those alleged in the claim and established, it will unwillingy reply : "One of these facts is that the respondent is not married to the appellant according to religious rites, and to a woman such as this I shall not, therefore, award maintenance whatever the circumstances may be - whether she married the appellant according to civil rites or not, whether Polish Law - which recognises such a marriage - applies in Israel or not." Were this indeed the correct approach to the problem with which we are concerned, I would have thought there was substance in the criticism referred to - presuming that the judge was right in his conclusion that there is no basis in this case for applying the presumption that "a man does not indulge in sexual intercourse for the purpose of sin." In my view, however, that general approach is wrong, and I have therefore reached the same conclusion as was arrived at by the learned judge in regard to the obligation of the appellant to pay the maintenance awarded against him, although I have reached that conclusion by a slightly different route.

My opinion is that it is imperative to distinguish between the question whether the wife has a right to maintenance at all, and the question of the amount of the maintenance to which she is entitled. The first question is one of a substantive right which is claimed by the wife, while the second question is one of the remedy which she seeks.

The right. As far as the first question is concerned, I am of opinion that it too should be decided in accordance with Polish law. It is this law which conferred upon the parties the status of married persons. And as a result of that status, it conferred upon them certain rights and obligations. These rights and obligations continue to exist for so long as the status of marriage is preserved. For this purpose I do no more than repeat what I said in *Halo v. Halo* (12). at p. 204, that is to say: -

> "When we say that a person enjoys a particular status, whether it is the status of a married person, or the status of a citizen of the State, or a member of a religious community, it is understood that, by reason of such status alone, the law confers upon such a person certain rights, or imposes upon him certain obligations; and the good of the community (in the case of marriage) or of the group (in the case of citizenship or membership of a community) requires that the rights and obligations in question, shall remain in force as against the whole world. In other words, they are rights and obligations in rem, and this position remains for so long as that person continues to hold that particular status." (See also the two authorities cited in that judgment (ibid.).)

Perhaps it would not be superfluous to repeat in addition the observations of Lord Greene in *Baindail's case* (17), which are cited above, that is to say, that when the appellant in that case acquired the status of a married person in accordance with Hindu law: -

> "...he had imposed upon the rights and obligations which that status confers *under that law.* That status" - and I add: with all the rights and obligations which flow from it – "he never lost. Nothing that happened afterwards, save the dissolution of the marriage ...could deprive him of the status of a married man" - and again I add: with all the rights and obligations which flowed from it - "which he acquired under Hindu law at the time of his Hindu marriage...".

And, in conclusion, I rely upon the statements by Cheshire (4th edition, p. 659), which were approved by Pilcher, J. in *Araujo v. Becker* (26), that: -

> "Not only the existence, but also the extent, of an obligation, whether it springs from a breach of contract or the commission of a wrong" or - so I would add - from a status acquired by a litigant - "must be determined by the system of law from which it derives its source."

It follows from all I have said that the nature of the rights and obligations which flow from the source of the status of marriage acquired by the parties is to be determined by that law which conferred such status upon them, for were this not so, the expression 'status' would lose all its content. It follows that the right of the respondent to claim maintenance for herself from her husband must be decided according to Polish law, since such right - if it exists - has its source in the status of marriage which was created by that law.

The rule, therefore, that the status of marriage imposes upon the husband the duty of maintaining his wife whom he has deserted, is so universal in our time, that the wife who applies to court and who has acquired her status through her marriage in accordance with a foreign law, should not be required to prove the provisions of that foreign law which confers that right upon her. Even were it not so, however, it is proper to assume, in a case such as this, that the foreign law is the same as local law. In other words, it is proper to assume that Polish law - in the same way as Jewish law - recognises the right of the wife to be maintained by her husband who has deserted her. According to this approach - that is to say, that the substantive right of the wife to maintenance is accorded to her under Polish law - in turning to Jewish law we do not ask that law whether it would, according to its provisions, afford the remedy of maintenance to this respondent in the circumstances set forth in the counter-claim, but we ask it whether, assuming that the parties were married according to Jewish law, it would oblige the husband to maintain his wife, the facts set forth in the counterclaim having been proved. If the reply is in the affirmative, then it follows that we must deduce that Polish law, too, would furnish the same reply. Since it is not disputed that Jewish law does indeed entitle the wife, who lives apart from her husband through no fault of her own, to

maintenance, it must be held that Polish law, too, would grant her this right. I must only add that no question arises before us as to the application of the principles of private international law which are applied by the Polish court, and for that reason there is no need to prove those provisions, since at the time that the parties acquired the status of married persons, they were citizens of that country, it was the country of their domicil, and they also designated it as the country of their residence after the marriage.

The amount of maintenance. I have reached the conclusion - though not without some difficulty - that this is a question of "remedy", and not one of "a substantive right", and that for this reason it must be determined in accordance with local law. It seems to me that we are concerned here with the giving of effect to a right to maintenance, and not with the extent of that right. I have not, indeed, found any direct authority laying down the principle as I have expressed it, nor have I found any authority against this proposition. I think, however, that it is possible to resort in this regard, by way of analogy, to the English rule which distinguishes between the right to recover damages for breach of contract - the existence, and also the extent, of which must be determined by the "proper law" under which the right was created - and the measure of damages which must be awarded as a result of such breach - which it is proper to determine in accordance with local law, the law of the country in which the court sits, to which the claim for damages has been brought. (See Cheshire, 4th edition, p. 659, and the judgment in *D'Almeida's* case (26).) Indeed, the expression "extent of the right or obligation" must not be confused with the expression "measure of damages". The first expression relates to the question of the degree of damage in respect of which compensation must be paid or the circumstances in which the damage must be regarded as being the direct consequence of the breach in question, while the second expression relates to the question of the sum which will constitute full satisfaction for the damage which was caused or the payment of which will be regarded as *restitutio in integrum.* If we apply this test to the matter with which we are concerned, then the extent of the right to recover - or the duty to pay - the maintenance relates to the question in which circumstances such rights or obligations exist - for example, whether the right or obligation is to be enforced when the reason for the husband's and wife's living apart is due to the wife's fault - while the amount of maintenance which the husband is obliged to

pay to his wife relates to the question in which way effect is to be given to such rights or obligations.

I am strengthened in my opinion by the following examples:

(a) There was a time in England when it was impossible for a wife, whose husband had deserted her and did not maintain her, to recover maintenance by bringing a monetary claim against him in a civil court. Her remedy was - and this remedy is still available today - to buy her necessaries from a merchant, and to debit her husband's account with that merchant with their price. The merchant, and he alone, was then entitled to sue the husband in a civil court for the price of the goods which he sold to the wife (see *Rosenbaum v. Rosenbaum* (13), at p. 1050).

(b) In the judgment last referred to, I attempted to show that all those remedies which are afforded by English law to a wife whose husband has deserted her and refuses to maintain her, for the implementation of the substantive right to recover maintenance from him, may be classified - where each such remedy relates to that substantive right - into one general category called "alimony". I also pointed out in that case that when a civil court in England awards alimony to a wife, it generally resorts to the practice - which was indeed no more than a practice - according to which the ecclesiastical courts in England used to award alimony, namely, by obliging the husband to pay an "ethical" allowance which did not exceed a third of the husband's income - where the matter related to his obligations to pay such an allowance on a fixed basis - or a fifth of his income - when the matter related to the payment of an ethical allowance for the period during which the main claim was pending, where such claim was based upon a cause of action constituting a matrimonial offence (ibid., pp. 1053, 1055). In resorting, however, to the practice referred to - and I emphasize this point - the civil courts of England merely act in accordance with a statutory provision - which has existed since 1857 - under which it is clearly laid down that the courts shall afford a remedy in accordance with the principles which used to be applied by the ecclesiastical courts in such matters. When, however, that same court, in the same case with which it is dealing, recognises the existence of the actual substantive right of the wife to recover maintenance in the circumstances referred to, it resorts to the principles rooted in the common law which

take precedence over the practice referred to. (See the remarks of Duke J. in *Dean v. Dean* (27), at pp. 174 and 176.)

(c) And finally, in *Levin's* case (10), at p. 936, it was held by this court - after it recognised, relying upon Jewish law, the right of the respondent's wife to recover maintenance from her husband, the appellant - that the question of the amount of maintenance must be considered "in the light of the rule that the decision as to the amount of maintenance is within the discretion of the judge of first instance." In approving this rule the court indeed did no more than follow a previous decision given by the Supreme Court in the time of the Mandate.

These three examples lead me to the clear conclusion that everything relating to the determination of the amount of maintenance is nothing more than a matter of the procedure for giving effect to the substantive right of a married woman to recover maintenance from her husband, and the obligation of the husband to pay such maintenance; in other words, that this is a matter of remedy and nothing more.

If this conclusion is correct, then it is the *lex fori* which applies in connection with the fixing of the amount of maintenance - as distinguished from the obligation to pay such maintenance - and not Polish law. I shall be content in this connection to cite the dicta of Scrutton L.J., which he made in the case of *The Colorado* (28), at p. 108: -

> "The nature of the right may have to be determined by some other law, but the nature of the remedy which enforces the right is a matter for the law of the tribunal which is asked to enforce the right."

In applying the *lex fori* in order to determine that question of the amount of maintenance - whether the expression quoted relates to Jewish law, or to all those rules applied by the civil courts of this country in fixing the amount of maintenance which it obliges the husband to pay - including the tests laid down in *Levin's* case (10), and which were applied by the learned judge in the matter before us, I see no grounds - again applying a rule of the *lex fori* - for interfering with the discretion of the judge in fixing the maintenance in question at the sum which he laid down.

From all this it follows that the appeal - also to the extent that it relates to the counter-claim - is without substance, and that the appeal as a whole, therefore, should be dismissed.

I could have concluded my judgment at this point were it not that I feel bound to consider one basic question presented to us by counsel for the appellant in his attempt to prevent us from deciding that the law which determines the validity of the marriage of the parties is the foreign law which applied to them at the time that they contracted their civil marriage outside the country. Just imagine, says Mr. Sheps, that if that proposition is accepted, parties who celebrated their marriage according to Jewish law outside this country, at a time when they were citizens of a state which required the celebration of a marriage by civil rites alone, will not be regarded by the civil courts of Israel as married persons. And let there be no mistake about it, Mr. Sheps added with emphasis, that there are a large number of cases of Jews who celebrated their marriage by Jewish law alone, before their immigration to Israel, and surely the marriages of these Jews in such cases should be regarded as valid.

In short, as Mr. Sheps argued, that very principle of "a healthy policy" which was stressed by the learned judge in upholding the validity of the civil marriage of the parties, obliges us to lay down a rule other than that which we have accepted, which is calculated to create a serious obstacle for Jews who belong to the category mentioned, and whose number is greater than those who celebrated their marriages by a civil ceremony alone before they came to Israel.

The question raised by counsel for the appellant is undoubtedly a serious question which demands a well thought out reply. It is for this reason that I do not propose to run away from my duty upon the usual ground that when this question comes before us directly, we shall consider it and give our decision. The reply which should be given to this question may also be a factor which should properly be considered in laying down the rule according to which the validity or invalidity of a marriage such as that celebrated between the parties in this case should be determined. On the other hand, since the question referred to only arises indirectly, I do not intend to deal with it at any length,

but shall content myself with pointing to the general line of thought which has led me to the conclusion which I have reached.

My conclusion is as follows : I incline to the view that even a civil court in Israel, when faced with the question of the validity of a marriage celebrated between Jews in another country by Jewish law alone, will be found to recognise such marriage, even if the law of that country of which the parties were citizens at the time of such marriage only recognises a marriage celebrated in civil form.

I have already dealt, in another part of my judgment, with the rule - which was already laid down in the time of the Mandate - that the personal law of stateless Jews is Jewish law. It is true that there is no mention of such a rule in the Palestine Order in Council itself, and it is possible indeed to hold another view, namely, that the personal law of such Jews should be deemed to be the law of their last nationality (in regard to this possible approach, see the remarks of Wolff, ibid, p. 103, note l). It is not my intention, however, as I have already said, to depart from the rule referred to, more particularly as in my opinion it is sound. I do wish, however, to express my disagreement with the approach which was the basis at that time for the acceptance of that rule - namely that Jewish law is the religious law of such Jews, and that it is only for this reason that it must be regarded as their personal law (in connection with this view, see *Freyberger's* case (1)). Such a conception of the matter appears to me to be fundamentally wrong, since it disregards the historical development of the Jewish people throughout the generations, and also because this conception is artificial and unrealistic, since it results in compelling unbelieving Jews - and there are such Jews - to obey Jewish law only because it is their "religious law" as it were - an impossible situation. In my view, the true basis of the rule referred to is that Jewish law is the national law of stateless Jews, no less than it is the national law, in matters of personal status, of Jewish who are citizens of Israel. I go further, however, and say that when a question such as that posed by counsel for the appellant arises before an Israel court, that court will certainly be entitled - for the limited purpose of recognising the validity of a marriage celebrated outside the country by Jewish rites alone - to regard Jewish law as the national law of the parties - that is to say, within the meaning of Article 64 (ii) above -

even if the parties, at the time of the marriage, were citizens of a foreign state which does not recognise such marriages. I shall clarify my view.

It is almost superfluous to explain today - what must now be plain to all - that the Jews, even after they were exiled from their country, never became, in their own eyes, a religious sect. According to their own conceptions, they never ceased to be a nation together with the other nations of the world. Their absence from their own country, to which its sons continued to be faithful, was temporary, and carried with it, through all its wanderings, and during all periods of its exile, that most valuable treasure - its culture, its and West Library, p. 69), said that this was:-

During the long period, however, in which the Jews were compelled, in the lands of their dispersion, to confine themselves within the Ghetto walls, Jewish law soon assumed to a growing degree a religious form. But it never ceased, for this reason, to be the national law of the Jews, even after a breach had been made in the walls of the Ghetto and the Jews entered the world outside those walls. And this is also true of those Jews who, having "tasted enlightenment" and having acquired civil and political rights in the countries in which they lived, began to regard some of the provisions of Jewish law, and perhaps many of those provisions, as foreign to their spirit. In speaking of the place of the "Shulhan Aruh" in the life of the Jewish people, Ahad Ha'am, in his essay "Ancestor Worship" (Essays, Ahad Ha-Am, translated and edited by Leon Simon, East and West Library, p. 69), said that this was:-

> "The book closest to the spirit of our people having regard to its situation and needs during those generations which accepted it for themselves and their descendants. And if we declare 'that this is not our law', then our declaration will be untrue, for this is indeed our law in the form that it necessarily assumed at the end of the Middle Ages, just as the Talmud was our law in the form that it assumed at the end of an earlier period, and as the Bible was our law in the form that it assumed when the people was still living a national existence in its own country ; these three together are but three different milestones along the road of

> the development of one entity - the spirit of the Jewish people - in accordance with its position and needs during different periods."

And in another essay (The Law from Zion) he wrote :-

> "Only by the complete atrophy of his feeling for his people can a Jew be so 'emancipated' as to be able to regard all those things that have been sacred to the people from time immemorial with the indifference and detachment of an entire stranger, who may accept or reject them, may treat them with reverence or contempt, on the strength of a purely intellectual assessment of their objective worth. A Jew who has not yet suffered that kind of atrophy cannot rid himself of his attachment to his national past and all it held sacred, even though he may have become a thoroughgoing sceptic in matters of religion ; and the only difference between him and the religious Jew is that he says 'I feel' where the other says
> 'I believe.' "[1)]

It is, indeed, a separate question whether, and to what extent, foreign States recognise the application of Jewish law - as part of their municipal law - to Jews who were resident in such places, just as it is a separate question whether - as one must suppose - those states which accorded a measure of recognition to Jewish law, did so upon the basis that that law was the law of a particular religious aspect that dwelt among them. This latter manifestation, in fact, provides reliable testimony as to the vital part played by Jewish law in respect of Jews in various countries. In this regard it is fitting that I should not pass over the observations made in the year 1795 by Lord Stowell, when called upon, sitting as an ecclesiastical court in England in *Lindo v. Belisavio* (30), to determine the validity of a marriage celebrated according to Jewish law. This is what he said: -

[1)] Translated by Leon Simon.

> "This is a question of marriage of a very different kind" (that is to say, which was not celebrated in accordance with the provisions of Canon Law) "between persons governed by a peculiar law of their own, and administered, to a certain degree, by a jurisdiction established among themselves - a jurisdiction competent to decide upon questions of this nature with peculiar advantage... If I am to apply the peculiar principles of Jewish law, which I conceive is the obligation imposed upon me, I may run the hazard of mistaking those principles, having a very moderate knowledge of that law."

(As quoted from the judgment of Stirling J. in *De Wilton's* case (29)).

As I have said, I do not attribute a great deal of importance - from the point of view of the problem with which we are dealing now - to the question of the extent of the application of Jewish law, as part of the municipal law of foreign states, to their Jewish residents. I do this since the very moment that we admit - as we are obliged to admit - the continued existence of the Jews, in all generations and in all the lands of their dispersion, as a separate people, we must test the nature of Jewish law by the historic relationship of the Jewish people to this law. We shall then conclude - against our will - that the Jewish people really treated Jewish law, throughout their existence and their dispersion, as their special property, as part of the treasure of their culture.

It follows that this law served in the past as the national law of the Jews, and even today possesses this national character in respect of Jews wherever they may be.

If this conclusion, based as it is upon the historical approach which I have mentioned, is correct, we can easily rid ourselves of that artificial conception - with which we have already dealt - which compels obedience to the 'religious' law by persons who in no sense regard themselves as religious. That conclusion, moreover, brings us to a satisfactory solution of the problem raised by counsel for the appellant.

I must now return to interpret the expression "law of his nationality" which is mentioned in Article 64(ii) of the Palestine Order in Council. Generally speaking, it will be proper to assign to this expression its ordinary and accepted meaning, that is to say

the law of the country of which the party affected was a citizen or national at all relative times, the *lex patriae.* However, in regard to the situation assumed by counsel for the appellant in posing the question referred to, we may extend the meaning of the expression referred to in such a way as also to embrace Jewish law, where the parties who were Jews, and foreign citizens, married outside this country ; that is to say, for the restricted purpose of validating such a marriage, it is proper to prefer here, over and above the foreign national law *(lex patriae)* which governed the parties at the time of their marriage and which only recognises marriages celebrated in particular civil form, the other national law which they possessed then, and which continues to be their national law, that is, Jewish law. If, moreover, we follow this course, and lay down the law in these terms, we shall also remain faithful to the principle - a widely-accepted principle in this branch of the law - that it is the duty of the judge who investigates the question of the validity of a marriage to do his best, so far as the law enables him so to do, to hold a marriage valid, and not invalid.

This latter approach, which prefers the one national law of a person who possesses dual nationality over his other national law, with the object of validating a marriage which is valid according to one of those laws, but not to the other, is not foreign to private international law. In this regard I draw attention to the example furnished by Martin Wolff in his book referred to above, at pp. 130, 131.

To sum up, I myself would incline to regard the marriage of Jews, as presented in the example of counsel for the appellant as valid. Since this is so, the question posed by him has no effect on my conclusion in regard to the correctness of the principle according to which I have held that the 'Polish' marriage of the parties is also valid.

On the basis of what I have said, I agree that both parts of the appeal should be dismissed.

WITKON J. I agree that the appeal should be dismissed, though I differ somewhat from the grounds which moved my colleagues Olshan and Agranat JJ. to reach that result. As will appear, I am in general agreement with the learned judge who sat in this case in the court of first instance.

My starting point is the well-known principle that in any case involving a 'foreign' element - foreign nationality, residence outside the country, a contract or act executed or performed in another country and so forth - it is the duty of the court to examine whether it is necessary to resort to the principles of private international law before having recourse to the internal municipal law. The provisions of the municipal law are generally directed to cases in which a foreign element does not arise, unless that law itself lays down a provision specifically directed to such elements. Where a foreign element appears in any case, resort must first be had to the principles of private international law, and it must be ascertained whether those principles refer us to any foreign law or not. The principles of private international law take precedence over any other law which is purely municipal and internal.

There are two principles of private international law which must be considered in this case, when we examine the validity of the marriage between the appellant and the respondent, and both these principles prevent us from examining this problem according to the religious law. And this is the first principle: when a fundamental question falls to be considered - in this case, the question whether the appellant is entitled to claim damages from the respondent, and whether he is liable for maintenance - and when this question is dependant upon the reply to another question (an incidental question) - in this case the question of the validity of the foreign marriage celebrated by the parties in Poland - the court must consider the incidental question according to the law (the municipal or foreign law) which applies to that question and not according to the law (the municipal or foreign law) which applies to the fundamental question. That was decided in the case of *Goodman's Trusts* (18), and it is in this respect that the importance of that decision lies in connection with the case before us. The second principle is that the question of the validity of the marriage - at least from the point of view of form - must be tested according to the law which applied in the place and at the time of the celebration of the marriage (*locus regit actum),* and no change in the "personal law" of the parties - resulting from a change in their citizenship, their residence, or any other change - can operate to invalidate that which was valid at the time and in the place where the marriage was celebrated. These two principles refer us to Polish law, which applied to the parties at the time and in the place of their marriage, and there is again no room

for the application of any other law in regard to the question of the validity of the marriage.

Counsel for the appellant relied on Article 47 of the Palestine Order in Council, and submitted that the matter before us is governed by the religious law, that is to say, Jewish law, and that according to that law the civil marriage celebrated between the parties in Poland is invalid. That law, counsel submitted, is universal in its application, and applies to Jews, who are governed by it in matters of personal faith - that is to say, Jews who are not foreign nationals at the time of the filing of the claim and therefore subject to the law of their nationality in accordance with Article 64 of the Order in Council. This submission disregards the two principles of private international law which I have stated above. It is based, apparently, upon the assumption that to the extent to which Article 47 brings into application, by way of incorporation by reference, Jewish law - which itself is universal in its application to Jews wherever they are, be their nationality or residence whatever it may - there is an indication that the Mandatory legislation intended to exclude the principles of private international law in respect of Jews, who are thus subject to Jewish law. My reply to this submission is that this was not the intention of the Mandatory legislature. The provision in Article 47 is a provision of the municipal internal law, and does not form an exception to the rule which I have stated: that private international law takes precedence in its application over municipal internal law. The provision in Article 47 is also subject to the rules of private international law. And if it be argued that Jewish law is universal, the reply is that every religious law, in its application in this country, flows from an act of the secular legislature, namely, Article 47 of the Order in Council - from the point of view of the basic norm according to the theory of Kelsen - and derives its force from that Article. The secular legislature only conferred legal force upon religious law subject to the principles of private international law. This, in any event, is the proper approach for a civil court in this country. And if it be argued that the position in a religious court is otherwise, as was hinted in *Cohen's* case (9), (which was cited in a judgment of my colleague Olshan J.), and that there is in this, therefore, evidence that a civil court too should apply religious law in accordance with Article 47 without having regard to the principles of private international law. otherwise there might be different results in the two judicial fora - the civil and the religious. If this result could be brought about in one

and the same case by the litigants' choosing which court they will approach, the result could certainly not be one contemplated by the legislator. My opinion, therfore, is that a religious court, too, is obliged to act in accordance with the principles of private international law, once the legislature has conferred upon it jurisdicton in matters of personal status or in any other matter, and that there is no fear of there being different results in the two jurisdictions which exist side by side in this country.

We cannot apply the religious law - in accordance with Article 47 - to a particular matter before we have ascertained whether the principles of private international law refer us to a particular foreign law. In the present case we have found that Polish law applies, in view of the two principles of private international law to which I have referred - the principle relating to decisions of incidental questions, and the principle that a change in citizenship or residence has no effect upon the matter. This being so, Jewish law has no application to this case, in spite of its universal character. It is Polish law which applies, because it is the law which governed the parties at the time and place of their marriage. The provisions in Article 64 of the Order in Council are, in my opinion, irrelevant to this matter, and it is only fortuitous that the 'national' law at the time and place of the marriage is the same law which applies at the place of its celebration. If, for example, private international law had referred us to some other foreign law - not Polish law - we should have applied that law without any reference to Article 64 and without paying any regard to the Polish nationality of the parties in the past. The only source for the application of Polish law is, as I have said, private international law, which applies in this country by virtue of Article 46 of the Order in Council.

My colleague, Agranat J., has asked the question how one can grant relief to the respondent under Jewish law when her status as the wife of the appellant is only recognised by Polish law, and he draws a distinction between the "right" to claim maintenance and the "amount" of the maintenance to which she is entitled. In my opinion there is no necessity to draw such a distinction and for this reason I express no opinion upon it. In my view the institution called "marriage" possesses a universal character, and a marriage under Jewish law is no different from what is accepted in the rest of the civilised world. I have no hesitation, therefore, in applying the right to maintenance of a

wife married under Jewish law in favour of a wife whose marriage is based upon foreign law, but is recognised by the law of this country.

In view of what I have said above there is no necessity for me to deal with the question of the validity of the marriage between the respondent and the appellant from the point of view of religious law, namely Jewish law. Since, however, my colleague Olshan J. has dealt at some length with this question, I wish to state in detail the grounds which have impelled me to differ from his opinion.

The learned judge in the court below laid down the principle in the following terms: -

> "Since the parties at no time intended to be married under the provisions of Jewish religious law, that law will not regard their union as a marriage. The cohabitation of the plaintiff and the defendant cannot be regarded as cohabitation for the purposes of a religious marriage, though it certainly was cohabitation for the purposes of marriage under Polish civil law.
>
> There is no presumption to assist the defendant in her submission that it must at least be presumed that she has been married according to Jewish religious law. From the point of view of Jewish religious law the parties have never enjoyed the status of a married couple."

I do not wish to raise the question whether this is also the rule under Jewish law, since my colleague Olshan J. also did not do so. While Olshan J. was of opinion that there was nothing in the evidence of the appellant to displace the presumption of Jewish law "that a man does not indulge in sexual intercourse for the purpose of sin," it seems to me that the learned judge, who heard the witnesses and weighed their evidence, was justified in reaching the conclusion that the appellant at least had no intention of marriage. Although the judge did not believe the appellant in regard to other matters on which he testified, he accepted his evidence on this point, and there was also nothing before him to contradict this evidence. On the contrary, even the respondent said (at p.

28 of the record) : "My husband is not orthodox" ; and this was the ground for his refusal to celebrate a religious marriage because, as he said, "It is unnecessary". If, therefore, the principle is as stated by the learned judge, namely, that the presumption in question only applies to Jews who are "orthodox" , and who intend to be sanctified, then there was a sound basis in the evidence for his conclusion, and we are not entitled, in my view, to interfere therewith. My colleague Olshan J. points out that in a case dealing with maintenance there is no need to decide finally and irrevocably as to the validity of the marriage. In my view, this presumption is nothing but a rule of evidence. And in any event, what difference can it make ? If there is no room for the application of the presumption, then the marriage has not been proved and if there is room for the application of the presumption, then the marriage has been proved for all purposes, as long as that evidence has not been contradicted. I see no distinction in this regard between a claim for maintenance and any other claim which gives rise to the question of the validity of the marriage. A distinction such as this creates the impression that there is some distinction between a marriage "de jure" and a marriage "de facto". In my opinion, the public interest demands that we give a clear reply to the question of the validity of the marriage, nor may we leave the parties in a state of doubt as to whether they are married one to the other, or not.

As I have said, my reply to this question is based upon Polish law, which operates in this case by virtue of the principles of private international law, and, as was held by the learned judge, I too answer this question in the affirmative.

Appeal dismissed.

Judgment given on February 19, 1954.