C.A. 238/53

AHARON COHEN and BELLA BOUSSLIK

v.

THE ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Civil Appeal
[January 15, 1954]
Before Cheshin J., Silberg J., and Sussman J.

Family law - Husband and wife - Form of marriage ceremony - Impediment of marriage - Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953 *- Alteration of substantive rights - No retrospective effect - Declaratory order.*

The appellants, Aharon Cohen and Bella Bousslik, went through a form of marriage ceremony in the office of their advocate. They had previously requested the Rabbinate to marry them but since the petitioner, Cohen, was regarded as of, Priestly stock and Bella Bousslik was a divorcee, the Rabbinate refused to solemnize their marriage because of the Biblical injunction forbidding the marriage of a "Cohen" and a divorced woman.

The office of the Registration of Inhabitants refused to register Cohen as a married man and the appellants then sought a declaration in the District Court that they were lawfully married. After the case had been heard but before judgment, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, was passed by the Knesset. Section 1 of this Law[1)] confers exclusive jurisdiction in matters of marriage of Jews in Israel, being nationals or residents of the State, upon the Rabbinical Courts. The District Court declined to make the declaration sought, and the appellants appealed.

Held by a majority (Silberg and Sussman JJ.)

1) For s. 1 see infra p. 246.

1) As the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, alters substantive rights it does not operate retrospectively and the District Court had jurisdiction to make the order sought.

2) Notwithstanding the Biblical prohibition of a marriage between a "Cohen" and a divorcee, once such a marriage has been entered into in a manner recognized by Jewish law, that law regards them as husband and wife.

3) In the present case the marriage had been entered into in a manner recognized by Jewish law (by the intended husband handing the intended wife something *of* value, namely, a ring, in the presence of two witnesses) and accordingly the petitioners were entitled to the declaration sought.

Held by Cheshin J. dissenting:-

1) The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, affected procedure only, and operated with retrospective effect, and the District Court accordingly had no jurisdiction.

2) The granting of a declaratory order is a matter within the discretion of the courts and in the circumstances of the present case that discretion should be exercised against the petitioners and the order refused.

Palestine cases referred to:

(1) *C.A.* 22/42 - *Olga Welder (also known as Azgour) v. Samuel Azgour and Another;* (1942), 9 *P.L.R.* 328.

(2) *Cr. A.* 4/38 - *Abdul-Rahim Muhammad Nassar v. Attorney-General;*(1938), 5 *P.L.R. 65.*

(3) *Cr. A.* 6/38 - *Issa Jaber Abou Iswai v. Attorney-General;*(1938), 1 *S.C.J. 64.*

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

(5) *C.A.* 240/37 - *Palestine Mercantile Bank Ltd. v. Jacob Fryman and Another;* (1938), 5 *P.L.R.* 159.

(6) *H.C. 22/39 - Zussman Stark v. Chief Execution Officer, Tel Aviv and Another; (1939), 6 P.L.R.* 323.

(7) *L.A.* 136/26 - *Saleh Salah Hamdan and Others v. Ma'mour Awkaf Nablus and Another;* (1926), 3 *C.O.J.* 1119.

(8) *H.C.* 76/36 - *Josef Babayoff v. Chief Execution Officer, Jerusalem and Another;* (1936), 4 *P.L.R.* 19.

(9) *C.A.* 92/42 - *Municipal Council of Jerusalem v. Hevrat Harchavat Hayishuv B'eretz Israel;* (1942), 9 *P.L.R.* 503.

(10) *C.C.* 117/45, *Tel Aviv-Moshe Nathaniel* v. *Joseph Cohen and Others;* (1945), *S.D.C.* 695; *C.A. 5/46* - (1947), 14 *P.L.R.* 313 *(on appeal).*

(11) *C.A.* 190/35 - *Esther Banin v. Moshe Banin;* (1936), 3 *P.L.R.* 71.

(12) *H.C.* 5/42 - *Israel Rokach v. The District Commissioner, Lydda District, Jaffa and Others;* (1942), 9 *P.L.R.* 191.

(13) *H.C.* 1/37 - *Rivka Silberstein and Others* v. *Constable in Charge of the Police Lock-up, Haifa and Another;* (1937), 1 *S.C.J.* 13.

(14) *Motion* 190/43, *Jerusalem - Dr. Raphael Ossorguine and Others v. The Hotzaah Ivrith Ltd.;* (1943), *S.D.C.* 144.

(15) *C.C.* 267/47, *Tel-Aviv - Mordechai and Le'ah Levin v. Local Council Ramat Gan; Hamishpat,* (1948), *Vol.* 3, 296.

Israel cases referred to:

(16) *H.C.* 149/51 - *Zigfrid Garler v. Maya Garler and Others;* (1951), 5 *P.D.* 1399.

(17) *H.C.* 293/52 - *Edna Amitsaur v. Chief Execution Officer, District Court, Tel Aviv and Others;* (1953), 7 *P.D.* 98.

(18) *Cr. A.* 122/51 - *Dov Ben-Avraham Ogapel and Others* v. *The Attorney-General;* (1951), 5 P.D. 1672.

(19) *Cr. A.* 121/51 - *David Epstein* v. *The Attorney-General,* (1953), 7 P.D. 169.

(20) *H.C.* 71/49 - *Izhak Kwatinski v. District Commissioner, Jerusalem* and *Others;* (1950), 4 P.D. 815.

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

(22) *A. v. B. Appeal No.* 1/60/706; (1950), *Rabbinical Courts of Appeals (Collected Judgments), p.* 132.

English cases referred to:

(23) *Marie Tilche Sasson v. Maurice Sasson;* [1924] *A.C.* 1007.

(24) *Abbot v. The Minister for Lands;* (1895), 72 L.T. 402.

(25) *Hitchcock v. Way;* (1837), 112 *E.R.* 360.

(26) *In re Athlumney; Ex parte Wilson;* [1898] 2 *Q.B. 547.*

(27) *In re Joseph Suche and Co., Limited* (1875), 1 *Ch.D.* 48.

(28) *Hutchinson v. Jauncey;* [1950] 1 *All E.R.* 165; [1950] 1 *K.B. 574.*

(29) *Republic of Costa Rica v. Erlanger;* (1876), 3 *Ch. D.* 62.

(30) *The Colonial Sugar Refining Company, Limited v. Irving;* [1905] *A.C.* 369.

(31) *Guaranty Trust Company of New York v. Hannay and Company;* [1915] 2 *K.B.* 536.

(32) *Richardson v. Mellish;* (1824), 130 *E.R.* 294.

(33) *Sasty Velaider Aronegary and his wife v. Sambecutty Vaigalie and others;* (1881) 6 *App. Cas.* 364.

(34) *H. (otherwise D.) v. H.;* [1953] 2 *All E.R.* 1229.

(35) *Leeds and County Bank, Ltd. v. Walker;* (1882-3), 11 *Q.B.D.* 84.

(36) J*ames Gardner v. Edward A. Lucas and Others;* (1878) 3 *App. Cas.* 582.

(37) *Kimbray v. Draper;* (1868), *L.R. 3 Q.B.* 160.

(38) *Wright v. Hale and Another;* (1860), 3 L.T. 444.

(39) *Warne v. Beresford;* (1837), 150 *E.R.* 1002.

(40) *The Ironsides;* (1862), 6 L.T. 59.

(41) *Hamilton Gell v. White;* [1922] 2 *K.B.* 422.

(42) *Grand Junction Waterworks Co. v. Hampton Urban District Council;* [1898] 2 *Ch.* 331.

(43) *Dyson v. Attorney-General;* [1911] 1 *K.B.* 410.

(44) *Burghes v. Attorney-General;* [1911] 2 *Ch.* 139.

(45) *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, Ltd.;* [1921] 2 *A.C.* 438.

(46) *Gray v. Spyer;* [1922] 2 *Ch.* 22.

(47) *Thomas v. Attorney-General;* (1936), 155 L.T. 312.

(48) *Har-Shefi v. Har-Shefi;* [1953] 1 *All E.R.* 783.

(49) *Roesin v. Attorney-General;* (1918), *T.L.R.* 417.

American case referred to:

(50) *Harril v. American Home Mortgage Co.; 1 Corp. Juris Sec., p.* 1025.

South African case referred to:

(51) *Martens v. Martens ;* [1952] 3 *S.A. L.R.* 771.

Ganor for the *appellants.*
Weinberg, Deputy State Attorney, for the respondents.

SILBERG J. The subject of the appeal before us is the determination of the legal significance of an unusual act, namely the solemnization of the marriage of a Jew and a Jewess not in the Office of the Rabbinate, but in an advocate's office, by an advocate, after the Office of the Rabbinate had refused to solemnize it on the ground that it was contrary to Jewish law.

2. The particulars in the case are set out below. They present such a tangle of questions of law and fact, of law and ceremonial, of Jewish law and that of the State of Israel, that it is desirable to set them out in a detailed and systematic way:

(a) The first appellant, Aharon Cohen, and the second appellant, Bella Bousslik, are Israeli Jews not figuring in the list of adult members of the Jewish Community of Palestine (Knesset Yisrael).

(b) In 1949, the first appellant applied to the Offices of the Rabbinate in Tel Aviv and Ramat Gan for the solemnization of his marriage to the second appellant, who had shortly before been divorced from her husband by a bill of divorcement, in accordance with Jewish law. The appellant stated that in spite of his name Aharon Cohen[1)], which suggested he was a descendant of Aharon the High Priest, he was not a priest and, therefore, the Biblical prohibition of the marriage of a man of priestly stock and a divorced woman (Leviticus XXI, 7) did not apply to him. The statement, however, did not satisfy the Rabbis, and they refused to grant his application.

[1)] Cohen in Hebrew means a priest.

(c) In view of this refusal, the appellants proceeded to live together as man and wife in the same dwelling; they regarded themselves for all purposes as husband and wife and were reputed to be husband and wife by all their acquaintances. This state of things lasted until August-September 1952. About that time, the first appellant again applied to the Chief Rabbinate of Tel Aviv for permission to marry the second appellant, reiterating his claim that he was not of priestly descent. The learned Rabbis considered the application - this time not in their capacity as an Office of the Rabbinate, but as a Rabbinical Court - heard argument, took evidence, and ultimately rejected the application on the ground that the first appellant was at least "possibly of priestly descent" and could not, therefore, be granted permission to marry a divorcee.

(d) A rumor then reached the appellants - we do not know how - that the rabbinical prohibition might be circumvented by the performance of a religious ceremony outside the Office of the Rabbinate, and they asked Mr. David Ganor, an advocate, to perform the ceremony for them. Mr. Ganor consented. He at first published a notice in two local newspapers to the effect that Mr. Aharon Cohen, "who is divorced and at liberty to marry", proposed to marry Mrs. Bella Bousslik, "who is divorced and at liberty to marry"; that the marriage would take place on December 16, 1952, "at an advocate's office in Tel Aviv"; and that "anyone being aware that either of the parties is disqualified from marrying the other may notify the advocate's secretary, Miss Haya Tomashin, to such effect."

(e) When no opposition had been lodged with the aforementioned Miss Tomashin, Mr. Ganor, on December 16, 1952, prepared to perform the marriage ceremony. There appeared in his office the groom and bride, together with two witnesses specially invited for the purpose (Fisher and Hirsh), and two uninvited witnesses, namely, two police sergeants (Katz and Pachter) of the Investigation Branch of Tel Aviv District Headquarters, who had come to watch the "irregular" ceremony as guardians of the law, and were prepared to take part in it themselves as witnesses to the marriage. In the presence of all four witnesses, the first appellant took a gold ring from his pocket and gave it to the second appellant, saying as he did so: "You are sanctified to me by this ring in accordance with the Law of Moses and Israel." Moreover - as he has explained to us, to enhance the validity of the proceedings - Mr. Ganor had the appellants and the two invited witnesses sign a special document - "special" in a twofold sense - styled by him "marriage deed (and settlement)". This deed

certifies that "I, Aharon Cohen, do this day take Mrs. Bella Bousslik to wife by 'acquisition', that is to say, I sanctify her to me by a ring, etc.", and that "I, Bella Bousslik, after Aharon Cohen has taken me to wife this day ....hereby affix my signature to this deed to signify my consent to the marriage etc." The declarant, Aharon Cohen, further says in the deed: "As a settlement in accordance with age-old Jewish custom, I allocate to my wife, Bella Bousslik, an amount of IL. 5,000.-". This brief passage ostensibly justifies the description "settlement", which, as we have seen, figures (in brackets) at the top of the document. This is how the appellants' marriage ceremony was held - a marriage ceremony without a canopy, for a canopy, for some reason, was not put up either in or outside the advocate's office.

(f) Some days after this ceremony the first appellant asked the Office of the Registration of Inhabitants of Tel Aviv at Hakirya to enter the change of his personal status from "single" to "married" in his identity booklet, but that office refused to do so on the ground that the marriage was not legal and not recognized by law.

(g) Following this refusal, the appellants filed an application by way of motion against the Attorney-General in the District Court of Tel Aviv, asking for a judgment declaring that they were married one to the other. This application was accompanied by various sworn declarations - by the appellants (the applicants) themselves, by the invited witnesses to the marriage (Fisher and Hirsh) and by Mr. Ganor- certifying the main facts stated above. In connection with another application, for the early hearing of the case, a further sworn declaration was submitted by the first appellant (the first applicant), containing two paragraphs which give a hint, and perhaps more than just a hint, of the background of the matter. These two paragraphs read as follows :

> "6. Owing to the non-recognition of our marriage by the competent authorities, we are denied certain commodities, such as those due to the head of the family on a special ration card, and various income tax facilities. We are further caused unpleasantness when staying at an hotel in another town, since our identity booklets make us appear as unmarried people; this is most distressing for us.

7. The non-recognition of our marriage threatens the economic security of one of us in the event of the death of the other, since only a person whose marriage is recognized shares in the inheritance of the other."

(h) And now for the two other particulars which, although of a legal character, belong to this recital of facts. They are - if one may use the expression - two legal "facts", which, in the opinion of the court below determined the case against the applicants-petitioners - the Jerusalem Ban, and the Marriage and Divorce Law.

(aa) *The Jerusalem Ban.* At the end of the winter of 1949, a national conference of Rabbis met in Jerusalem which, with the sanction of the Chief Rabbinate, considered and approved various rules of matrimonial law designed to regulate certain matters and to obviate certain difficulties in connection with matrimony and the solemnization of marriages. These rules contain the following paragraph :

"We prohibit every Rabbi or other person in Israel from solemnizing marriages, unless he has been authorized and appointed to perform this function by the writ and signature of the Chief Rabbis of the towns of Eretz Israel."

The rules conclude as follows:

"These rules have been made by the Assembly of the Enlarged Council of the Chief Rabbinate of Israel. The sanction against anyone breaking these rules is the imposition of a ban to be applied - as it has always been applied - with the full severity of the rules made by the Rabbis in Israel for all communities in Israel... and they shall be observed according to the letter until the Redeemer comes to Zion. The offender against any of them shall suffer the penalties of excommunication, ban and curse."[1)]

[1)] There is a play upon words in the original which we have not attempted to translate.

These rules thus impose a ban on anyone solemnizing a marriage without being authorized to do so by the local rabbi and this ban, as appears from an earlier passage of the rules, applies to anyone "assuming the function of a witness to such a marriage." The act under consideration is thus affected by the ban both as regards the part played by the advocate and by the invited witnesses.

(bb) *The Marriage and Divorce Law*. The application in question was filed in the court below on January 1, 1953, and judgment was given on October 4, 1953. Between these two dates an important event took place. The Knesset enacted the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, which came into force on the date of its publication in the Official Gazette, i.e. on September 4, 1953 - exactly one month before the date of the judgment. I refer to Section 1, which enacts:

> "1. Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical courts."

From that date, it is quite immaterial whether or not the parties are members of the Jewish community of Eretz Israel, and it appears, at least *prima facie* - and this was also the opinion of the learned judge in the court below - that if the application had been filed after the coming into force of the said Law, the District Court would not have been competent to deal with the matter.

3. The Court below considered the application of the appellants, and rejected it after extensive discussion of the relevant Jewish law. I shall later revert to the reasons for the judgment. For the time being, it is sufficient to point out that the learned judge arrived at the opinion that of all the three ways in which a woman is 'acquired', "by money, by deed or by intercourse," (Kiddushin, I, 1) the most valid one in this case seems to have been the first, the 'acquisition' by something of value, but that method too was of doubtful validity, in view of the opinion expressed in rabbinical literature that a marriage performed in

contravention of any ban (which applies also to the witnesses) is null and void, since the violation of the ban disqualifies the witnesses, and the marriage thus becomes one contracted without witnesses, which is invalid "even if both parties affirm that it has taken place" (Kiddushin 65a; Shulhan Arukh, Even Ha-Ezer, 42, 2). This was considered to apply to the present case, too ; as a result of the Jerusalem Ban, the witnesses were disqualified; the disqualification of the witnesses entailed the nullity of the marriage - not only in form but in substance - so that it could not be recognized in a civil court either.

The learned judge was not quite positive on this point. He did not overlook the fact that other authorities oppose the view just set out, whether as regards the disqualification of the witnesses or the resulting nullity of the marriage, but the result of this conflict of views is, in his opinion -

> "that considering the possible disqualification of the witnesses, the solemnization following the payment of something of value must be regarded as of doubtful validity and cannot be pronounced valid."

The same doubt, though for other reasons, was expressed by him with regard to the validity of the solemnization by consummation. He sums up his remarks saying that since "not more has been proved than allows us to declare that the second applicant (the second appellant) is possibly married to the first applicant (the first appellant)", therefore, 'as it cannot be said with certainty that there has been no solemnization... it cannot be held, either, that the parties are married to each other."

For this reason alone the learned judge was about to reject the application. But before he was able to pronounce judgment, the second legal fact mentioned came into existence, namely, the promulgation of the Rabbinical Courts (Marriage and Divorce) Law, 1953; and this was an additional, independent ground for rejecting the application. The opinion of the learned judge was that in view of the provision contained in section 1 of the Law, he no longer had power to decide upon the application, although the proceedings had begun before the passing of the Law.

The learned judge thus placed his judgment on a two-fold basis. He rejected the application for lack of jurisdiction or, alternatively - in case the court of appeal should find that he had been competent to consider and determine the matter - on substantive grounds. It is against this judgment, and the two grounds upon which it is based, that the appeal before us is directed.

4. I shall first deal with the question of jurisdiction, the answer to which will open or close the door to the remaining questions which arise. That question falls into three parts:

(a) Was the District Court competent to deal with the application when it was first filed, before the promulgation of the Marriage and Divorce Law?

(b) Would the District Court have been competent to deal with the application had it been filed after the promulgation of the Marriage and Divorce Law?

(c) If the answer to the first question is 'yes', and to the second 'no', how are we to decide a case where, as here, the application was filed before, but determined after, the promulgation of that Law?

5. I begin with the second question, declaring at once that, in my opinion, the answer to it must be a definite 'no'. Section 1 of the Marriage and Divorce Law provides that "matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical Courts." Now a declaration of the validity of a marriage is undoubtedly a "matter of marriage"; the parties in this case are Jews and nationals and residents of the State, and the first that they are not members of the Jewish Community of Eretz Israel is now irrelevant, since section 1 is principally designed to abolish the distinction between members and non-members of the Jewish community of Eretz Israel. This being so, exclusive jurisdiction over an application of this kind is today vested, by virtue of that Law, in the Rabbinical Courts, and the District Courts will not in future have power to entertain such an application.

Our attention has been drawn to the judgment given by the Supreme Court in the case of *Waldar (Azgour) v. Azgour* (1), which seemingly contradicts the opinion I have just

expressed; but that judgment is irrelevant here and has no bearing at all, even by way of analogy, on the question before us. It merely establishes, in reliance on the judgment of the Privy Council in *Samson v. Samson* (23), that the declaration of the validity of a divorce already effected is not a judgment of divorce (which cannot be granted to foreign nationals in view of Article 64(i) of the Palestine Order in Council [1)], but it does not say anywhere that such a declaration is not even a "matter of divorce" (within the meaning of Article 51 of the Order in Council), and there can be no doubt that the Supreme Court regarded that declaration as such a matter. Logic demands that we should hold that a declaration of the validity of a marriage must be regarded as a "matter of marriage". Is it possible that such a declaration, which ordinarily serves as the basis for the very existence of the matrimonial relationship of the couple, should not be regarded as a "matter of marriage" within the meaning of section 1 of the said Law or of Article 53(i)[2)] of the Order in Council? It might well be said that both legislators, the Palestinian and the Israel, in referring to a "matter of marriage", meant first and foremost the making of such declarations. The least that can be said is that they certainly had no intention of excluding these declarations from the scope of that term. We can thus say that the declaration requested by the appellants is a "matter of marriage" within the meaning of section 1 of the Marriage and Divorce Law and that, if the application had been filed after the promulgation of the said Law, the District Court would undoubtedly not have been competent to deal with it.

6. It seems to me, on the other hand, that the answer to the first question should be in the affirmative, i.e. that during the period between January 1, 1953 (the date of the filing of the application) and September 4, 1953 (the date of the coming into force of the Marriage and Divorce Law) the District Court was competent to consider and determine the application of the appellants. The sole reason for this is that the parties were not members of the

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[1)] Palestine Order in Council, 1922, Art. 64(i):

Matters of personal Status — 64.(i)...matters of personal status affecting foreigners personal other than Moslems... shall be decided by the District Courts, which shall apply the personal law of the parties concerned...; provided that the District Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage except in accordance with any Ordinance transferring such jurisdiction.

[2)] Palestine Order in Council, 1922, Article 53(i):

Jewish Religious Courts — The Rabbinical Courts of the Jewish Community shall have:-(I) Exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners as defined in Article 59

Jewish Community of Eretz Israel and that, therefore, the provisions of Article 53(i) of the Palestine Order in Council did not apply to them. It is true that I doubted, even before the promulgation of the Marriage and Divorce Law, the validity of the distinction between a member and a nonmember of the Jewish community of Eretz Israel, regarding the distinction as having lost its content immediately with the establishment of the State. However, it was then an accepted legal principle in Israel, and was adopted by this Court, although with various reservations and qualifications, even in cases which occurred after the establishment of the State (see *Garler v. Garler* (16), *Amirsaur v. Chief Execution Officer* (17), and others). We are thus not entitled to depart from this principle, and have to decide that before the promulgation of the Marriage and Divorce Law, i.e., until September 4, 1953, the District Court was certainly competent to consider and determine the application.

7. There thus arises the third of the above questions, namely, whether or not, in view of the fact that the application was filed before the promulgation of the Marriage and Divorce Law, the District Court was competent to decide upon it even after the promulgation of that Law, or, in more technical language, whether or not the provision in section 1 of the Marriage and Divorce Law is a retroactive provision which deprives the court of jurisdiction, even in actions begun before the promulgation of the Law.

8. Ostensibly, this problem may be solved by reference to certain basic rules governing the interpretation of statutes, that is, to the well-known distinction between substantive and procedural Laws. It is generally known that a new substantive Law, which changes the rights and obligations of a person, is entirely prospective, that is to say, unless the Law itself makes explicit or implicit provision to the contrary, it is presumed to operate prospectively and not retrospectively, and not to affect the rights that were vested in the parties at the time the proceedings began (for an interpretation of the term "vested right" or "right accrued", compare the judgment of the Privy Council in *Abbot v. The Minister for Lands* (24)). As regards a procedural Law, however, which changes the modes of procedure of the court, it is presumed that it operates retrospectively, that is to say, that the court is obliged to follow it even with regard to proceedings begun before its promulgation. This is an accepted principle which has found its expression in very many English judgments. I cite a few instances.

"Where the law is altered, by statute, pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, show a clear intention to vary the mutual relation of such parties." *(Hitchcock v. Way* (25).)

"Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." (Per Wright J., in *re Athlumney, Ex parte Wilson* (26).)

"...it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them... there is one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights." (Per Jessel M.R. in *re Joseph Suche and Company Ltd.* (27), vide *Hutchinson v. launcey* (28) at p. 168.)

The gist of the idea of the retroactivity of new procedural provisions of law has been expressed by Lord Justice Mellish in one short, simple and clear sentence:

"No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done." (per Mellish L.J. in *Republic of Costa Rica v. Erlanger* (29).)

This and only this is the reason why a change in procedural law differs from a change in substantive law with regard to the question of retroactivity. The underlying consideration is that procedure is not a personal matter of the litigant; it is, so to speak, a preserve of the court, and therefore, if it is changed by the legislator, the change will operate also with regard to those parties who began to litigate before the change occurred.

9. But what I have said does not by itself provide a solution to our problem - therefore I have used the expression "ostensibly". The next and more difficult question is: what is the nature of the innovation introduced by the Marriage and Divorce Law, and must not the transfer of jurisdiction from the civil court to the religious court be here regarded as a fundamental change in the *substantive* law of the State? Not everything relating to court procedure is a procedural matter within the meaning of the above distinction. For instance, the right of appeal, a matter with which the court is unconcerned, is regarded, for the purposes of the principle in question, as a substantive right, and a new Law withdrawing it will not as a rule affect the position of a party whose case in the lower court began before the promulgation of that Law (see the judgment of this court in *Ogapel and Others v. The Attorney-General* (18), and *Epstein v. The Attorney-General* (19), and the judgment of the Privy Council in *Colonial Sugar Refining Company v. Irving* (30)).

10. But before embarking upon a discussion of this question let us see whether a solution to it cannot be found in the statute law of this country. I am thinking of section 17 of the Interpretation Ordinance,1945. Subsection (2) of that section provides :

> "(2) Where any enactment repeals any Law, such repeal shall not, unless a contrary intention appears,-...
>
> (c) affect any right, privilege, obligation or liability, acquired, accrued, or incurred, under any law so repealed ; or
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> (d) affect any penalty, forfeiture, or punishment, incurred in respect of any offence committed against any law so repealed ; or

> (e) affect any investigation, legal proceeding, or remedy, in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, as aforesaid, and any such investigation, legal proceeding, or remedy, may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing enactment had not been passed, made or issued."

Thus the text of the Law, as far as it is relevant to our case.

11. If the above section 17 (2) (e) did not use the words "may be instituted", there would be no doubt whatever in my mind that the provision of subsection (e) definitely solves our problem. The proceeding which began in the District Court under the old Law (the Order in Council) which empowered that Court to deal with matters of marriage of Jews not being members of the Jewish Community of Eretz Israel, is certainly a "legal proceeding", and consequently may "be continued" by virtue of the provision of subsection (e), until the passing of judgment, as if the "repealing enactment", i.e. section 1 of the Marriage and Divorce Law, "had not been passed, made or issued". But how are we to interpret the words "may be instituted" ? It is certain, as I have mentioned in para. 5 above, that today, after the promulgation of the Marriage and Divorce Law, the District Court is not competent to entertain proceedings in matters like the one in question. Now, if that is so, do not those words indicate that the reference is to a legal proceeding which has not been changed by the new Law, and which concerns a substantive right which has been so changed, and not to a legal proceeding which has itself been changed by the new Law ? For the legislator could not have permitted the institution of a legal proceeding under the old law unless he had in mind a change in the substantive, not the procedural, law.

I think that this line of reasoning is not convincing. The simple solution is that the legislator had in mind two things: a change in the substantive law *and* a change in the procedural law. In the case of the former, a proceeding of the kind referred to in the Ordinance may be instituted and continued; in the latter case such a proceeding may of course be only continued, where it was begun before the promulgation of the new Law. The conclusion is that where, as in the present case, the new Law withdraws jurisdiction from one court and transfer it to another court or tribunal, this transfer of jurisdiction does not

affect a proceeding begun previously, and the court may continue it until it has given judgment.

Explicit proof of this is to be found in two judgments given by the Supreme Court in the Mandatory period, and to which the Attorney -General, most fairly, has drawn our attention, namely, *Nassar* v. *Attorney-General* (2), and *Iswai* v. *Attorney-General* (3). The question in those cases was whether, in view of a new Law which withdrew the power to deal with a certain offence from the District Court and vested it in the Military Court, the District Court was still permitted to try the accused, whose case had been referred to it prior to the promulgation of that Law. The court decided that it was. It reached this decision on the strength of section 5(1) of the Interpretation Ordinance, 1929 (Laws of Palestine, cap. 69), which agrees almost word for word with the above-quoted s. 17(2) of the Interpretation Ordinance, 1945. Some support for this view may, on close scrutiny, be found also in the dicta of Justice Dunkelblum in *Kwatinski v. District Commissioner* (2).

12. But even one who does not agree with the interpretation given above to section 17(2) (e) or consider himself bound by the two judgments rendered during the Mandatory period will in the present case arrive at the same conclusion, for the reason referred to in para. 9 above. I am of the opinion that the transfer of jurisdiction from a civil court to a religious court, in the course of the proceedings, would in effect be a substantive change in the legal position of the litigant. Let us not be unduly influenced by terms and concepts of alien origin, but try to see things in the light of our own realities. The additional authority granted to the Rabbinical Courts with the promulgation of the Marriage and Divorce Law was not authority for authority's sake, but authority for the purpose of a change in content in order to ensure the correct application of a particular law, namely, the Jewish law. They said "the vessel" and meant its contents[1)] It was contended that it was immaterial who dealt with matters of marriage of the citizen so long as the law according to which they were dealt with was the Jewish religious law. But this contention was not accepted by those who fought for the adoption of the new Law, and from their point of view they were quite right. Jewish law as applied by a civil court is different from Jewish law as applied by a religious court. There is a difference in approach, in method, and sometimes also in the actual

[1)] This is a reference to the old Hebrew saying : "Look not upon the vessel but upon what it contains."

content of the judgment. For instance : in a civil court, everyone, even the party himself, may be a witness, while not everyone is qualified to give evidence in a religious court (see. e.g., the many categories of persons disqualified as witnesses enumerated in Shulhan Arukh. Hoshen Mishpat, 33 to 37). In Jewish law, "two are equivalent to a hundred", that is to say, if a hundred witnesses state that the husband is dead, and two state that he is not, the wife may not remarry, because she is possibly still bound to a living husband ; and if she has already remarried, she must be released from the new husband's control (Shulhan Arukh, Even Ha-Ezer, 17, 46; Ba'er Heitev, ibid. 127); the religious court may under no circumstances declare the absolute validity of the new marriage. But if (before the promulgation of the new Law) a civil court had had to deal with such a question, it would certainly have preferred the testimony of a hundred reliable witnesses and decided that the new marriage was valid.

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 *(Neussihin v. Neussihin* (4)) ; 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.

In short: the differences between the jurisdiction of the civil court and the jurisdiction of the religious court are so profound and so fundamental, that in my opinion it is quite impossible to say that the transfer of authority by the new Law from the civil court to the religious court is merely a procedural change. Whatever its "official" description in customary terminology, this change, as we have seen, is in practice likely to affect decisively the substantive rights of the parties, and it should therefore be treated as a

change in the substantive law, that is to say: the law should not be read retroactively, and it should be declared that the transfer of jurisdiction does not deprive the civil court of the power to consider and determine a matter with which it had begun to deal before the promulgation of the new Law.

13. The conclusion at which I have arrived is, therefore, that as the application was filed in the court below before the promulgation of the Marriage and Divorce Law, that court was competent to consider and determine it even after the promulgation of that Law.

14. It is fitting at this point to deal with a contention brought forward by Mr. Weinberg, the representative of the Attorney-General. That contention is that even if the Court was competent to deal with the application, and even assuming that from the point of view of the substantive law the parties are married to each other, the court should have dismissed the application, because the grant of a declaratory judgment in the circumstances is contrary to public policy. There are in this country - Mr. Weinberg submits - various provisions of law aimed at regulating matters of registration of marriages in a proper and orderly fashion through the competent authorities. He had in mind the Marriage and Divorce (Registration) Ordinance, 1919. That Ordinance says that the registering authority, in the case of a Jewish marriage, is the Rabbi. This means that the legislator particularly intended that a Rabbi, and not a private person, should perform the marriage ceremony and that, in the language of our sources, "anyone who does not know the nature of divorce and betrothal shall not deal with them" (Kiddushin 6a). Public policy, too, in such serious matters, in which the community is also interested, demands that not everyone who claims authority should be permitted to exercise it. The action of the appellants thus constituted both a circumvention of the law and an infringement of public policy, and they should therefore not be granted the declaration for which they applied. Accordingly, the representative of the respondent concluded, the learned judge was right - though not for the reason given by him - in rejecting the application of the appellants.

I must confess that this contention appealed to me, and that I was almost on the point of accepting it. Upon reflection, however, I realized that it was not well-founded. It is true that such acts, in themselves, infringe upon public policy, and that there can be no greater "mischief" than the performance of such "private" marriage ceremonies. It is moreover

correct that with regard to the grant of declaratory judgments the court has a certain discretion and will refuse relief prayed for where it would not be equitable to grant it *(Guaranty Trust Co. v. Hanney & Co.* (31)). I am prepared to add: or where the grant of the application would be contrary to public policy. But I am still not prepared to say that in the present case, after the act in question has been carried through, the act being legal according to religious law and therefore also according to civil law, it would be contrary to public policy to declare explicitly the validity of that act. All that the parties requested the court to do was to tell them what, according to the civil law, was the legal status of their marriage; and if the civil law endorses in this matter the religious law and recognizes the validity of the marriage, how can it be said that the declaration of this fact is contrary to public policy ? In any case, it is not particularly healthy and safe to rely on considerations of public policy in withholding the grant of a declaratory judgment. An English judge said 130 years ago that "public policy" was "a very unruly horse, and when once you get astride of it you never know where it will carry you." *(Richardson v. Mellish* (32)).

I am of opinion that in this respect, too, there was nothing to prevent the court below from granting the appellants the relief they prayed for, provided only that their arguments were well-founded.

15. This brings us to the last, and most difficult, part of this appeal, namely, the question whether the learned judge was right in deciding that the validity of the marriage of the appellants could not be recognized according to Jewish law. A particular difficulty arises from the fact that the learned judge, as will be remembered, did not *definitely* rule that the marriage was null, but only that it was of doubtful validity, so that, in effect, he left the question open and refrained from deciding the legal problem confronting him.

With all due respect to the learned judge, it seems to me that this is not the correct approach. "Teach your tongue to say: I know not" *(Berakhot* 4a) is not an injunction addressed to a judge, who should, rather, as a general rule, arrive at a definite opinion on every legal question arising before him. Here the judge was faced - as he saw the matter - with a disagreement between the authorities as to the disqualification of witnesses by reason of a ban; and despite his understandable reluctance to become involved in the

debate between these great authorities, it was his duty to reach a decision in the matter for the purposes of the concrete case before him. Proof of this duty - if such proof be required - may be found in the following pronouncement of the Supreme Court in *Palestine Mercantile Bank Ltd. v. Fryman* (5) :

> "If the Ottoman Law is not clear it is the duty of the judges to expound it, however difficult it may be."

From a purely legal point of view, as distinguished from the religious point of view, which deals with "prohibitions" and which always tends, in cases of doubt, to forbid, there is in Jewish law no special marriage status because of the doubt that perhaps a marriage has been contracted (see *Kiddushin* 5^{b} : "Where there is a doubt, it is only on prescription of the Sages that we suspect a marriage", and Rabbi Nissim, in his commentary on Alfasi, Responsa of the Maharik). The doubt which can arise is what is the exact legal status of such people, and where the doubt arises out of judicial conflicts between great authorities, the judge is bound, in this as in any other question of law, to arrive at a decision which is both certain and clear, however humble he may feel himself to be.

We therefore have to supply what, to our regret, the learned judge has omitted and to try to take a stand, one way or the other, on the questions he left open.

16. A woman, in Jewish law, is "acquired" in three ways : by money, by deed, or by intercourse; and the contention of counsel for the appellants is that his clients have adopted all three methods: solemnization by something of value - by the giving of the ring ; solemnization by the "marriage deed" - by the delivery of the so-called "marriage deed" ; and solemnization by intercourse - by living together as husband and wife. As to the third method, he invokes of course the legal presumption that no man will indulge in sexual intercourse for the purpose of sin (Yevamot 107a, Gittin 81b, Ketubot 73a), for were it not for this presumption, there would be no evidence of *intention,* which as is well known, is required also for a marriage by intercourse (Shulhan Arukh, Even Ha-Ezer, 26, 1). In addition to that, Mr. Ganor invokes a presumption of another kind, the presumption of "repute" - that is, where a man and a woman were reputed to be husband and wife for at least 30 days, an adulterer with the wife will be able to be punished (Yerushalmi Kiddushin

IV, 8), and Mr. Ganor argues that whereas the appellants have been reputed for a long time as married to each other among all their acquaintances, this "presumption by itself creates a sort of matrimonial bond between them." These are, very succinctly, the contentions of counsel for the appellants.

17. For brevity's sake, I will begin with the last three contentions of counsel for the appellants and say at once that in my opinion they are completely unfounded, and provide no basis for assuming - or even for having any doubt in the matter - that the marriage of the appellants is valid.

(a) *Solemnization by Marriage Deed.* It is obvious even to a person with only a rudimentary knowledge of rabbinical law that the "marriage deed" (and settlement) drawn up by Mr. Ganor can on no account, either as to its form or as to its contents, be regarded as a real marriage deed. A marriage deed in Jewish law is a constitutive document, which itself (by its delivery) creates the legal bond between the partners, and not a declaratory document, confirming something that has already taken place.

> "What is the procedure for a marriage deed? The man writes on a piece of paper or a clay tablet... 'thou art sanctified unto me', and gives it to the woman in the presence of witnesses", (Shulhan Arukh, Even Ha-Ezer, 32, 1; the source is Kiddushin 9[a]).

The object of the marriage deed is constitutive and not probative - the creation of the matrimonial relationship (upon delivery of the deed) and not the evidencing of it (although some say that under certain circumstances a marriage deed may serve also as evidence: see the Responsa of R. Yosef Kolon, Shoresh 74, and compare the Responsa of R. Shmuel of Modena, (known and hereinafter referred to as "Rashdam") Even Ha-Ezer, 2 and ibid., 21, the latter quoted in paragraph 20 below). But what did Mr. Ganor instruct the appellants to do? He had them sign a document in which they certified to each other that they had already bound themselves by way of solemnization by something of value, i.e. through the delivery of the ring. This is what the first appellant declared:

"I, Aharon Cohen, do this day take Mrs. Bella Bousslik to wife by 'acquisition', that is to say, I betroth her unto me by a ring..."

And the second appellant stated:

"I, the undersigned, Bella Bousslik, after Aharon Cohen has taken me to wife this day... hereby affix my signature to this deed.. ."

It is obvious that a marriage was not here performed by means of the deed, but that the deed attests that a marriage has been performed independently of it; and such a document, whatever its name, can on no account serve as a marriage deed, which in Jewish law effects the solemnization.

(b) *Solemnization by intercourse.* This, too, has not taken place in the present case since there is no evidence that the relations between the parties were maintained "for the purpose of solemnization". The presumption that "a man does not indulge in intercourse for the purpose of sin" does not in my opinion apply here, for the following reason. This presumption is, in the final analysis, the legal conclusion from the well-known principle : "a man does not abstain from doing what is allowed to him and prefer doing what is forbidden to him", which means: where two ways are open to a man, one legitimate and the other illegitimate, normally a man does not leave the legitimate and choose the illegitimate way. Therefore when a man has sexual intercourse with a woman, we prefer to say that he did so for marriage, rather than to say that he did so for sin, for it is forbidden to have intercourse with an unmarried woman. Thus it is laid down (Shulhan Arukh, Even Ha-Ezer, 149, 1):

"The presumption is that a man does not indulge in sexual intercourse for the purpose of sin, because he can indulge in sexual intercourse in obedience to the law."

The emphasis is thus placed on the religious aspect: on the willingness of a person to prefer a lawful act to a transgression; therefore the presumption in question is inapplicable to the present case. The appellants had applied to the Rabbinate Offices for the

solemnization of their marriage and had been turned away; they had applied to the Chief Rabbinate Tel Aviv, for a license with equal ill-success. The reason given was that the appellant, Aharon Cohen, was at least possibly of priestly stock and could not therefore marry a divorced woman. This ruling of a high religious authority, expert in the matter, cannot be questioned by us as far as the religious aspect is concerned, so that for the purposes of this case, we have to assume that the appellant was indeed prohibited from having the solemnization performed. Now if religious considerations should have prevented the man from marrying the divorcee, and if by doing so he violated the religious code, how can he, in respect of that very act, invoke a presumption which, as we have seen, is based entirely upon the idea that a person will not wish to commit a sin?

Here it may be objected that we cannot definitely say that the first appellant has broken a religious rule. Even according to the decision of the Rabbis, he is only possibly of priestly stock, that is to say, he is either a priest or an ordinary Israelite; so he may in reality be an ordinary Israelite, permitted to marry a divorcee. Can we say that the presumption does not apply on the strength of a mere doubt?

My answer to this is that a presumption to which a doubt attaches ceases to be a valid presumption and cannot establish a valid marriage even because of doubt. For "a slight doubt cancels out much that is certain", and anyway there was no evidence here of any intention to solemnize a marriage.

I shall clarify the matter. The presumption that a man does not indulge in sexual intercourse for the purpose of sin is, on close scrutiny, some substitute for direct evidence on the issue of the intention to solemnize a marriage. It is quasi-evidence similar to judicial notice, which is founded on contentions of logic. We ourselves are witnesses, everyone of us, that that man surely intended to live in marriage, for that is the "presumption", that is to say, it is something we know from our observation of the nature of man, that he does not reject the legitimate and prefer the illegitimate, and therefore we take it for granted that he intended to be married. In the case before us, as I have already said, we have to proceed on the assumption that the first appellant is at least possibly of priestly stock; that is to say, we have to assume that possibly this man is indeed a 'priest', and knows that he is, and if in spite of this fact he is prepared to marry a divorcee, it shows that he is not strict in the

observance of religious prohibitions. The consequence of this doubt is that we, the "witnesses", are not certain that the appellant intended that the sanctification should be solemnized by the act of intercourse itself, and we are unable to attest this; it follows that the solemnization by intercourse is, at most, a solemnization without witnesses, which does not create a marriage even where marriage is intended. An explicit rule provides that even when a man had intercourse with a woman not for the purpose of sin but for the purpose of matrimony, but the intercourse took place in private, then the woman is not regarded as his wife (Tur Shulhan Arukh, Even Ha-Ezer, Hilkhot Kiddushin, 26, 1; Shulhan Arukh, Even Ha-Ezer, ibid.), meaning she is not regarded as his wife for any purpose.

In the present case, the position is consequently this. Although the fact of the appellants' living together proves abundantly - just as the evidence of eyewitnesses would prove, in the above sense - the existence of sexual relations between them, it gives no indication at all of the intention involved in having such relations, i.e. of whether or not the parties had such relations for the purpose of matrimony. The solution to this question must be sought in the presumption that a man does not indulge in sexual intercourse for the purpose of sin; but this presumption, as I have already said, does not apply here because of the doubts involved; and in the absence of this presumption, there is no evidence of intention which is one of the material elements for the validity of a marriage.

It follows from the above that the said presumption cannot be relied on in this case.

(c) *Presumption of reputation.* This presumption does not help the appellants either. The problem - if problem there be - may here be solved in a few words. The presumption is that if a couple come to another town, introduce themselves there to everybody as husband and wife, and are reputed to be such for at least thirty days, it is assumed as a fact that they have contracted a marriage in the manner prescribed by the Jewish religion. This presumption is not peculiar to Jewish law but occurs also, in one form or another, in English common law (see the judgment of *Aronegary v. Vaigalie* (33)). But what is the nature of this presumption? Its nature is, both in Jewish and in English law, that it does not create, but proves the matrimonial relationship. Its effect is the exact opposite of that of the marriage deed, as explained above. This being so, it is quite useless in this case, for we need no proof of facts, and a relationship cannot be created by it. We know all the facts, all

the processes of solemnization gone through by the appellants ; the question is only ; what is the value of these processes, and how can they be supported by that presumption? The latter, as stated, evidences facts, but is unable to *create* facts, to transform an unmarried woman into a married one.

18. To sum up: The appellants can rely neither on solemnization by marriage deed, nor on solemnization by consummation, nor on a presumption arising from their being reputed to be husband and wife. From these three points of view they certainly cannot be regarded as married.

19. There remains the last question: is there no basis here for assuming solemnization by something of value? Should the appellants not be regarded as husband and wife because of the ring which the first appellant gave to the second appellant at Mr. Ganor's office?

The learned judge, as will be remembered, rejected this contention, but not decisively; he regarded the ceremony in question as of doubtful validity. The reason was that according to the Responsa of the Rashdam, Even Ha-Ezer, 21 (quoted by the learned judge from Freimann's well-known "Seder Kiddushin Ve-Nissu'een", p. 172), an infringement of the Salonica Ban on sanctifying a woman "otherwise than in the presence of ten witnesses" disqualifies the witnesses, and disqualification of the witnesses makes the marriage null, as does a sanctification without any witnesses; the witnesses in the present case seemed further disqualified, and the ceremony invalid, as a result of the Jerusalem Ban quoted above. Although many disagreed with the Rashdam the matter still seems to be in doubt, and it therefore seemed impossible to declare the marriage valid, as requested by the appellants.

Mr. Ganor relied on a judgment of the Rabbinical Court of Appeal in Israel, in Case No. 1/60/706 (22), where the court ruled that a "secret marriage" performed between a man of priestly stock and a divorced woman, in the presence not of ten, but of only two witnesses, without a canopy, without benedictions and without a rabbi, was valid "and made her the man's wife for his lifetime" (ibid. p. 135). The learned judge did not consider this reference and made no comment upon it. The reason for this is, I suppose, that he saw an important difference between the two cases in the fact that the earlier one occurred some

twenty years before, and the present one, as will be remembered, after the imposition of the Jerusalem Ban. In actual fact, however, this distinction is of no importance, because although the Jerusalem Ban was not in existence at the time of the earlier case, there did exist - as a perusal of the earlier judgment will show - other rules that were violated, but this did not induce the learned Rabbis to disqualify the witnesses and invalidate the marriage.

On careful examination of the dicta of the learned judge, and the sources on which they are based, we find that the invalidation of a marriage because of witnesses being disqualified through the infringement of the Ban receives support - ostensibly - only in a responsum of the Rashdam, Even Ha-Ezer, 21, and in a passage of R. Yosef Mitrani's Responsa, Part One, 138 (Fourth Impression, 5528, fol. 99B) which relies on the aforementioned opinion of the Rashdam. The other references given in the judgment of the learned judge are the following (in the order of their occurrence):

1) Responsa of Maharchash, Even Ha-Ezer, Article 42;
2) Responsa "Shoel U-Meshiv", 3rd Ed., part One, Article 239**;**
3) Responsa "Be'or Moshe", Kuntras Kevod Hachamim, Article 9;
4) Yeshuot Yaakov to Even Ha-Ezer, Article 28;
5) Responsa "Minhat Eleazer", Part Three, Article 39;
6) Response "Divrei Malkiel", Part Four, Article 119.

The first, fifth and sixth of the above authorities come to the conclusion that a marriage should not be invalidated for the reason in question; the second and third do not touch at all upon the question of the disqualification of the witnesses, and apparently base the invalidation of the marriage on another reason; the fourth gives no decision one way or the other, either on the question of disqualification or on the question of invalidation (compare Freimann, op. cit., pp. 320-322). It should be pointed out here that the author of "Shoel U-Meshiv" who was quoted by the learned judge as aforesaid, in another responsum deals expressly with the question of the disqualification of the witnesses by reason of a violation of the Ban, and reaches the definite conclusion that a marriage should not be invalidated on account of such a disqualification (Response "Shoel U-Meshiv", ibid. Part

Two, Article 157). It follows that we have to deal here solely with the significance of the rule laid down by the Rashdam in his above-mentioned responsum.

20. Upon perusal of the text of the Rashdam's responsum, it seems to me, with all due respect to the learned judge, that the Rashdam's decision, too, should not have led him to dismiss the application of the appellants.

There are many reasons for this.

a) I am of the opinion that the Rashdam - one of the principal originators of the Salonica Ban - did not himself intend the extreme conclusion drawn from his responsum by the learned judge and, as far as I know, such an intention was not attributed to him in the controversy which arose in his own times over the question of the disqualification of the witnesses. Let us now acquaint ourselves with the Rashdam's responsum and examine the case decided by him.

A young man gave out that he had sanctified, through solemnization by money, his brother's daughter, a girl of twelve or thirteen, and produced in evidence a deed certifying the act of solemnization. The deed was signed by two witnesses, "and the deed was confirmed - that is to say, the signature of the witnesses were authenticated - by three laymen" (i.e. three persons who were not expert religious judges or experts at all). Two or three days later, the matter came before the community and the witnesses began to back out of the awkward affair :

> "One of them said that the alleged incident had never taken place, the other said that it was true that he (the young man) had given her (the girl) such and such a sum, but that he had not told her at all (that he was sanctifying her thereby); he had only said to the witnesses : 'be my witnesses' ; and he (the witness) said that he had not heard it".

There was thus ground for the assumption that the whole matter was a fabrication. But what was to be done when according to law a witness could not go back on his original testimony (Ketubot 18b and elsewhere)? The only question to be considered was, therefore,

what value attached to that deed, and whether it could serve as legal evidence of the act of solemnization. The Rashdam (who lived in Salonica -" the events took place in the 16th Century) was requested to make a thorough investigation. He studied the case in all its aspects, and ruled that the solemnization in question was undoubtedly null, and that the girl was still unmarried. What led him to this decision? We shall do well to quote his own fine words, which reflect - both directly and between the lines - the warm heart and the keen brain of a great humanitarian (I am giving only the main passages):

> *"Responsum.* In my humble opinion they are not to be regarded as husband and wife, and I will set out my reasons. First of all, it is well known within this city (Salonica), that both saintly men who have died in the meantime and men who are still alive among us, have agreed and pronounced, and have imposed a severe and absolute Ban, at a great assembly held on the Sabbath of Chanukah in the Talmud Torah Society, that no woman shall be sanctified unless in the presence of 10 witnesses, all of or above the age of 18 years, and witnesses testifying to sanctifications otherwise than aforesaid, should be banned, and all this is very well known within this city."

And after raising several doubts on the position of the law which might tend to tip the scales to a more vigorous conclusion, he continues as follows:

> "I do not disregard these stricter opinions, but nevertheless I have not hesitated to search for ways and means to find in favor of this girl. And this is what every humane man should do, so that fraud should not be rewarded, and criminals not be given the benefit of their evil deeds when they take advantage of young girls deceitfully and wrongfully, to bind them unto them as if they had captured them by sword."

> "After God has taught us all this, there can to my mind be no doubt that this marriage cannot at all be regarded as sanctified. If we were to be strict because of the deed, the Rashba has already written that a deed of sanctification in itself is no evidence : and it is clear that such a deed

> does not prove anything. Thus there is no doubt that as far as the deed is concerned, the marriage need not be recognized, and if we were to be strict because of the testimony of the witnesses who, when called upon to confirm their signatures before the three, orally testified as to their witnessing the marriage, there is surely in this also nothing whatever, for several reasons:
>
> (a) most of the authorities have laid this down that testimony which has been taken in the absence of a party is no evidence;
>
> (b) those witnesses have transgressed a ban, and thereby disqualified themselves from testifying."

It is obvious that the Rashdam did not invalidate the solemnization on the ground that the witnesses had already been disqualified while watching the proceedings, so that this was a "marriage" without witnesses; rather, he invalidated the evidence given subsequently by the disqualified witnesses, and did not admit it as valid proof of the facts (which, as we have seen, were very doubtful). In other words : he did not invalidate the actual, physical "witnessing", but the giving of evidence, the statement of the witnesses (before the three "laymen") after the event. If the Rashdam had been of the opinion - as the learned judge assumes - that the witnesses were already disqualified at the time of the solemnization, why did he choose a roundabout way, rather than say, briefly and simply, that the marriage of the child was null and void even if the facts were as stated in the deed ?

b) The second case in which the Rashdam deals with the question of the disqualification of witnesses on account of the Ban (Responsa of the Rashdam, Even Ha-Ezer, 27) - and which was the subject of a sharp controversy between him and his chief opponent, R. Izhak Adarbi (Responsa "Divrei Rivote", 225 and 226) - likewise exclusively concerns the invalidation of testimony taken after the solemnization. It involves two rival bridegrooms, each claiming to have sanctified the woman in question, and each producing evidence to this effect. Again we can do no better than read the actual text of the responsum which contains most interesting folklore material on the life of the Jewish

community and the jealousies between the different congregations within the communities in the Balkan countries at the end of the 16th Century :

> "The youth Yosef son of Tishtiel had sanctified Gamila daughter of R. Izhak Herbon. The youth had lived in the house of his father-in-law for a long time ; he ate, drank and plied his trade there. Eventually, the girl's father conceived some grudge against him and threw him out of the house, and he went far away. The girl remained as he left her for nearly a year and a half. Then her father wished to arrange a marriage between her and another youth, and she, for fear of her father, revealed nothing to him and kept silent. She never gave the other youth a friendly look... Then the (other) youth gave out that he had betrothed the said girl Gamila, and the Rabbi of the congregation of the other youth was willing to accept the testimony of the witnesses (to the betrothal of the second youth)...
>
> In the meantime, the first bridegroom was in Constantinople when he sent a deed signed by two witnesses attesting that he had betrothed his aforesaid bride. Then the court of the congregation of the girl appointed a bench of three from among the learned members of the Yeshiva, [1)] and they sent for the girl..... and they sent for the witnesses. One of them was found in the city; he appeared, attested his signature, and attested orally everything stated in the deed. The second (witness) was not found in the city, but two witnesses appeared and attested his signature and the deed was confirmed.
>
> Then one of the judges went to talk to the girl, and exhorted her to tell the truth. She said that it was true that she had become sanctified to the first youth, in the presence of the witnesses to the deed, knowingly and willingly without the knowledge of her father and mother. The judge then asked her why she had said nothing when she saw that her father

[1)] Talmudical college.

had negotiated her marriage to another man. She replied that she had been afraid of her father and had thought that the truth would come out in time ; she substantiated this latter statement by pointing out that all the neighbors knew from personal observation that she had never given the other youth a friendly look...

The next day, this Yosef (the first bridegroom) and the father of the girl appeared before the court of the congregation of the girl. The second bridegroom and his father also appeared. The court asked him to produce his evidence, and he impudently declared that he would not bring his witnesses before them, but only before his own Rabbi. They told him to bring his witnesses anyway, and if his Rabbi wished, he could come too.

On a Wednesday morning, while we were studying at the Yeshiva, members of the congregation of the second bridegroom's Rabbi appeared to produce the record of the evidence which they had taken ; and we were verily furious at so much impertinence, and seeing that all their goings on were just hocus-pocus, we did not trouble to investigate anything.

The eminent Rabbi Yosef Bibas then ordered the father of the girl to have his daughter brought under the wedding-canopy with the first bridegroom, which he did. There the matter remained for nearly a fortnight. The bride groom sanctified his wife in public under the wedding -canopy, and on the Sabbath he gave a great feast. Nobody said anything until, a fortnight later, a different mood came over them - the work of the devil....."

There ensued a quarrel between the two Rabbis - the one of the congregation of the first bridegroom and the one of the congregation of the second bridegroom. Each of the rabbis pleaded for "his" bridegroom and invoked his decision. The matter was brought before the Rashdam, who wrote as follows :

> "..... God knows and is witness how reluctant I am to assume authority in matters like these, but since the event has already taken place (the reference to the wedding ceremony), I am compelled to rule, and have no hesitation, that this woman is his absolutely lawful wife married to her husband Yosef (the first bridegroom)."

The Rashdam then embarks on an analysis of the law and continues as follows : -

> "In the present case I do not say only that there is some slight suspicion of marriage, but the matters appear to me to be as clear as the sun, for several reasons :
>
> (a) There are several witnesses who testified that the girl never showed the second man any friendliness, and if that is so, how can it be assumed that she would have accepted him in marriage without the concurrence of her parents ?
>
> (b) At the outset, when the suspicion arose that false witnesses were being sought, we asked the Rabbi that he should now take the evidence of the second man and warn him to bring his witnesses before us - and we did this not only once, but twice - without avail ; the whole country knows the Ban which was pronounced about a year ago in the Talmud Torah Society, that no man may sanctify a woman where there are only two witnesses present, and that all witnesses must be of or above the age of 18 years.
>
> All these matters go to prove clearly that everything was made up and fabricated, and the witnesses were just afraid to appear before us."

We see here, too, that the result of the disqualification of the witnesses by reason of the Ban was, not that the sanctification was void *ab initio,* but that the testimony taken on it

subsequently - in the case before the Rabbi of the "opposing congregation" - could not be relied upon. The Rashdam, as we have seen at the end of his opinion, used this argument as additional support for his finding that there was no truth in the statements of the witnesses of the second bridegroom.

Thus, as I said before : the Rashdam did not invalidate the act of sanctification but the testimony of the witnesses given subsequently with regard to that act. If that is so, and the reference is to the invalidation not of the material evidence but of the mode of taking the evidence, then such invalidation can have no bearing on the case before us, because -

1) the civil court is not bound by the rules of evidence of the religious law, and may, in any matter, take evidence also from a person not qualified to give evidence under Jewish law (see *Cotic v. Wolfsohn* (21)) ;

2) (and this is perhaps the main point) there is no dispute between the appellants and the respondent as to the act itself : everybody agrees that the first appellant has performed the act of sanctification. The question is only whether he has also succeeded in thereby sanctifying the woman to him, and this question, as is apparent, is totally unaffected by the disqualification of the witnesses after the fact ; incidentally, even in Jewish law, if both partners declare that the sanctification has taken place before two competent witnesses, they are bound by their declaration as regards the prohibitions resulting from their union (he is forbidden to her relatives, and she is forbidden to his) ; only where he has sanctified her in private, i.e. without witnesses, "a marriage is not recognized even if both of them admit it" (Kiddushin 65^a , Shulhan Arukh, Even Ha-Ezer, 42, 2).

The Rashdam was one of the chief sponsors of the Salonica Ban ; he was foremost among those who spoke of the disqualification of the witnesses on account of that Ban ; nonetheless, as we have seen, he did not intend to invalidate the sanctification itself. Now if the Rashdam did

> not do so, how could his disciples? So I do not agree with the view that the Salonica Ban entailed the invalidity of the sanctification, and I am therefore of the opinion that the infringement of the Jerusalem Ban, too, did not invalidate the sanctification performed by the first appellant.

c) At this point it will be asked : why, indeed, were the witnesses not disqualified at the time of the actual sanctification ? If the infringement of the Ban disqualified witnesses attending the ceremony, surely the sanctification itself was invalidated.

The answer is to be found in the Responsa of Rabbi Shabtai Cohen, Part III, 1 (I have not been able to obtain the original, and therefore quote from Freimann, op. cit., p. 175). After Rabbi Shabtai - fellow-townsman and near-contemporary of the Rashdam - states that in spite of the numerous cases of "fraudulent sanctification in the presence of two witnesses" which occurred in his time in Salonica, he has never heard of a decision invalidating a sanctification on account of the infringement of the Ban by the witnesses, he raises the question as to the reason for this and offers the following solution :

> "It seems in my humble opinion, that the possible reason for this is that there are no grounds for disqualifying them (as witnesses to the sanctification) because of their infringement of the Ban, since that infringement took place while they were witnessing the sanctification, and they were not under any prior disqualification before attending the ceremony ; it follows that they did not become disqualified until after the woman was sanctified. The sanctification is thus completed. but the witnesses are 'wicked men' and disqualified from then onwards."

The language is somewhat difficult, but the idea is simple and clear : a person who becomes disqualified as a witness by reason of having committed a sin becomes so upon *completion* of the sin, in the present instance upon completion of attendance at the sanctification; by the time the witnesses become disqualified, the sanctification is already complete and valid.

Exactly the same idea, in relation to a very similar question, occurs in the Responsa of Rabbi Moshe Rotenberg, Hoshen Mishpat, 5 (quoted in Pithei Teshuva, Hoshen Mishpat, 34, 5, 14). The question there was the legal validity of the evidence where the witnesses (as in that case) had by the very act of testifying in court, infringed a prohibition of the Torah. Is the evidence admissible or inadmissible ? The answer was : there has been the commission of a sin, but no disqualification, because the disqualification was as a result of the giving of evidence and committed only thereafter.

This arithmetic of hours and minutes will doubtless seem to many as formalistic or an empty quibble; but such criticism will not be justified. It should be remembered that the disqualification of "a wicked man" from giving evidence, originating as it does in most cases in a particular passage of the Torah (see Sanhedrin 25[a] and Baba Kama 72[b]), is itself only a formalistic disqualification, a disqualification imposed by the law, operating quite regardless of the actual credibility or reliability of the witness (see Rabbi Shabtai Cohen, Hoshen Mishpat, 34, 1, 3). Therefore it is only just that we should watch most jealously the limits of such disqualification, even in a formalistic manner, for the very purpose of restricting the consequences of that other formalism.

d) Although, perhaps, it is unnecessary, yet, to prevent all misapprehension, I would nevertheless emphasize that paras. (a) to (c) above refer solely to Bans such as the Salonica Ban and the Jerusalem Ban, which do not themselves, directly and by express provision, invalidate a marriage solemnized in contravention of them. I am not unaware that, in the Middle Ages and later, certain communities enacted "regulations" ("takkanot") or "agreed rules"("haskamot") which expressly and directly - by judicial "expropriation" of the sanctification money or by reference to the principle that a man who sanctifies presumably does so in conformity with the Rabbinical precepts (Gittin 33[a]) - invalidated sanctifications not so complying. It is very doubtful, though, whether these regulations could actually have had the effect of invalidating marriages ; very few Rabbis applied them in practice and not only in theory. However, this question does not concern us, for the Jerusalem Ban, at least, contains no such invalidating provision. The question before us was merely whether this Ban causes invalidation of the marriage indirectly, through the disqualification of the witnesses, and as explained above, my answer to this question is in the negative.

e) I have given consideration to a further point which, independently, forces us to conclude that the marriage of the first appellant is not invalid because of the infringement of the Ban by the witnesses. Let us not forget that the first appellant sanctified the second appellant, not before two, but before four witnesses : two who had been specially invited, Mr. Fisher and Mr. Hirsh, and two who had come to the scene as unbidden guests, Police Sergeants Katz and Pachter, These two police officers certainly did not infringe the Ban, because they had not come in order to abet an offence - had not, in the language of the Ban, "assumed the function" of witnesses - but, on the contrary, had come to watch the unusual ceremony with a view to investigation and action by the police. On the other hand, although the two police officers had not been invited, and had not come in order to be witnesses to the sanctification, they became so automatically, because it is the law that "if a man sanctifies a woman in the presence of two persons without having said to them 'you are my witnesses', she is nevertheless sanctified" (Kiddushin 43[a] ; Shulhan Arukh, Even Ha-Ezer, 42, 4) ; "even if the witnesses do not intend to be witnesses, but have only come to look on, they become witnesses, and the woman is sanctified" ("Beit Meir", quoted in Pithei Teshuva to Even Ha-Ezer, ibid., subs. 1i).

It follows that even if we regard Mr. Fisher and Mr. Hirsh as disqualified witnesses by reason of the infringement of the Ban, the validity of sanctification still has some support in its having been "witnessed" - i.e. attended and observed-by the Police Officers Katz and Pachter, and this attendance and observation has been legally and adequately proved in the District Court.

It might be objected that even Police Officers Katz and Pachter cannot be witnesses to the sanctification, because the disqualified witnesses (Fisher and Hirsh) disqualify the valid witnesses (Katz and Pachter) according to the well-known rule that "where one of them is a relative or disqualified, the testimony of both of them is invalid." The brief and simple answer is ; we are here concerned with the validity of the actual physical witnessing of the sanctification, and not with the acceptability of witnesses who are to testify on it subsequently, and in regard to this actual, physical witnessing - "seeing in itself", in the language of R. Yehuda - the aforementioned rule is quite inapplicable (see R. Yehuda's remarks in Tosefta Makkot 6[a], from the word *"Shmuel").*

f) In conclusion, I would point out that the whole idea of the disqualification of witnesses because of a Ban has never gained wide acceptance in rabbinical literature, and that it is very doubtful whether there is still room for it at all in our day, especially in the case of the Ban which - unlike the Salonica Ban of the Rashdam of Modena - has not gained much recognition even in this city. This is what Meirat Einayim on Hoshen Mishpat 34, 5, 10 writes:

> ".... but a person who infringes bans imposed by community regulations should not be disqualified from giving evidence, for in that case not one in a thousand would be qualified."

If this applied in the days of the author of the Sefer Meirat Einayim, it applies all the more today. That idea of the disqualification of the witnesses is still sometimes resorted to - but even then only as a secondary consideration - where it is a question of permitting the remarriage of a deserted wife, the whereabouts of the husband being unknown, since Rabbis have at all times regarded it as their sacred duty to release such an unhappy woman from the bonds of matrimony and to use, in a matter of this kind, their power to allow rather than their power to forbid. This is evidenced by thousands of responsa releasing such women on the strength of very flimsy suppositions, from a patent desire to grant them relief ; the judges have here, in fact, entered the domain of the legislator.

21. It follows that the first appellant has contracted a marriage with the second appellant by way of "sanctification by something of value", in the presence of competent witnesses, and that by virtue of that act, they have to be regarded as husband and wife. The fact that the husband is, or may possibly be, of priestly stock and that the woman is a divorcee in no way affects the validity of the marriage. Although the prohibition of the marriage of a divorced woman to a man of priestly stock is a disobedience of the law: "Thou shalt not.....", a marriage involving the infringement of such laws is nevertheless valid (Kiddushin 68[a], and elsewhere). I will not here express an opinion as to the legal consequences of this prohibited marriage in respect of maintenance, the marriage settlement, the succession of the husband and the like, because there is no claim before us on these points within the framework of this case. What the appellants have claimed is a

declaration that they are "married" to each other, that is to say, that he is her legal husband and she his legal wife, and to this declaration they are entitled.

22. I have arrived at this conclusion with considerable reluctance. I frankly admit that my inclination, as a judge and as a man, has been, from beginning to end, not to give official sanction to that private ceremony. Nobody will approve of marriage ceremonies like this and no judge will feel sympathetic towards applications like the present. I have examined very carefully whether there is not some basic flaw in a marriage of this kind, but I have found none. I thought for a moment that it might be possible to invalidate it on the ground that the whole intention of the couple was, not to become married to each other in accordance with Jewish law but, as appears from the sworn declaration quoted in paragraph 2(g) above, to obtain a marriage certificate entitling the "head-of-family" to receive a ration-card, income-tax facilities and other similar paraphernalia. I told myself that the solemnization had been effected not for "sacramental" but for documentary purposes and that there had been no intention of sanctification. But I had eventually to reject all these arguments in favor of validation. For the purpose of sanctification it is the events that matter, "and in matters of sanctification no conjectures and no evidence are admissible to disprove the intention of sanctification." (See R. Moshe Isserlis, Even Ha-Ezer, 42, 1; see also ibid., 4.)

- Moreover, even if we were permitted to use such conjectures and evidence, and thereby - on the well-known principle that there are certain conclusions which a judge must draw from given circumstances even without formal proof - to ascertain the ultimate intention of the couple, those secondary objectives would not in themselves be calculated to invalidate the matrimonial relationship established between them. For in matters of sanctification, it is intended relationship, and not any ulterior motive, that counts (even in the case of the seven women who "take hold of one man, saying, 'We will eat our own bread, and wear our own apparel : only let us be called by thy name, to take away our reproach' " (Isaiah IV, 1), and who thus avowedly marry for "nominal" reasons, it is very doubtful whether it would have been possible to permit remarriage on the strength of this solemn declaration). This is illustrated by the great difficulties confronting the rabbinical courts in this country when attempting to dissolve "fictitious" marriages. An ancient precedent is to be found in the Tosefta story (Ketubot V, 1) of R. Tarphon, a man of priestly stock, who, in a year of

dearth, married three hundred women for the sole purpose of enabling them to partake of the priestly dues - which reminds us, if the comparison could be permitted, of the ration-cards of the first appellant.

The same inclination not to annul a marriage by reason of its having been contracted "fictitiously" (for the purpose of obtaining citizenship, an entry visa or the like) is conspicuous also in the secular jurisprudence of the British Commonwealth as shown, for instance, by the South African judgment of *Martens v. Martens (*51), quoted with unqualified approval in *N. v. H.* (34). This principle prevails also in several Central European countries; we know that famous revolutionaries, such as Rosa Luxemburg in Germany in 1898, succeeded in avoiding deportation by means of such fictitious marriages. The reluctance of the legislator and the judge to probe into the purpose of the marriage is thus a feature common to the matrimonial law of a number of legal systems - both religious and secular - and the reason for it is easy to see: intimate matters such as the genuineness of the relationship between spouses are impossible to investigate, and a sensible legislator will not be anxious to prohibit an "evasion of the law" which cannot be prevented. We may here - with a slight change in wording - apply a talmudical dictum Yevamot 65b) :

> "Just as the legislator is required to legislate reasonably so is he required not to legislate unreasonably. If he does the latter, he will find himself among the 'aiders and abettors' of transgressors."

In short: I have reviewed every aspect of the case, and have found no ground for the annulment of the sanctification. I therefore consider it my duty as a judge to declare its legal validity. A judge has nothing to go upon but the law, and therefore must not disregard anything he finds therein, whatever the consequences. There is no one more competent in matters of religion and religious law, and no one more jealous of them, than the Chief Rabbis of Israel, and they, too, in a similar case, have declared the validity of a marriage. I am referring to Appeal No. 1/60/706 (22)**,** mentioned in paragraph 19 above. That case, too, concerned a sanctification performed without ten witnesses, without a canopy, without benedictions and without a Rabbi, and there, too, the parties were a man of priestly stock - definitely, not merely possibly, so - and a divorcee. The man was subsequently left by the divorcee and married another woman, lived with her for several years and then died. The

two women then began to litigate over the estate. The matter came before the Rabbinical Court of Appeal where the second wife of the deceased appeared as appellant, the first wife as respondent. One of the arguments of the appellant was:

> "...the court (i.e. the court below) should not have entertained the application of the respondent and sanctioned after eighteen years a secret sanctification effected without a canopy, without benedictions, without a Rabbi and without ten witnesses. Such a judgment not only casts a slur on the deceased and his daughter, who is stamped by it as illegitimate, but it is likely to become a very dangerous precedent and to have a deleterious effect on Jewish family life." (ibid., p. 134.)

This contention of the appellant was dismissed by the learned Rabbis as follows:

> "It is true that in the present case the marriage was forbidden by the Torah, and that both husband and wife infringed a prohibitive law, that is to say that a man of priestly stock shall not "take a woman put away from her husband" (Leviticus XXI, 7), but the court was not for this reason prevented from affirming the validity of that marriage, because a sanctification infringing a prohibitive law is nevertheless valid; on the contrary, the court was in duty bound to define the present personal status of the wife in accordance with her application, notwithstanding that this status is based on a sanctification contrary to the law of the Torah, and regardless of the fact that the husband is no longer alive, for the wife is of course interested even after the death of the husband in the determination of her personal status." (ibid., p. 136.)

These are most telling remarks, worthy of those who made them. The Rabbis did not refuse to give that widow the relief claimed by her, although she herself, by the very act in question, had by no means behaved in accordance with the law. Just as there is no mercy in the law, so there is no resentment in the law. Nor were the learned Rabbis afraid of the difficulties and dangers to family life suggested by the second wife; because the refusal to

adjudicate according to law is in itself an offence, and no one is told, "Do commit an offence, so that you may reap a benefit" (Menahot 48a).

We, in this court, are even less in a position to withhold our judicial opinion as to the marriage contracted by the first appellant; we must categorically declare its validity.

In the light of all I have said, I think that the appeal should be allowed and that the appellants should be granted the declaration requested by them, namely, that on December 16, 1952, at Tel Aviv, the first appellant contracted a marriage with the second appellant by way of "sanctification by something of value," and that they are to be regarded as husband and wife as from that date.

SUSSMAN J. In this appeal I have had the advantage of reading the judgments of my learned colleagues, which show that the following three problems arise:

a) Was the District Court competent to continue dealing with the application of the appellants after the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (hereinafter referred to as "the said Law") had come into force?

b) Are the appellants married to each other?

c) Do considerations of public welfare demand that the court refrain from granting the appellants the relief which they claim?

2. As for the first problem: the question arises whether s. 1 of the said Law is a purely procedural provision for seeing that a person has no vested right in procedure, a provision introducing a change in procedure applies also to proceedings which began before that provision came into force. Thus, the provisions of the said Law concerning jurisdiction do not apply to the present case unless they are procedural; if they are substantive, the application of the appellants must be determined according to the rules which obtained before the said Law came into force.

I do not think that section 14 of the Interpretation Ordinance helps the appellants; section 17(2)(e) of that Ordinance refers to proceedings for the enforcement of a right arising from a Law which has been repealed; such a right is susceptible of enforcement even after the Law from which it arises has been repealed, since a new Law does not, as a rule, detract from a substantive right a person has acquired. As for rules of procedure, however, it is generally agreed that there can be no vested right in them. As to this point, I have nothing to add to the remarks made by my esteemed colleague, Justice Cheshin, in paragraph 12 of his judgment.

On the other hand, I think that it would be unrealistic to say that the extension of the jurisdiction of the Rabbinical Courts, and the curtailment of the jurisdiction of the civil courts, by the provisions of the said Law represent a change in procedure only. In paragraph 12 of his judgment Justice Silberg points to the fact that jurisdictional change has affected in a substantive manner the validity of marriage : where a couple have married in a foreign country before a civil official, in accordance with the laws of that country, a civil court in Israel will recognize the marriage, but a Rabbinical court will regard it as null - by reason of the "universal" effect of Jewish law, which does not require or invoke the rules of international law designed to settle conflicts between the legal systems of different countries; it makes no difference that a question of private international law did not arise in the present case; the fact that had such a question arisen the Rabbinical court would not have decided it in the same way as a civil court is sufficient to convince me that the significance of the change resulting from the provisions of the said Law with regard to the powers of the courts is not purely procedural.

Moreover, the technique applied by the legislator is calculated to support my conclusion. Section 1 of the said Law vests the Rabbinical court with exclusive jurisdiction in matters of "marriage and divorce of Jews in Israel, being nationals or residents of the State". The legislator did not specify according to what law the Rabbinical courts were to deal with those matters. But it is beyond doubt that it intended not only to transfer jurisdiction from the civil court to the religious court (in so far as it had previously been vested in the former), but also to make Jewish law applicable to those matters from the substantive aspect. This meant, in so far as jurisdiction in matters of the personal status of foreigners was transferred to the Rabbinical courts, the repeal of the rule embodied in

Article 64 of the Palestine Order in Council, which prescribes the application of the national law of the persons concerned. By way of a change of jurisdiction the legislator introduced, in effect, a change in the substantive rights of the parties.

It follows that, even if the power of the District Court to deal with an application like the one before us was withdrawn, its power to continue dealing with and determine such proceedings has not been affected.

3. The marriage contracted in this case is valid according to Jewish law in spite of the Biblical prohibition.

4. There remains the third problem on which, again to my regret the views of my learned colleagues are divided.

I am not prepared to dispute the principle enunciated by Justice Cheshin, namely, that, in considering whether or not to grant declaratory relief, the court may take into account the behavior of the parties, as reflected in the actions which constitute the basis for their application to the court. However, even if we take this factor into account, there is still an important consideration which, in my opinion, tips the scales in favor of the appellants: the Biblical prohibition infringed by the appellants is a *lex imperfecta,* since no sanction is attached to it, and a marriage contracted in disregard of it is nevertheless valid. In fact, as hinted by my colleagues, should the appellants apply to a Rabbinical court, the latter will recognize the validity of the marriage (see *Stark v. Chief Execution Officer* (6)) and grant the declaration requested. So what point would there be in a civil court acting otherwise? It seems to me that in a case like the present the need to remove doubts as to the personal status of the appellants (and to remove such doubts is the purpose of the declaration prayed for) is a more weighty consideration than the behavior of the parties.

5. In conclusion, I wish to add one remark. My learned colleagues have already expressed their distaste for the irregularity of a secret marriage. I share this feeling, but would not be easy in my mind unless I called attention to the situation which in my opinion has given rise to that marriage. Persons of religious views will of their own accord avoid infringing religious prohibitions and not take the course the parties in this case have taken. However,

those who are not religious have no opportunity in this country of contracting a marriage by way of a civil ceremony, under the auspices of the State authorities. There is, in my opinion, no better way to prevent the recurrence of what happened in this case than the enactment of a civil marriage Law, which will enable those who do not wish to have a religious marriage ceremony to undergo a civil marriage. I agree that the appeal be allowed and the appellants granted the declaration sought.

CHESHIN J. This is an appeal against a judgment of the District Court of Tel Aviv dismissing a claim for an order declaring that a sanctification of the second appellant (a divorced woman) to the first appellant (a man of a priestly family) solemnized by a lawyer in his office and not in the presence of ten persons, is a valid and binding sanctification according to Jewish law.

2. I must confess that had the question of the validity of the sanctification been the only question before me, I would not have hesitated for one moment to express my full concurrence in the exceptionally clear and well-reasoned judgment of my colleague, Silberg J., without adding one word to it. At the very outset, before entering on the merits, however, we are faced with two important and weighty questions to which we must find an answer and, to my great regret, I differ from the opinions of my learned colleagues in regard to both of these questions. The first question relates to the jurisdiction of the District Court, and the second question relates to the discretion of the Court to grant the declaratory order sought. I shall deal with these questions one by one.

3. In regard to jurisdiction, the claim was brought at the beginning of 1953, and it is not disputed that the District Court was at that time competent to deal with it. In the course of the proceedings, however, and before judgment was pronounced, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, which introduced a number of important changes in the legal position which previously existed in the field of personal status, was passed. Section 1 of that Law provides:

> "Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under , the exclusive jurisdiction of Rabbinical Courts"

Since it is not disputed that both the appellants in this case are nationals and residents of Israel, it is clear that had they brought their claim to-day, they would have had to lodge it in the Rabbinical Courts. The question therefore is whether, and to what extent the jurisdiction of the District Court to continue to hear the claim in question, which was pending before it at the time the new Law was enacted, was affected by that Law.

4. No authority dealing with the interpretation of statutes is necessary for the proposition that a new Law is presumed not to affect vested rights in any way, and that it does not operate to annul, vary, replace, derogate from or add to such rights, unless the legislature has disclosed its intention of doing so in unambiguous terms. Every statute, therefore, is deemed to be prospective, that is to say, to apply to the future, and not retrospective, that is to say, to apply to the past. The direct logical result of that interpretation is that the provisions of a Law which are repealed by a later Law remain in force and fully operative in regard to rights acquired by a person before such repeal, whether the repeal was prior to the presentation to court by such person of a claim to his rights, or whether it was subsequent to such claim but before the case was decided. My colleague, Silberg J., cited a number of authorities to this effect, and I do not intend to cite them here a second time. I shall merely add one or two cases in order to support this view.

In *Leeds and County Bank v. Walker* (35), Denman J. said, at page 91:

> "...in the absence of anything in the Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to the note in question as it existed in 1880, and down to the time when the present action was brought..."

In Maxwell's work on the Interpretation of Statutes (9th ed.) p. 229, it is mid (as quoted in the judgment of Evershed M.R. in *Hutchinson v. Jauncey* (28)):

> "In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed

> when the action was begun, unless the new statute shows a clear intention to vary such rights."

The very same principle is laid down in section 17(2) (c) of the (Palestine) Interpretation Ordinance, 1945, which provides that:

> "Where any enactment repeals any law, such repeal shall not... affect any right, privilege, obligation, or liability, acquired, accrued, or incurred, under any law so repealed."

A distinction, however, must be drawn - and all judges and commentators, without exception, are in agreement with such a distinction - between substantive rights and rules of procedure. It is agreed by all that no one acquires a vested right in rules of procedure, and that a litigant will not be heard to say: my claim must be determined in accordance with the procedure which existed at the time that I acquired my rights or at the time that I filed my claim, and new rules of procedure which were framed thereafter do not apply to it. A number of authorities on this point, too, were cited by my colleague, Silberg J., and I shall content myself with adding only a few more.

In *Gardner v. Lucas* (36), Lord Blackburn said, at p. 603:

> "...I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then, again, I think that where alterations are made in matters of evidence... those are retrospective, whether civil or criminal."

Even before this, in *Kimbray v. Draper* (37), Blackburn J. had said, (at p. 163) that:

> "When the effect of an enactment is to take away a right, prima facie it does not apply to existing rights; but where it deals with procedure only, prima facie it applies

to all actions pending as well as future."

6. This same principle was first fully adumbrated and explained in *Wright v. Hale* (38), which is regarded as the leading authority. In that case Pollock C.B. said, at p. 445 :

> "There is a considerable difference between such laws as affect vested rights and those which only affect the proceedings or practice of the Courts ...If therefore a Statute were to say: 'In questions which depend an mere judgment ...no suitor shall be allowed to call more than three witnesses', that enactment would apply to all actions, whether pending at the time it was passed or to be brought afterwards; it would be an enactment relating to practice, and a suitor could not say: 'I have a right to call as many witnesses to that subject as I please, and will therefore call ten surveyors, ten brokers, ten surgeons, etc. A matter of that sort cannot be called a right, and I think, when a statute merely alters the course of procedure in a cause, and does not especially say that its provisions shall not apply to any action commenced before it came into operation... its provisions will apply to the procedure in such actions."

7. This principle too - namely, the principle relating to matters of procedure - was laid down in numerous English cases which are followed by the courts until today. My attention has not been directed to even one judgment in which judges have deviated from this principle in the slightest degree. Matters of procedure are decided according to the existing law, and this rule also applies to claims which are pending. There is one exception to this rule, and that is the right to appeal in an existing claim.

> "To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure".

says Lord MacNaghten in the case of *The Colonial Sugar Refining Co. v. Irving* (30) (see also Craies on Statute Law, 5th Ed., p. 371).

8. In connection with statutes, moreover, which are directed towards divesting a court of its jurisdiction to deal with a particular category of claims, it would appear that opinions in England changed somewhat in later years on the question of the application of such statutes to claims which are pending. Thus, for example, in *re Joseph Suche and Co.* (27), it was said by Jessel M.R. that:

> "it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

But the observations made in *Hutchinson's* case (28), and the rules laid down in that case, deviated from the principle stated. In that case Evershed M.R. said at p. 579:

> "Having examined the many cases cited for the landlord, I doubt whether the principle ought to be expressed in quite such precise language as Jessel M.R. used in *re Joseph Suche & Co. Ltd.* (27). In other words, it seems to me that, if the necessary intendment of the act is to affect pending causes of action then this Court will give effect to the intention of the Legislature even though there is no express reference to pending actions."

It follows that in matters of procedure and jurisdiction, even in regard to claims which are pending, we are to be guided not only by the express language of the legislature, but also by the intention to be gathered from that language.

9. The great importance for our purposes of *Hutchinson's* case (28), and the remarks of Evershed M.R. which I have cited, lie in the fact that that case dealt with a new law which divested a court of its jurisdiction to deal with a particular class of claims and its effect upon a claim which had been brought before that law came into force. The court reached

the conclusion that by virtue of the new law, it had been divested of jurisdiction to deal with a claim which had already been filed, but had not yet been determined. Effect was thus given - though this was not expressly stated - to what had already been decided in England, namely, that a statute which introduces a change in the jurisdiction of a court also applies to claims which are pending. (See, for example, *Warne v. Beresford* (39), the *Ironsides' case* (40), and the observations of Maxwell, Interpretation of Statutes, 9th edition, p. 233 on *Warne's* case (39).)

10. I also find some support for this principle in *Hamden v. Nabus (7).* The facts of that case were as follows. After the constitution of the Land Courts in this country, a certain land case was brought before the Land Courts in Sh'khem. When it became known to the Court however, that the same case had previously been brought before the Sharia Court [1] and had not been concluded, the Court dismissed the claim, holding that the Sharia Court and that court alone, was competent to deal with claims that were pending before it. The Appeal Court rejected this opinion, and said:

> "By the Proclamation of 1918 all jurisdiction over cases concerning ownership of land was taken from the Sharia Court... Instead, a jurisdiction has been given to the Land Courts by the Land Courts Ordinance, 1921. Whether or not a case was pending in the Sharia Courts at the date of the Proclamation, the Courts were prohibited from giving any judgment deciding the ownership of land... The judgment of the Land Court must be set aside and the case heard."

> It must be noted that the Proclamation of 1918 (that is the Proclamation of June 24, 1918), entitled "Constitution of Courts", (Bentwich, Legislation of Palestine, 1918-1925, Vol. I, p. 605), did not expressly and permanently abolish the jurisdiction of the Sharia Court to deal with land cases, though it did direct - in section 23 - that "until further notice the Court shall not give any judgment decided the ownership of land ..."

[1] Moslem religious court.

It was not therefore, the intention of the Proclamation permanently to deprive the courts - including the Sharia Courts - of the jurisdiction to deal with land matters, nor to lay down that cases pending before those courts should be transferred to courts other than those which existed or which would be established in the future, as it did provide, for example, in section 25 of that Proclamation. The intention of the Proclamation was merely to suspend the jurisdiction of the court to give judgments in land matters for an unspecified period, that is to say, until the giving of further notice. That additional notice was not given; the jurisdiction of those courts was not explicitly terminated, and no direction was given as to the fate of cases which were pending before them. Instead of this a new Ordinance, the Land Courts Ordinance, 1921, was enacted, and that Ordinance, too, did not provide that cases which had begun in other courts should be transferred to the Land Courts, or be disposed of in some other way. Nevertheless, it was held by the Court of Appeal in *Hamdan's* case (7), that the jurisdiction to deal with those cases which were pending before other courts had been conferred upon the Land Courts which were established for the first time by the new Ordinance. It follows that a case which has been filed in a competent court, and is pending before that court at a time when jurisdiction to deal with cases of that kind is conferred upon another court, must be dealt with in such other court, although the jurisdiction of the court in which the claim was first filed has not been taken away from it, and has not been clearly terminated. And why is this so? The reason, in my opinion, is that a person has no vested right in rules of procedure. From the time, therefore, that a new law was passed conferring jurisdiction upon special courts, the jurisdiction of the existing courts came to an end in respect of pending claims as well, and such claims, when brought before the special courts, cannot be said to be pending in two courts at one and the same time, as the Land Court thought was the position in *Hamdan's* case (7).

11. It has been said that section 17(2)(e) of the Interpretation Ordinance is designed to prevent any legal proceedings which have commenced from being affected. What is referred to, however, are legal proceedings "in respect of any such right, privilege, obligation" and so forth, as stated in subsection (c), and the meaning of the provision is that where a right or obligation, etc., has been changed, such change shall not affect any legal proceedings which have already begun in connection with such right or obligation.

I would mention here, in passing, that section 17 of the Interpretation Ordinance is substantially similar to section 38 of the English Interpretation Act, 1889, and it has already been laid down more than once that the rights spoken of in section 38 are material rights, personal rights, and not abstract rights, rights in matters of procedure and other rights of that kind (see, for example, *Gell v. White* (41)).

12. Let us now return and enquire what was the purpose of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953. Was its purpose to change vested material rights, or was it to introduce a new procedure and different jurisdiction? It should be pointed out at once that the name of the Law indicates its content. This is a law relating to jurisdiction. Its whole purpose is to define the limits of jurisdiction of the Rabbinical Courts. Section 1, which is the most important section for our purposes, lays it down that: "matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of Rabbinical Courts."

Not a single word in this section is designed to affect in the slightest degree any substantive rights of the individual, to vary them, change them, or derogate from them. The section deals with the question of the jurisdiction of the courts alone, and details those matters which shall henceforth fall within the jurisdiction of the Rabbinical Courts. From the historical point of view the real meaning of this section, and the background of the law as a whole, are well known. It may be mentioned in parenthesis that the legislature itself has pointed out the purpose which the law was intended to achieve. In the explanatory note to the proposed law (see Proposed Laws, No. 163, of May 12, 1953), it is said:

> "The proposed Law removes the restriction contained in the Mandatory Legislation... which established the jurisdiction of the Rabbinical Courts only in respect of persons who were 'members of the Jewish Community', that is to say, who were registered in the Register of the 'Knesset Yisrael', and who were not foreign nationals."

I do not intend to say that we are entitled to interpret the Statute in the light of the explanatory note of the legislature to the proposed Law. That explanation, nevertheless, throws light upon the legislative background, and from this point of view is likely to give

additional support to the interpretation which follows in any case from the law itself. Were it said in the Law, for example, that the marriage of a person of priestly family and a divorced woman will henceforth be void, or that a religious marriage which was not celebrated in the presence of ten persons, shall be deemed not to have been celebrated at all, there would be room for the argument in each of these cases that vested rights of the applicant and others in a similar position had been affected, and that since the legislature did not expressly reveal its intention that the Law should act with retrospective effect, it has no effect upon claims which were pending in the civil courts at the time that the Law came into force.

That was in fact the basis of the decision of the High Court of Justice in *Babayofff* v. *Chief Execution Officer* (8). That was a case of maintenance which had been dealt with in the Rabbinical Court. At the time the claim was filed the parties were thought to be Palestinian nationals, and the Rabbinical Courts were therefore competent to deal with the case. In the course of the proceedings the law was changed, and persons of the class to which the parties belonged were accorded the status of foreign nationals. The effect of this change in the law, therefore, was to deprive the parties of their status as Palestinian nationals, that is to say, to change them from Palestinian nationals to foreign nationals. In these circumstances it was held by the High Court of Justice that the new Law was not retroactive, and that it therefore had no effect upon the proceedings that were pending. The position is entirely different in a law such as the one we are considering, in that that Law does not deal at all with the rights and status of the litigants, but only with the jurisdiction of the court. Nothing whatever is said in the Law about the personal rights of individuals. The whole object of the Law is to introduce a procedural change. Before the Law was passed, the appellants could have brought their claim before the civil courts of the State. After the enactment of the Law they, and persons in the same situation, have to bring their claims before the Rabbinical Courts of the State. Where, therefore, is the substantive personal right which has been affected? What has happened is that the forum has been changed; there has been in these circumstances no change in a right or deprivation of a right.

13. It has been submitted that a statute which transfers jurisdiction from one court to another cannot affect pending claims. As authority for this proposition the case of *Nassar*

v. Attorney-General (2) was cited. In that case a man had been convicted by a civil court, and it was argued on appeal that that court had been deprived of jurisdiction in the course of the proceedings on the charge, since military courts had been established after the appellant had been charged but before he had been convicted, and jurisdiction to deal with the offence of the type of which the appellant had been convicted, had been conferred upon the military court. This submission was not accepted by the court which contented itself with the following laconic judgment: "In our view, having regard to section 5 of the Interpretation Ordinance, the accused was properly tried by the civil court."

This was the sole ground upon which the court based its decision. We have already seen, however, that the court held otherwise in *Hamdan's* case (7), and it seems to me, moreover, with all respect that the court fell into error in *Nassar's* case (2). At that time the Interpretation Ordinance, 1929 (Drayton, Cap. 69), was in force, and section 5(1)(e) of that Ordinance - which is fundamentally similar to section 17(2)(e) of the Interpretation Ordinance of 1945 - provided that the repeal of an Ordinance shall not affect "any investigation, legal proceeding or remedy in respect of any such right and any such investigation, legal proceeding or remedy may be instituted, etc." But we have already seen that that 'right' which is spoken of here is the right mentioned above in section 5(1)(c) - which is identical with section 17(2)(c) of the Ordinance of 1945 - and the meaning of that right is a personal, substantive right acquired by a person, and not some abstract advantage gained from the rules of procedure. The whole purpose of section 5 was to prevent a substantive right from being affected by the Law which was repealed, and not the judicial procedure itself.

14. It has also been submitted that there is not in this case a change of the jurisdiction of the courts alone, but also a material change in substantive law and the application of the law. I do not accept this submission. The appellants applied to the District Court and sought a declaration in regard to their personal status. It is not disputed that their status is to be determined according to Jewish law. What then is the difference between the District Court and the Rabbinical Court? Both courts will have to deal with the matter within the same framework of substantive law, while the Religious Court has the advantage that it is also competent to decide questions of Jewish law, on which some of the greatest of the

rabbis of Israel have differed. In what respect then can the appellants be aggrieved if they must now seek their remedy in the Rabbinical Courts?

15. The doors of the Religious Courts, moreover, are wide open before them. And they may also have resort to legal precedents. I refer to the case of *A. v. B.* (22). In that case a Rabbinical Court was asked at the outset to decide the question of the validity of a sanctification which had been performed between a member of a priestly family and a divorced woman, before two witnesses alone, without ten persons being present, and without the canopy and the recitation of the traditional blessings. The Rabbinical Court pronounced the marriage valid. In the judgment, on appeal, of the Supreme Rabbinical Court of Appeals it is said, inter alia:

> "The Supreme Court holds that the court of first instance was correct in law in accepting the evidence of the witnesses in regard to the marriage of the respondent and the deceased; although this marriage was forbidden by the Bible, being a marriage of a divorced woman to a member of a priestly family, nevertheless the marriage was valid, and made the woman the wife of her husband all the days of her life, and she is regarded as the widow of the deceased after his death." (Ibid., p. 135.)

And two important principles - of those relevant to the matter before us - were laid down in that case by the Rabbinical Court of Appeals. First, "the right of any *person interested* to request the Court to determine his personal status", and secondly, "a marriage without a canopy and the seven blessings, without the presence of ten Jews and without the drawing up of the marriage contract - although such a marriage is a disgraceful mode of procedure contrary to the teachings of the scholars and the accepted custom in Israel - such a marriage, despite the above defects, is valid." (Ibid., p. 139.)

From the point of view of its jurisdiction the Rabbinical Court accordingly reached the conclusion that it was "obliged to entertain the application and give its decision in accordance with the results of its consideration and deliberations" (ibid. p. 135-136), and, as I have said, in regard to the merits of the case, held the marriage to be valid. In which

respects, therefore, will the rights of the appellants be adversely affected if it be held that the law in question operates with retrospective effect, and that it is to the Religious Courts that they must now present their claim? The opposite is the case I have great doubts whether a civil court is obliged to entertain the case of the appellants, not from the point of view of lack of jurisdiction alone, but also from the point of view of discretion - an aspect which is not taken into account in the Rabbinical Courts, as we have seen above - but I shall return to deal with this question later at greater length.

16. It has been said that the law of evidence in a Rabbinical Court is not the same as the law of evidence, and the method of assessing evidence, in a civil court, and it has also been said that the system of justice in the two sets of courts cannot be compared, and that the principles of private international law will not be accorded proper recognition in the Rabbinical Courts. We are asked to conclude from these considerations that the transfer of the jurisdiction from the ordinary court to the Rabbinical Court is not a matter of procedure alone, but involves a fundamental change of material rights. There are a number of replies to this submission. In the first place, in regard to the law of evidence and the assessment of the sworn statements of witnesses, these are matters relating to the procedure of the courts, and we have already said that a person has no vested rights in matters of this kind. Secondly, in regard to private international law, no question has arisen in the present case which calls for investigation or clarification according to the principles of private international law, and this is neither the time nor the place for a consideration of this question. Thirdly, it is true that the Rabbinical Courts do not regard themselves as bound by the principles of private international law, but that is no proof that those courts will never in any case be prepared to follow those principles, and in a proper case will pay no attention to them. And finally, even if we must regard the new law as altering material rights upon the single ground that the Rabbinical Courts do not recognize the principles of private international law, what is the distinction between a case that is pending - such as the case before us - and a case which has not yet been brought? A case brought from now onwards in the Rabbinical Courts will not be subject there to the principles of private international law, although the marriage was celebrated before the new Law came into force. This conclusion, as it seems to me, is plainly inconsistent with the presumption - which is not disputed - that also in cases such as that before us jurisdiction will henceforth be in the hands of the Rabbinical Courts.

17. In short, it is my opinion that it was not the intention of the new Law - the Law of Marriage and Divorce - to impair any material right of the appellants, and persons similarly placed. Section 1 merely lays down which court is competent to deal with matters of marriage and divorce relating to Jews of the class of the appellants. It follows that it merely regulates matters of procedure and nothing more. In the leading case, *Wright v. Hale* (38). which I have already mentioned,. it was held by Channell B. that:

> "Where the giving to a statute a retrospective operation would be to divest a right to put an end to an action by plea or such like, the Court should clearly see that the Legislature intended such a retrospective operation; that rule does not apply where a statute only relates to procedure or practice."

The Law of Marriage and Divorce deprived no one of his right of action. Nor did it impair any other substantive right. It was designed to change the procedure which was previously employed in regard to the jurisdiction of the courts of the State to deal with matters of marriage and divorce of particular classes of persons. Section 1 of the Law does not provide that "claims in regard to marriage, etc. shall be brought only in the Rabbinical Courts". Had the law laid this down, I would have said that "shall not be brought" excludes cases which have already been brought. The Law lays down another and different provision, namely, that from the day the law comes into force those matters shall be dealt with in the Rabbinical Courts. In other words, no other court will in the future be competent to hear and decide such matters. This intention on the part of the legislature is, in my opinion, clear, and it is therefore right that this procedural provision should apply not only to claims which will be brought in the future, but also to claims which had already been brought and were pending at the time that the Law came into force, since the civil courts have been deprived of jurisdiction to give a decision in such matters.

18. The dicta of Dunkelblum J. in *Kwatinski v. District Commissioner* (20) do not, in my view, contradict what I have said above, and this for two reasons. In the first place, the law which was being considered in that case by Dunkelblum J. dealt with the material rights of the individual, and not merely with questions of procedure. Secondly, the Law there dealt

with repealed older Laws, and since the legislature "found it desirable to create unity in the position of various persons", (to quote the words of the judgment in that case) it enacted special interim provisions in order to preserve the rights which were vested in such persons. Completely different is the case of a law which does not expressly repeal earlier laws, but which lays down provisions the purpose of which is merely to transfer the jurisdiction of one court to another court.

19. For these reasons it seems to me that the learned judge in the District Court was right in his conclusion - shortly expressed - that he had no jurisdiction to deal with the case. I am not sure that it was necessary for him to dismiss the claim completely - as he did - for this reason: it seems to me that in the circumstances, since the Rabbinical Courts are also included within the framework of the courts of the country, he could have transferred the case to the local Rabbinical Courts for consideration, without the appellant being compelled to restart proceedings.

20. In view of my conclusion as stated above, according to which the District Court is deprived of jurisdiction to deal with the matter, there is no need for me to consider the other questions which have arisen in this appeal. However, since my opinion is a dissenting opinion, I shall add some dicta on one further question, namely, whether in the circumstances of the case before us the court should have exercised its discretion in favor of the appellants.

21. The relief claimed is a declaration that the sanctification by which the first applicant - a person of a priestly family - married the second applicant - a divorcee - was valid; and that the applicants are married to each other according to Jewish religious law. A District Court is competent to grant relief of this kind by virtue of Rule 52(4) of the Civil Procedure Rules, 1938, which provides that:

> "No action shall fail on the grounds that the relief claimed is declaratory only."

The rule referred to does not differ in principle - though it is very much more limited in scope - from Rule 5 of Order 25 of the Rules of the Supreme Court of Judicature in

England. This last mentioned rule has been the subject of much discussion from the very day of its coming into force - in the year 1883 - and a number of basic principles in regard to its application have been laid down for the guidance of the courts. These principles may assist us in solving the question whether the circumstances of the case before us justify the granting of the declaratory order sought or not before examining those principles, however, it will be proper to point out very shortly the nature and origin of an order declaring rights.

The remedy in question developed in three stages. Before 1852 the Courts of Equity in England were not accustomed to grant declarations of rights, save as relief which was incidental to the principal remedy sought in the claim. This does not mean that they did not regard themselves as competent to grant such orders. There is no doubt that they were competent, but they saw no necessity to exercise that power since they did not regard the grant of declaratory orders alone as an appropriate solution for the problems which were brought before them. In order to amend this custom, which was accepted in the Courts of Chancery, Section 50 of the Chancery Procedure Amendment Act, 1852, was passed. This section laid down that Courts of Equity would be entitled to grant orders declaring rights, although no additional principal remedy had been sought in the body of the claim, and no such remedy was granted by the courts. This second stage, however, did not see the complete solution of the difficulty, since according to the interpretation given to Section 50 by the courts, declaratory orders would not be given save where the court was also competent to grant the principal remedy, although such remedy was not claimed by the plaintiff. This state of affairs continued until 1883, in which year Rule 5 of Order 25 - that is the third stage in the development - was made, which empowered the court to give Declaratory Orders whether a remedy ancillary to such relief was claimed, or not. (On this point see the judgment of Bankes L.J. in the *Guaranty Trust Co. v. Hannay* (31).)

22. In the Rules of Procedure which we are accustomed to follow, the provision parallel to Order 25, Rule 5, is Rule 52(4), although, as I have said, our Rule is very much more restricted than the English rule from which it was taken ; and there is room for the submission that our rule introduced to our law only the second stage of the development which I have described, and that we have not yet reached the third stage of that development. I make no comment on this submission, because it was not argued before us. One thing is clear, however, from all that I have said, and is not disputed: the source of a

declaratory judgment is to be found in the Courts of Equity. Since that is so, it seems to me that it would not be proper to grant such an order without paying due regard to the accepted principles of equity.

23. Let us now deal with some of the judgments of the English courts - both superior and inferior courts - on the nature, scope and content of a claim for a declaratory order made under Order 25, Rule 5, on the measure of usefulness of such an order, and on the duty of care cast upon the courts before granting such an order.

In the *Grand Junction Waterworks Co. v. Hampton Urban District Council* (42), Stirling J. said (at pp. 345, 346) :

> "...When the court is simply asked to make a declaration of right, without giving any consequential relief, the court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances."

And in *Dyson v. Attorney-General* (43), Cozens-Hardy M.R. said (at p. 417):

> "The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. I can, however, conceive many cases in which a declaratory judgment may be highly convenient..."

And in *Burghes v. Attorney-General (44),* Warrington J. said (at p. 156) :

> "But the jurisdiction (to give a judgment declaratory of rights under Order 25, Rule 5) is discretionary, and should be exercised with great care and after due regard to all the circumstances of the case."

A judgment more to the point in regard to the restrictions imposed upon the Court in considering the issue of a declaratory judgment, was given by Bankes L.J. in the leading

case of *Guaranty Trust* (31), which we have already mentioned. In that case the learned Lord Justice said (at p. 572):

> "There is, however, one limitation which must always be attached to it (the relief claimed), that is to say, the relief claimed must be something which it would be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. Subject to that limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief ..."

In *Russian Commercial Bank v. British Bank* (45), Lord Dunedin, in delivering one of the majority decisions, after praising the correctness of the test applied by the Courts of Scotland when requested to give an order declaratory of rights, said:

> "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it ; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

And Lord Wrenbury, expressing a dissenting opinion in the same case, said (at p. 461) :

> "...the authorities are numerous that the discretion of the Court to make a declaration..... is to be most carefully and jealously exercised. The present case is so extreme that if the discretion is to be exercised in favor of entertaining an action for a declaration without relief in this case, I cannot at the moment picture any state of facts in which the court might not exercise its discretion in that direction ...."

In *Gray v. Spyer* (46), Lord Sterndale M.R. said (at p. 27) that

> ".... claims for declaration should be carefully watched. Properly used they are very useful ; improperly used, they almost amount to a nuisance."

In *Thomas v. Attorney-General* (47), Farwell J. said (at p. 313) :

> "That power given to the court to make declaratory judgments is purely discretionary and the court is not bound to entertain such an application except in a proper case."

And finally, in *Har-Shefi v. Har-Shefi* (48), Singleton, L.J said (at p. 786):

> "... any such claim (for the giving of a declaration) will be carefully watched. The Court will not grant a declaration in the air."

24. The courts of this country have in general followed English precedent, and have defined the power to grant an order declaring rights in the light of the interpretations given to Rule 5 of Order 25 by the English courts. I shall cite, for example, the opinion of Windham J. , as quoted in *Nathaniel v. Cohen* (10), a judgment which was overruled on appeal on another point. And this is what Windham J. said (at p. 697 ibid.):

> " ... the court will with the greatest caution and reluctance give a declaratory judgment in vacuo where no consequential relief is prayed for and where at the same time, such consequential relief ... lies within the exclusive jurisdiction of some other tribunal."

The same applies to *Levin v. Local Council, Ramat Gan* (15), in which Judge Kassan said, at p. 298, that:

> "It has already been held by the court... nor is the point in dispute - that the court is entitled, by virtue of Rule 52(a) (sic.) of the Civil Procedure Rules, 1938, to issue a declaratory judgment even if it is not asked to grant relief ancillary to the main relief sought... but the question

> whether or not a declaratory judgment should be given is one within the discretion of the court, which is required to act with the utmost care and circumspection."

25. To sum up then, the position may be stated very shortly in these terms: The court will not as a rule refuse to give a declaratory judgment where there exists a dispute between the parties and one of them seeks advice and guidance in regard to his legal rights so that he may know which path to follow, even though he does not at the same time also seek relief which is ancillary to such a declaration. The court, however, will examine an application of this kind with the closest scrutiny, and will not grant the application save after having weighed all the circumstances of the case - only then will it decide in favor of the plaintiff.

26. No general principles have been laid down in the decided cases under which the court is to weigh the circumstances of the case brought before it. In any event, the investigation of such principles has not been exhausted, and it would seem that each case is to be decided according to its own particular facts. We have already seen the test suggested by Lord Dunedin in the *Russian Commercial Bank* case (45). This test was adopted by Bourke J. in *Ossorguine's* case (14). As against this, we find that different and additional considerations have been relied upon in other judgments. I shall not deal with them all, but with only a number of them.

In *Roesin v. Attorney-General* (49), it was held that a foreign national who resided in England, and had received no notice from the authorities of their intention to discriminate against him in regard to his duty of military service, in favor of other foreign nationals residing temporarily in England, was abusing the power of the court in applying for an order declaring that he was a national of a particular state.

In the *Grand Junction Waterworks* case (42), which has already been referred to above, it was held that where an alternative remedy exists, a declaratory judgment will not be given. This principle was also laid down in the *Municipal Council of Jerusalem* case (9), and was even extended to some extent in that case (see p. 510).

27. I have not found any judgment which deals directly with the question whether the behavior of the applicant for a declaration - that is to say, his behavior before he came to court, whether his hands were clean, whether his conscience was clear, and so forth - is one of the circumstances which the court is required to weigh in dealing with the application. However, even though I have found no proof of this, I have found a reference to this question. It appears from *Nathaniel's* case (10), that the Appeal Court, in confirming the decision of the lower court to dismiss the application for a declaratory order, did not disregard the behavior of the applicant for such an order (see, particularly, the dicta on p. 320). And in an American case (see *Harril v. American Home Mortgage Co.* (5)), it was held that a mortgagor was not entitled to an order declaring promissory notes and the trust deed void, "without doing equity by repaying or offering to repay money borrowed on the security thereof."

28. It is not surprising that the courts have not been required to lay down a principle in connection with this serious question, for what kind of applicant turns to the court for a declaration ? I would say that the usual applicants are persons who, by reason of negotiations which they have conducted with others in good faith, are puzzled as to their rights. They ask themselves what, indeed, are the obligations into which they have entered and to what rights they are entitled from the other party. Against them stand litigants who submit legal submissions to deprive them of their rights. The doors of the courts are open before applicants such as these, subject to the restrictions which we have seen above. It is very rare that persons will knowingly - and, I would say, deliberately - place themselves in a position of embarrassment and thereafter approach the court and request an order declaring their rights and their legal status. It may be that this is the reason for the dearth of judgments on this point. It is my feeling, however - and I cannot rid myself of this impression - that the court, in considering all the circumstances of the case before it, particularly as we are dealing with relief which originated in the Courts of Equity, cannot, and should not, disregard the behavior of an applicant and the background of his actions which, he submits, have created the rights in respect of which he seeks an authoritative declaration from the court.

29. How did the appellants behave? The facts are clear, and there is no need to relate them again except in a very abbreviated form. The first appellant is a man of priestly family - or

a person in respect of whom there is a doubt whether or not he is of such a family - and the second appellant is a divorced woman. The first appellant proposed marriage to the second appellant, who agreed. No Rabbi, however, could be found in Israel who was prepared to perform the ceremony of marriage according to Jewish religious rites, by reason of the Biblical prohibition (Leviticus XXI, 7) "..... neither shall he take a woman put away from her husband". The parties then approached the advocate, David Ganor, who represents them and who has submitted his contentions on their behalf in these proceedings. He conducted an "unofficial" wedding ceremony for the appellants in his office, in the presence of only two witnesses who had been specially invited for the occasion, and in the presence of two constables who came as uninvited guests in order to warn those participating in the marriage farce that their action was illegal. All those present knew, of course, that the celebration was irregular, and had not been performed in accordance with the usual and accepted manner between bride and groom. Mr. Ganor, however, who described himself as one who has completed courses in an 'Academy, and studied the Talmud, although not the Shulhan Arukh', and who attended lectures on Jewish law by Dr. Eisenstadt for a year at a law school, and who - he added - was in a better position than others, knowing both parties to the marriage, for 'it is impossible to deceive me as those who register marriages at the Rabbinate might be' - this advocate examined the certificates in the hands of the parties, and after having made his findings in regard to their personal status, he performed the ceremony of sanctification and authorized them to live together as husband and wife. It is, of course, no part of our duty to examine the standard of 'knowledge' attained by Mr. Ganor in Jewish law - of the Talmud and the commentators, both the early and the later - nor is the matter of any importance for our present purposes. It is, however, admitted by all that Mr. Ganor knew - and it is to be assumed that he also conveyed this knowledge to his clients, the bride and bridegroom, and also to the witnesses who 'accompanied the bridal pair' - of the prohibition imposed by the Bible on a person of priestly family from marrying a divorced woman, and of the rules of marriage made by the Rabbis of Israel, in accordance with which - as was held by the learned judge:-

> "It is forbidden (a) to perform a sanctification of a betrothal except when there is a marriage canopy, in the presence of ten witnesses, and after the registration of the marriage in the offices of the Rabbinate ; (b) to celebrate a sanctification save by those who are authorized and

> appointed for that purpose by the Chief Rabbinate of Israel, local officers of the Rabbinate, and officers of the Chief Rabbinate in each city and large town; (c) to rely upon any evidence of a marriage which has not been performed in accordance with this rule."

As is well known, these restrictions are strengthened by the Ban which is imposed on any person who infringes them. I do not intend to investigate here the validity of the marriage which was celebrated in breach of these rules, or the penalty which follows such infringement. What interests me here is the intrinsic meaning of the Regulations of the Rabbis of Israel in general, and of these marriage regulations in particular.

30. The various rules framed by the spiritual leaders of the Jewish people during the long period of its exile were designed to regulate, by means of the imposition of an internal independent discipline, the conduct of Jewish communities, to uphold their spiritual and moral level, to define the right of the individual and the community, to fix the relationship between man and his neighbor, and to lead to the increase of religion and wisdom in Israel. One of the earliest series of rules was intended to regulate married life and was designed to build a fence around and to prevent any breaches in the wall of the Jewish family. These rules in regard to marriage, which were dictated by the needs of the place and time, were framed primarily to prevent clandestine sanctifications, sanctifications of persons kidnapped, sanctifications which would bring the institution into contempt, sanctifications contrived as a result of cunning, sanctifications entered into by compulsion, and other sanctifications and marriages which were opposed to the morals of Judaism and the customs of the Jewish people. They were designed to impose, and they did in fact impose, the rule of the home over Jewish communities in the lands of their dispersion, and to impose community rule upon the individual. By reason of the special circumstances in which diaspora Jews found themselves, the sanction for these rules was the punishment which could be imposed, namely, the Ban, which involved not only the exclusion of the wrongdoer from the communal group, but also his excommunication and treatment as an outlaw.

31. It is not disputed that in our times, and in the Jewish State, matters such as these demand an approach consistent with the existence of a sovereign state, and the elimination

from our renewed life of the institutions of the exile. Until, however, such matters are regulated by the State, it would seem that in some areas of activity - and in particular in the area of personal status - the vital need today, even in this country, for a number of rules which, in their time and place, fulfilled so vital a function in the life of the Jewish communities of the exile, has not yet completely disappeared. My colleague, Silberg J., with great erudition, has dealt at length with the 'Jerusalem Ban' - which was relied upon by the learned judge in the Court below - and cited both early and late authorities in support of his observations. I do not wish to repeat the details of that Ban, which is similar to rules acted upon previously by our people, in exile and in the Land of Israel itself. Special interest attaches, however, to the introductory words to that Ban, and to the rules for the enforcement of which it was introduced. The introduction provides as follows: -

> "Because of the Ingathering of the Exiles from all the places of their dispersion, and from the ends of the earth, and far-away isles, who are coming up in their thousands and tens of thousands, and are settling in the Holy Land through the great loving-kindness of the Holy One, and are bringing with them their former customs which are not in accordance with the rulings of the sages of the Land of Israel in the Holy City of Jerusalem, and those of the Rabbis of the communities of Israel in Matters of sanctification, divorce, levirate marriage, and this is liable to lead to differences of opinion in Israel and to disturb the peace of the House of Israel; for this reason we have regarded it as our duty to re-enact the rules issued by our former Rabbis, and to add further similar rules which are demanded by the times for the sake of ensuring the peace of the community - rules which are of fundamental importance in regard to all the rules of our former Rabbis for their communities from the days of Moses until later generations.
>
> This follows the customary invocation of the help of God and the expression of deference to the great sages of bygone ages, and the consent obtained for the Ban by all the great rabbinical authorities then living in Jerusalem."

This Ban and these rules were designed, therefore, to build a fence [1)] and so prevent licentiousness in Jewish family life, and thus preserve stable relationships, a high moral level, and the purity of ethical standards in this fundamental institution of human society. The fact that such regulations have not lost their meaning may be seen from the facts of *Banin v. Banin* (11). That case dealt with a man who sanctified a woman against her will, and not in the presence of ten persons, and so forth. The matter came before the Rabbis, who annulled the sanctification. This shows that demoralization still exists, threatening the stability of the family and the status of the Jewish woman. The regulations were designed to build a fence against such lawlessness. What did the appellants do in this case?! What did the lawyer do who guided them by his advice and acts? They impudently disregarded accepted rules, and were impervious to the purpose which those rules were designed to achieve.

32. Nor is this all. In the time of the Mandate the authorities in this country recognized the urgent communal need of centralizing in one legal body matters relating to the marriage and divorce of the residents of the country, in order that there should be continuous and effective control over such matters. This is proved by the Marriage and Divorce (Registration) Ordinance (Drayton, Vol. 2, Chap. 88), which laid down detailed and express directions for the registration of marriages and divorces, and special instructions for giving effect to those directions. And in order to prevent unbridled license in such matters, it was held by this court in the time of the Mandate (see *Rokach v. District Commissioner* (12)) that the authorities were not obliged to supply forms of certificates for the registration of marriages and divorces to a Rabbi who was not authorized as a registering authority by the competent religious institutions of the Jewish community. The effect of this ruling is that not even every Rabbi in Israel is empowered by the law of the country to celebrate sanctifications. A couple, therefore, who approach a rabbi who is not entitled to register marriages according to law, to celebrate a marriage between them, does so in vain. In that case Frumkin J. said, at p. 201:

[1)] This phrase is taken from the Mishna, "Build a fence around the Law", meaning : it is not enough to obey the law ; observe the prohibitions which will prevent you breaking the law.

> "... One cannot overlook the danger of upholding the contention of the respondents, both from the point of view of public policy, as well as of the preservation of the traditional purity of Jewish family life ... The main object of the Ordinance would then be defeated and the purpose of keeping the celebration of marriage and divorce within the framework of law and good order undermined."

33. It would perhaps not be superfluous to review here, shortly, the attitude taken by the Supreme Court in the time of the Mandate to the question of the validity of marriages of the type with which we are now dealing, though I myself am not prepared to decide the appeal on this point in view of my attitude on the other questions which have arisen. The opinion of the Supreme Court in the time of the Mandate was expressed on a number of occasions by Frumkin J., and the same conception is found in all his judgments on this question as a central theme. In *Banin's* case (11), Frumkin J. said, at p. 562:

> "We personally feel some doubts as to the validity in law of the second marriage. According to the evidence of the woman, who is supposed to be the second wife of the Respondent, she was not married to the Respondent by marriage contract, but by a marriage ceremony (Kiddushin) in the presence of two witnesses. In the case of *Hefzibah v. Ibrahim Mizrahi,* the Rabbinical Court of Appeal of Palestine has declared invalid Kiddushin not effected before a representative of the Rabbinate and not in the presence of a congregation of ten, and not accompanied by a deed of writing."

In another judgment, (see ,*Silberstein v. Constable in Charge of Police Lock-up* (13), Frumkin J. said, at p. 17 :

> "The effective part of the solemnization of a marriage ceremony under Jewish law is that the bridegroom puts a ring on the finger of the bride saying : 'You are hereby sanctified to me under the Law of Moses and Israel'. Under strict Religious law the mere handing over of the ring or a coin to the bride followed by the said phrase is sufficient to

> establish a binding marriage between the parties; but in practice this is not the common form of marriage. It is only a part - as I have said, the effective part - of the ceremony which should be [1)] celebrated by a religious minister in the presence of a congregation of at least ten males and is accompanied by a written deed of marriage, called 'Ketuba'.

Again in another judgment, *Stark v. Chief Execution Officer* (6), Frumkin J. said, at p. 279 :

> "On more than one occasion I expressed my distaste for forms of marriage like this and I have a very strong view that semi-marriages of that sort, if I may so call it, should be discouraged, but if under Jewish law some sort of a tie is established between a couple undergoing such a formality, a dispute arising out of or in connection with it must be left for the Rabbinical Court to decide. However strange it might seem that there might be a marriage which is yet incomplete such a thing apparently exists in the Jewish law and just as parties are allowed to sue for certain rights under a defective agreement, there is no reason why a party should not be allowed to sue for certain rights under an incomplete marriage."

In these cases a civil court was not asked to give a declaration of rights, and the question of validity of the marriage only arose incidentally in an application for the giving of actual relief of another kind. The court, however, whenever it found it possible to do so, did not fail to express its contempt for marriages performed in this way, and to voice serious doubts as to the validity of such marriages.

34. In short, we are not dealing with the case of a man who came to this country from overseas bringing his wife with him, or who sanctified a woman here according to Jewish rites in good faith and in a manner in which such a ceremony is performed in his own country, and who seeks a declaration of rights, that is to say, in more usual terms - who

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[1] The original has "is" in place of "should be".

seeks legal confirmation of his marriage. We are dealing with people who knew the position, and intended to circumvent it. They did not genuinely believe that their sanctification had been performed in accordance with religious rites and in accordance with law. On the contrary, they knew that - at least from a formal point of view - the sanctification had been performed in defiance of the rites of the law. They ask us for a judgment declaring their rights according to Jewish law, when they themselves have impudently paid no regard to Jewish law and the rules promulgated by those having authority in the very matter from which, as they submit, their rights flow. They claim rights emanating from their own wrongdoing. The matter may be compared with one who offends the law as did Zimri and asks to receive the reward of Phineas [1]). And Phineas, let it be added, was also of priestly family. Is this a case in which the court should help those who seek its assistance and exercise its discretion in their favor ? Is it conceivable, for example, that a man who married a minor in contravention of the Marriage Age Law, 1950, could petition a civil court and seek a declaration that the marriage was valid according to Jewish law ? And if he were to seek such relief - is it conceivable that the court would accede to his request although his submission be sound from the purely legal point of view? This would be an abuse of the process of the court and not a means of exercising its jurisdiction. In my opinion the court is not bound to assist lawbreakers and should prevent a wrongdoer from reaping the benefits of his wrong.

35. As I have said, I have found no direct authority for the conclusion which I have reached. I cannot help feeling, however, that from the point of view of equity, and from the point of view of "the accepted principles according to which the court uses its powers" - according to the true test as laid down by Bankes L.J. in the *Guaranty Trust* case (31) - this is a case in which the court is not bound to exercise its discretion in favor of the appellants. My colleague, Silberg J. has reached the opposite conclusion, but he too did not do so without much reluctance. This is what he says : -

> "I have arrived at this conclusion with considerable reluctance. I frankly admit that my inclination, as a judge and as a man, has been, from beginning to end, not to give official sanction to that private

[1] See the story in the Book of Numbers, Chapter 25**,** Verses 1-15

> ceremony. Nobody will approve of marriage ceremonies like this, and no judge will feel sympathetic towards applications like the present."

My learned *colleague* states, at the conclusion of his remarks: -

> "In short: I have reviewed every aspect of the case, and I have found no ground for the annulment of the sanctification."

With all respect and regard for the views of my colleague, the court has not been asked to annul the sanctification, but to declare its validity - that is to say, to give it legal confirmation. As is well known, the distance is wide indeed between a prayer for annulment and one for a declaration of validity.

Neither in the South African case of *Martens v. Martens* (51), which is mentioned at the conclusion of the judgment of Silberg J., nor in the English case of *H. v. H.* (34), which quotes the South African case with approval, was the question considered of the right of the 'deceivers', the 'fictitious' husband and wife, to appear before the court and to ask with supreme effrontery for a declaration by the court that their marriage was celebrated in accordance with religion and law. The question of the marriage, although it was of importance in those cases, arose only incidentally in connection with the question of the granting of other vital relief. Those cases, therefore, are of no assistance in the present appeal.

As far as the attitude of the lower court is concerned, it is sufficient to read the judgment of the learned judge to see that were it not for the fact that he held the sanctification itself to be invalid, he too would not have exercised his discretion in favor of the appellants.

My colleague, Sussman J., also expresses his dissatisfaction at the 'act of lawlessness' in the celebration of the secret sanctification, and he suggests his own solution to the whole problem. But does not common sense demand that, in the light of this dissatisfaction, the court should not confirm the 'act of lawlessness' and give it official sanction ?

36. In conclusion I wish to make two short observations. In the first place, the appellants are not altogether without remedy. They are entitled even now to submit their application to the Rabbinical Court. That court is competent to deal with their prayer, and we have seen that it has already recognized the sanctification of a member of a priestly family to a divorcee. Moreover, in accordance with what was held in *A. v. B.* (22),

> "Any person interested is entitled to request the Rabbinical Court to define his personal status. The considerations which are taken into account by a civil court are not conclusive in the Rabbinical Court."

My second observation is this. It cannot be said that the present case is an isolated one or the last of its kind, and that the civil courts will not be asked in the future to decide similar matters. We were told in the course of the proceedings that a judgment was given not long ago on the question of the validity of a secret marriage between a member of a priestly family and a divorcee, and that the judges of the District Court were divided in their opinions. It is true that the Marriage and Divorce Law referred to has introduced a radical change in the procedure to be followed in matters of personal status, and that the great majority of these questions will be considered in future by the Rabbinical Court. That law, however, only applies to residents and nationals, and if a declaration were to be given by this court in the present case, a vast number of foreign nationals and residents, in a position similar to that of the appellants, will bring their wives who were previously divorced to this country from overseas, or will marry divorcees in this country secretly, and will then approach the courts of this country for legal confirmation of their acts. The courts of this country will thus be turned into a clearing house to which all doubtful sanctifications and all void sanctifications of the persons described will be brought for confirmation and validation. In my opinion, this must be prevented at all costs.

In view of what I have said, I would dismiss the appeal.

It is therefore decided by a majority to allow the appeal, to set aside the judgment of the court below, and to declare that on December 16, 1962, at Tel Aviv, the first appellant Aharon Cohen, sanctified the second appellant, Bella Bousslik, by a Jewish ceremony of

sanctification and that by virtue of that sanctification they are to be regarded as husband and wife as from the above date.

Appeal allowed.

Judgment given on January 15, 1954.