HCJ 143/62

The Petitioner: **Henriette Anna Katerina Funk Schlesinger**

v.

The Respondent: **Minister of Interior**

Attorney for the Petitioner - Y. Ben Menashe
Attorneys for the Respondent – State Attorney Z. Bar Niv, Deputy State Attorneys Z. Terlo and Dr. M. Cheshin

Abstract

The Petitioner, a Christian woman and Belgian national, married Mr. Israel Schlesinger, a Jewish citizen of Israel, in Nicosia, Cyprus, in a civil ceremony in December 1961, as shown by a copy of the marriage register, confirmed by the Cyprus Minister of Interior. The Belgian Consul General in Limassol entered the Petitioner's marriage in her Belgian passport. The registration in the personal status register of the Belgian Embassy testifies to her marriage in Nicosia in reliance upon the marriage certificate issued to her by the district officer there and on the said entry in her passport. Several days after the said marriage ceremony, the Petitioner arrived in Israel as a tourist. Her request to be granted a visa for permanent residency was denied. After submitting a request to the Inhabitants Registry for a certificate of identity, she was told she could not be granted a certificate of identity showing her as married, an accordingly, the name "Schlesinger" would not

appear. An order nisi was issued against the Minister of Interior. In his response, the Respondent granted the Petitioner's request for permanent residency, but maintained his refusal to register her as married, arguing that the Petitioner and Mr. Schlesinger are not a married couple in accordance with the applicable personal status laws.

The Supreme Court, by a majority, made the order nisi absolute, holding:

a. The complex issue of the validity of the Petitioner's marriage under the applicable law should not have been raised in the context of her registration in the Inhabitants Registry.

b. (1) The role of the registration officer under the Registration of Inhabitants Ordinance, 5709-1949,[1] is merely that of a collector of statistics for the purposes of administering the Register of Inhabitants, and he holds no judicial authority.

(2) The above officer's considerations are strictly administrative and he is not charged with implementing religious instructions.

c. (1) According to the instructions given to registration officer by the Minister of Interior, a citizen who appears before an administrative authority is presumed to be speaking the truth.

(2) Having been presented with prima facie evidence, the officer must suffice with this evidence, because – being an administrative authority – he must not intrude into an area that is not his own in order to determine a legal dispute. Should he not wish to become the arbiter, he must register the details as presented by the requesting party, even if it is not convinced of their correctness.

[1] 2 L.S.I. 103.

d. The above Ordinance does not confer upon registration in the Register of Inhabitants the force of evidence or proof of anything. The information in it may or may not be true, and no one vouches for its correctness.

e. For the purposes of registering the family status of the Petitioner in the Register of Inhabitants, the marriage ceremony is conclusive, and prima facie evidence is sufficient to prove it. Examination of the marriage's validity is not a matter for the registration officer. It is presumed that the Legislature did not task a public agency with a duty it is unable to fulfill.

f. (1) The instructions that order the registration officer to pass on a matter of interfaith marriage to the "determination of the department" are unfounded as there is nothing for the department to determine.

(2). The validity or invalidity of an interfaith marriage is an extremely weighty matter, and when a couple askes to register under the above Ordinance, it cannot be said how the issue may ultimately be determined. The registration officer cannot speculate as to which court may address the matter, how the President of the Supreme Court may exercise his authority under art. 55 of the Palestine Order-in-Council 1922, and cannot predict whether the validity of the marriage will be recognized.

(3) As long as the Petitioner's marriage has not been invalidated in a judicial proceeding, she is deemed a married woman for the purposes of the Inhabitants Registry.

Israeli cases cited:

[1] MApp 39/57 *S. v. S*, IsrSC 11, 921, 922 (1957)

[2] CA 26/51 *Shimon Kotik v. Tzila (Tzipa) Wolfson*, IsrSC 5, 1341 (1951)

[3] CA 191/51 *Leib Skornik v. Miriam Skornik*, IsrSC 8, 141 (1954)

[4] HCJ 237/61 *Peer Hadar Co. Ltd. v. Head of the Land Registration and Arrangement Dept. et al.*, IsrSC 16, 1422 (1962)

[5] CA 85/62 *Calling-Up Officer under the Defence Service Law v. Avraham Nahari*, IsrSC 16, 2813 (1962)

[6] HCJ 145/51 *Sabri Hassan Abu-Ras et al. v. Military Governor of the Galilee et al.*, IsrSC 5, 1476 (1951)

[7] HCJ 155/53 *Salem Ahmad Kiwan v. Minister of Defence et al.*, IsrSC 8, 301 (1954)

[8] CA 238/53 *Aharon Cohen and Bella Buslik v. AG*, IsrSC 8, 4, 36 (1954)

Palestinian cases cited:

[9] C.A. 186/37 *Rivka Cashman v. Lindsay Gordon Cashman*, P.L.R. 4, 304 (1937) S.C.J. 2, 422; (1937) Ct.L.R. 2, 132

[10] C.A. 119/39 *Pessia Nuchim Leibovna Shwalboim v. Hirsch Zvi Shwalboim*, (1940) P.L.R. 7, 20; (1940) S.C.J. 1, 38; (1940) Ct. L.R. 7, 55

[11] C.A. 9/40 *Eliyahu Bichovsky v. Nitsa Lambi-Bichovsky*, (1940), P.L.R. 7, 228; (1940) S.C.J. 1, 184; (1940) Ct. L.R. 7, 173

[12] C.A. 11/41 *Eliyahu Bichovsky v. Nitsa Lambi-Bichovsky*, (1941) P.L.R. 8, 241; (1941 S.C.J. 1, 230; (1941) Ct. L.R. 11, 238

[13] C.A. 158/37 *Leib Neussihin and ors. v. Miriam Neissihin*, (1937) P.L.R. 7, 373; (1937) S.C.J. 1, 391; (1937) Ct. L.R. 2, 210

[14] Misc. App. 20/43 *Dr. Asher Apte v. Jehudit Gross (Apte) and an*., (1943) P.L.R. 10, 124; (1943) A.L.R. 1, 12

English cases cited:

[15] *Mette v. Mette*, [1859] 164 E.R. 792; 1 Sw. & Tr. 416; 28 L.J.P.&M. 117; 33 L.T.O.S. 139 *sub nom. In the Goods of Mette;* 7 W.R. 543

[16] *Brook v. Brook*, (1861) 1 1 E.R . 703, 704, 711; (1861) 9 H.L . Cos. 193; 4 L.T. 93, 99, 101 , 98 ; 25 J.P. 259; 7 Jur. N.S. 422; 9 W.R. 461, H.L.

[17] *Ogden v. Ogden (otherwise Philip)*, (1908) P. 46, 52, 61, 66, 67, 75; 77 L.J.P. 34; 97 L.T. 827; 24 L.T.R. 94, C.A.

[18] *In re Paine*, (1940) Ch. 46, 49, 50; 108 L.J. Ch. 427; 161 L.T. 266; 55 T.L.R. 1043; 83 Sol. Jo. 701

[19] *Pugh v. Pugh*, (1951) P. 482, 494; (1951) 2 L.T.R. 806; 95 Sol. Jo. 468; (1941) All E.R. 680

[20] *Sottomayer v. De Barros*, (1879) 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281, 282; 27 W.R. 917

[21] *Lepre v. Lepre*, (1962), see: The Law Times, vol. 233, December 6, 1962

[22] *Gray (otherwise Formosa) v. Formosa*, (1962) 3 All E.R. 419, 423; (1962) 3 W.L.R. 1246

[23] *Spivak v. Spivak*, (1930) 142 L.T. 492; (1930) L.J.P. 52; 94 J.P. 91; 46 T.L.R. 243; 74 Sol. Jo. 155; 28 L.G.R. 188; 29 Cox, C.C. 91

[24] *Dalrymple v. Dalrymple*, (1811) 161 E.R. 665, 669; 2 Hag. Con. 54

[25] *In re Peete, Peete v. Crompton*, (1952) 2 All E.R. 599; (1952) 2 T.L.R. 383; 96 Sol. Jo. 561

[26] *Middleton v. Janverin*, (1806) 161 E.R. 797; 2 Hag. Con. 437

[27] *Simonin v. Mallac*, (1860) 2 L.T. 327, 330; (1860) 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 6 Jur. N.S. 561; 164 E.R. 917

[28] *Hay v. Northcote*, (1900) 82 L.T. 656; (1900) 2 Ch. 262; 69 L.J. Ch. 586; 48 W.R. 615; 16 T.L.R. 418

[29] *Baindail (otherwise Lawson) v. Baindail*, (1946) 174 L.T. 320; (1946) P. 122; (1946) 1 All E.R. 342; 115 L.J.P. 65; 62 T.L.R. 263; 90 Sol. Jo. 151, C.A.

[30] *Chetti v. Chetti*, (1909) P. 67; *sub nom. Venugopal Chetti v. Venugopal Chetti*, 78 L.J.P. 23; 99 L.T. 885; 25 T.L.R. 146; 53 Sol. Jo. 163

[31] *Brook v. Brook*, (1858) 65 E.R. 747

[32] *Cheni (otherwise Rodriguez) v. Cheni*, (1962) 3 All E.R. 873; (1962) 12 C.L. 112

American cases cited:

[33] *Ruth Loughran v. John Loughran*, (1934) 78 L. Ed. 1219

[34] *Hastings et al. v. Douglas*, (1918) F. 378

[35] *Alecia McDonald v. James McDonald*, (1936) 58 P. (2d) 163; 104 A.L.R. 1290

English Statutes cited:
Age of Marriage Act, 1929 (9 & 20) Geo. 5, c. 36)
Matrimonial Causes Act, 1857 (20 & 21 Vict. C. 85) s. 22
Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 32
Marriage Act, 1949 (12 & 13 Geo. 6, c. 76)

Jewish Law sources cited:
Kiddushin 15b; 68b
Rashi, Kiddusin 68b, *s.v*. "*Lo*"
Leviticus 18

Catholic Canon Law cited:
Codex Juris Canonici, 1917, ss. 1014, 1070(2), 1070, 1071, 1133-1141, 87, 1099(2)

The Supreme Court sitting as a High Court of Justice

Before: Justices Silberg, Sussman, Berenson, Witkon and Manny

An objection to an order nisi dated 24 Iyar 5722 (May 28, 1962) ordering the Respondent to show cause why he continues to refuse to recognize the Petitioner as a married woman, whose name is Schlesinger, and register her accordingly in the Register of Inhabitants, and why he continues to refuse to issue a certificate of identity in accordance with the requested registration, as well as a permit for permanent residency.

The order nisi was made absolute by a majority opinion, against the dissenting opinion of Justice Silberg.

Order

Justice Silberg:

1. This is an objection to an order nisi granted by this Court, which concerns recognizing the Petitioner as a married woman, whose surname is Schlesinger, and so registering her in the Register of Inhabitants on the basis of a civil marriage between her and Mr. Israel Schlesinger in Cyprus, on December 21, 1961. The Petitioner is a Christian woman of Belgian nationality, and Mr. Israel Schlesinger is an Israeli Jew, and a permanent resident of the State of Israel. The Respondent's refusal stems from the fact that he does not recognize the validity of the above marriage.

2. Two questions stand before us in this matter. The Petitioner's attorney attempted to intertwine them, "joined together" in his hands [Ezekiel 37:17]. We shall not follow his lead, but rather separate them and discuss them individually. Were we not to do so, we would lose our conceptual train of thought in the zigzag, and find ourselves unable to resolve the problem or problems.

The questions before us are:

(a) Whether a marriage performed between a Jewish man and non-Jewish woman is valid *according to the laws of the state*?

(b) If we find that *it is not legally valid* – can the registration officer , indeed must the officer, register the Petitioner as married based on the civil marriage ceremony performed between the couple in Cyprus.

I emphasized above, according to the *laws of the state*, because according to *Jewish law*, there is no doubt whatsoever that such a marriage is not legally valid.

> And any woman who cannot contract kiddushin with that particular person or with others, the issue follows her status. This is the case with the issue of a bondmaid or a gentile woman" (TB Kiddushin 66b).
>
> …. How do we know it in regard to a gentile woman? Scripture says, "You shall not intermarry with them" (TB Kiddushin 68b).
>
> You shall not intermarry with them: *The law of marriage will not apply to them*" (Rashi, Kiddushin, *ad loc*., *s.v. lo*).

"The law of marriage will not apply to them" – no marital relationship can exist between a Jewish man and a gentile woman. Therefore – it is indisputable, except by the Petitioner's attorney in one of his arguments – the marriage of a Jewish man and a non-Jewish woman is invalid under Jewish law, whether it was conducted in a Jewish marriage ceremony or in a civil ceremony.

3. The question is, therefore, whether such a marriage is valid under the laws of the state. It is interesting and quite curious that no Israeli tribunal can *dissolve* this marriage. The rabbinical court cannot, because it has no jurisdiction over a marriage in which one spouse is not Jewish, MApp 39/57, IsrSC 11, 921, 922 [1]. The District Court also cannot, because the woman is a foreign national, and under art. 64 of the Palestine Order-in-Council, the District Court is not authorized to issue a decision dissolving the marriage of a foreign national (see and note: art. 2(f) of the Palestine Order-in-Council (Amendment) 1935, together with CA 186/37 [9]). And I think it greatly doubtful that – for reasons that need not be elaborated here – the Respondent can make recourse to art. 55.

But the fact that no tribunal has jurisdiction to *dissolve* the marriage does not mean that the marriage stands. The law precedes the judge, and it has its own reality. But the fact is that we are not concerned here with dissolution or validation of a marriage – as we lack jurisdiction for either – but with an *incidental* decision on its invalidity or

validity for the purpose of deciding upon the mandamus petition before us. We, like any court, are competent to make incidental decisions under the provisions of sec. 35 of the Courts Law, 5717-1957.

4. And so we return to the question at the beginning of the previous section: Is the marriage entered into by the Petitioner and Mr. Schlesinger in Cyprus valid under the laws of the State of Israel?

The primary argument of the Petitioner's attorney is that whatever the validity of this marriage may be in regard to the man, Mr. Schlesinger, from the perspective of the woman – the Petitioner before us – and *for the woman*, it is nevertheless valid. This is because under art. 64(ii) of the Palestine Order-in-Council, the validity of a marriage of a foreign national is determined in accordance with the national law that applies to her, and under Belgian law there is no flaw or defect in the marriage of a Christian woman and a Jewish man. In other words, Mr. Schlesinger is not married to the Petitioner, and he is a bachelor, whereas the Petitioner is a married woman, who is married to Mr. Schlesinger.

This is a serious argument, but it would seem that it must ultimately be rejected. I am not at all overwhelmed by the absurdity of this idea – a married woman who is married to a bachelor! – because in the vast, factious field of private international law that is so full of contradictions and inconsistencies, such wonders do exist. Consider, for example, a country that permits its citizen to marry a woman who is not eligible for marriage under her national law, and it (the state) also maintains the married woman in her pre-marriage citizenship. When that couple arrives in Israel, they may find themselves in such a paradoxical situation. This is not because Israeli law looks favorably upon such a half-married and half-single couple – indeed, as we shall see below, Israeli law objects to such divisions – but because the explicit provision of art. 64 of the Palestine Order-in-Council requires that the court view the spouses through different prisms: the husband (in the example above) is viewed through the prism of *his* national law, which deems them both married, while the woman is viewed through the prism of *her* national law, which deems them both single.

5. My response to that argument will be presented in the next two sections. First, I will examine the relevant legal situation in English Common Law, which is imported into our law through art. 46. I will then examine the view of Belgian law, which may lead us to art. 64.

6. As for the Common Law: an important rule of British private international law jurisprudence states that a marriage has no legal effect unless it is valid under the personal law of *each* of the spouses. This is termed the "cumulative system," as opposed to the "distributive system" that addresses such an issue by "allocation", that is, it determines the validity of the marriage of each spouse separately, in accordance with the law of *his* domicile alone.

The cumulative system, according to which the invalidity of the marriage in regard to one spouse renders the marriage invalid for the other spouse as well, has been the common thread in English case law for a hundred years or more – some of which expresses it explicitly, while in some it becomes absolutely clear through careful analysis. Below are the prominent cases that addressed this issue directly or indirectly. I shall present them in chronological order:

(a) *Mette v. Mette*, (1859) 164 E.R. 792 [15]:

In this earliest case, a marriage was invalidated for both parties because of the lack of capacity of *one* spouse, the husband, under the law of his domicile. The husband, a resident of England, married his sister-in-law (the sister of his late wife), who was a resident of Germany prior to the marriage, in Frankfurt. Under English law at the time, the marriage of a brother-and-law and sister-in-law was void, while under German law it was valid. The Court voided the marriage, stating:

> There could be no valid contract unless each was competent to contract with the other ([15] at 795-96).

(b) *Brook v. Brook*, (1861) 11 E.R. 703 [16]:

This case, decided two years later, also concerned the marriage of a brother-in-law and sister-in-law solemnized in a foreign country that permitted such marriage (Denmark). The House of Lords voided the marriage for violating English law. Halsbury (Simonds) vol. 7, p. 91, comment (r), presents this decision as evidence of the rule that a marriage is void unless it is valid under the antenuptial domicile law of *both* spouses. But that is mistaken, inasmuch as an examination of the *Brook* case shows (at p. 704, in the middle of the page), that the antenuptial domicile of both the husband and the wife was England, and in any event this does not show that the marriage would have been voided under the cumulative system, even if – as in the *Mette* case – only the domicile law of *one* party would have voided the marriage. But this decision indeed provides additional proof that in the matters of *capacity* to marry, English law follows the domicile and not the place of solemnization, and it (the above decision) of course does not *contradict* the said cumulative system.

As a living illustration of a modern Gretna Green in nearby Cyprus, it is apt and interesting to take note of a quote from the *Brook* case, in which Lord Campbell states:

> It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions (p. 711).

(c) *Odgen v. Ogden* (*otherwise Philip*), (1908) [17], p. 46:

A 19-year-old French domicile named Philip married an English domiciled woman. Under French law at the time, a man under the age of 25 could not lawfully marry without parental consent – which Mr. Philip did not have. Under the laws of England, a 19-year-old does not require parental consent. When the English woman heard that her husband, who had left her, had been granted an annulment in France, she went

ahead and married her second husband, in England, whose name was Ogden. After a while, conflicts arose between the lady and her second husband, and Mr. Ogden filed suit against his wife for a decree of nullity of marriage, on the grounds of bigamy, because – despite the French decision – his wife was still married to the above Mr. Philip. The question was whether the first marriage of Mrs. Philip-Ogden was valid or void, and the issue was which law should be applied to the first marriage – the English law of the wife, which deemed the marriage valid, or the French law of the husband, which deemed the marriage void, and which actually annulled it by judicial order due to the absence of parental consent.

The English court, applying the laws of England to the first marriage, deemed it valid, and therefore annulled the second marriage as bigamous.

This decision seemingly contradicts the cumulative system as, in validating the first marriage, it sufficed with its validity under the wife's law of domicile. But when we reviewed this precedent in depth, read the pleadings by the attorneys, the comments of judges, the text of the decision and the views of English legal scholars on the matter (see: *Ogden*, [17] pp. 52, 61, 66, 67, 75; WOLFF, PRIVATE INTERNATIONAL LAW, 2nd ed., pp. 328-29; CHESHIRE, PRIVATE INTERNATIONAL LAW, 3rd ed., p. 288; DICEY's CONFLICT OF LAWS, 7th ed., p. 235) we learned that the ratio decidendi of the *Ogden* decision was that parental consent for their son's marriage was a requirement of "form" rather than of "substance" – inasmuch as the two young spouses are not ineligible to be *married* to one another – and as we know, any matter of form is decided under the law of the place where the marriage was solemnized (*les loci celebrationis*), which was in the *Ogden* case – *coincidentally* – also the law of the wife's domicile. In effect, the only value of the *Ogden* decision is in the fact that the classification or distinction between the terms "form" and "substance" was made according to the *lex fori*, the law of the location of the court, and under English law, parental consent is a matter of form, as the "Gretna Green" cases confirm! "Gretna Green" marriages have been performed for centuries. Very young English couples who required the consent of their parents to marry would cross the border to a nearby Scottish village, stay there for several hours, and marry there before

the blacksmith and his assistant at the customs office. And why were these youthful elopements useful? Because Scotland did not require parental consent, and thus the marriage was valid under the law where the marriage was solemnized, and thus also valid upon return to England.

As we can see, the reasoning in *Ogden* is not only consistent with the cumulative system, it even supports it. This is because were the marriage of Mrs. Ogden to her first husband invalid under his law of domicile – not for a flaw of form but for a flaw of substance – the English court would have found it void for the other partner, that is the English wife, as well. In the case before us, it is unnecessary to elaborate on this, because the flaw in the marriage of a Jewish man and a non-Jewish woman – were Jewish law to apply, which we will discuss below – is a flaw of substance, of actual competence, because there can never be a lawful marriage between a Jewish man and a non-Jewish woman under Jewish law, as we have seen above.

(d) *In re Paine* ; (1940), Ch. 46 [18], provides clear, explicit authority for the above cumulative perspective. The discussion there concerned the provisions of a particular will. Incidentally, a question arose as to whether the parents of the children mentioned in the will were legally married. The marriage was solemnized in Germany. The wife was the husband's sister-in-law (the sister of his late wife.) His domicile was in Germany, her domicile was in England, and the court held that the marriage was void due to a flaw under the *wife's* law of domicile, because – said the judge – "the marriage must be a good and legal marriage according to the law of the domicil of both contracting parties at the time of the marriage" (pp. 49-50).

(e) *Pugh v. Pugh*, (1951), P. 482 [19]:

A resident of England married a Hungarian-born 15-year-old girl in Austria – which was permitted under the laws of Austria and Hungary, but prohibited and void under the English Age of Marriage Act, 1929. The court voided the marriage, stating:

> In view of those authorities it is clear that the marriage under consideration here was not valid, since, by the law of the *husband's* (emphasis added) domicil it was a marriage into which he could not lawfully enter (p. 494).

The court did not bother to enquire into the question of the wife's domicile because – so it would appear – it deemed it irrelevant, since even a flaw regarding one of the parties voids the marriage entirely under the above cumulative system.

(f) *Sottomayor v. De Barros*, (1879) 5 P.D. 94:

This case is, as far as I am aware, the only exception to the cumulative system. However, it, too, would be of no importance but for the special coincidence with the case before us. A Portuguese man, resident in England, and a woman who was a Portuguese national and resident, married in England. The two were first cousins, and under the laws of Portugal, such relatives cannot marry without a dispensation from the Pope. The English court declared the marriage valid, despite the substantive flaw under the *wife's* law of domicile. This decision is surely inconsistent with the cumulative system. However:

> (a). It is insignificant in view of the many decisions handed down in the past hundred years *in favor* of the cumulative system, and it should be deemed overturned by the later decisions in *Ogden*, *Paine*, and *Pugh* as mentioned above.
>
> (b). In *Sottomayer*, the validating law was the *lex fori*, the law of the state where the presiding court convened, and the *invalidating* law was the *foreign* law, and the court rejected the foreign law in favor of the local law. The case before us is the reverse: the local law, which is identical to the common law, invalidates the marriage at hand – were we to apply Jewish law – whereas the law that validates it is the foreign (Belgian) law. There is no precedent for validating such a case, even in the above *Sottomayer* case.

7. Here, one might argue: You have applied the Anglo-Israeli Common Law – but not the Belgian law! Were it to become clear that Belgian law actually follows the distributive system, we would be compelled – in terms of the wife – to reject art. 46 in favor of art. 64, and to validate the marriage in her regard.

My response is as follows: Based on ARMINJON (PRECIS DE DROIT INTERNATIONAL PRIVE, pp. 45-46), which was cited before us by the Respondents' attorney, it seems that Belgian law, too, follows the cumulative rather than the distributive system. But even were we not consider the words of this author as clear evidence of the Belgian law, we would arrive at the very same outcome. This is because when a party argues for the application of a foreign law but does not prove it, the "doctrine of processual presumption" immediately applies and the court assumes that the foreign law is identical to the law of the forum. Or – as the most recent editors of DICEY state – the court in this instance simply applies the law of the forum (DICEY'S CONFLICT OF LAWS, 7th ed., p. 1116).

And since the law of the forum in this case is, under art. 46, English Common Law, we again return to the cumulative system, which requires marriage eligibility under the personal law of both spouses.

As a result – assuming that Jewish law is the personal law of Mr. Schlesinger – his marriage to the Petitioner lacks legal validity both for the husband and for the wife, because one of the spouses, the husband, lacked the capacity to marry the Petitioner.

8. We thus reach the additional question: Is Jewish law indeed the "personal law" under which the *civil* court must adjudicate the matter of Mr. Schlesinger's personal status, in accordance with the aforementioned provision at the end of art. 47 of the Palestine Order-in-Council?

The answer to this is yes, certainly, and without a shadow of doubt. The Mandatory Supreme Court so ruled in CA 119/39 [10], and in CA 11/41 *Bichovsky v.*

Lambi-Bichovsky, (1941) P.L.R. 8, 241 [12], and the Israeli Supreme Court so ruled in CA 26/51 *Kotik v. Wolfson*, IsrSC 5, 1341 [2], and CA 191/51 *Skornik v. Skornik*, IsrSC 8, 141 [3], and so rule the Israeli courts each and every day without any misgivings, in hundreds and thousands of judicial decisions.

9. The Petitioner's attorney made a last-minute argument on this point immediately after we informed him of an English decision handed down several weeks ago in *Lepre v. Lepre*, (1962) [21], which was reported in The Law Times on December 6, 1962. This decision essentially relies upon an earlier decision handed down by the English Court of Appeal in the matter of *Gray (otherwise Formosa) v. Formosa*, (1962) 3 All E.R. 419 [22]. In summary, both decisions hold that English courts will not recognize a foreign court's annulment of a marriage due to the different faiths of the husband and wife, because such nullification is inconsistent with English principles of natural justice. The Petitioner's attorney argues that we, too – as a civil, secular court – must ignore Jewish law to the extent that it prohibits the marriage of Jewish man and a non-Jewish woman, because that flaw offends the sense of natural justice of Israeli public, as well.

This claim is incorrect. A court in state A can say that the laws of state B infringe its sense of justice, and completely ignore them. But a judge presiding in state B itself cannot say that the laws of the state infringe his sense of justice and that he is, therefore, unwilling to uphold them. The laws of every state, and all the more so a democratic state with a parliamentary legislature, befit – or is deemed to befit – the accepted principles of natural justice of that state, otherwise the laws would not have been enacted, and if enacted – would have been repealed under public pressure. Lord Denning could say in the *Formosa* case ([22] p. 423) that were a person off the street in England asked whether a marriage between a Catholic man and an Anglican woman was valid or not, that person would have answered: Valid! But it certainly cannot be said that any person in Israel, off the street or from the garret, would have responded in the affirmative to the question whether the marriage of a Jewish man and a non-Jewish woman should be recognized as valid. I believe that the vast majority of our public would answer in the negative. That is, not only are we, the presiding judges, not permitted to ignore existing laws so long as

they are in force, but in reality, and in truth, our religious personal laws do not contradict the view of the Israeli *general public*.

10. My conclusion is, therefore, that the marriage of the Petitioner to Mr. Schlesinger is null and void for both spouses, because the personal law of Mr. Schlesinger is Jewish law, which binds this Court under art. 47 of the Palestine Order-in-Council, as aforesaid.

11. This brings us to the second question of whether, despite the marriage's invalidity, the registration officer was required to register the Petitioner as married. The Petitioner's attorney argued that the registration officer only records what the registering party reports, and must not further enquire into the citizen's legal personal status.

I am willing to agree that if, for example, the registration officer believes that the citizen applying to him is married, he may register the citizen as such, and is not required to seek expert advice in order to root out any doubt he may have about the matter. But when he is convinced that the person is not married, he may not register anything that he believes to be a complete lie. Since the registration questionnaire inquires as to the *legal* family statues of the registering person, rather than the bare fact of whether that person had a marriage ceremony or not – as argued before us by the Petitioner's attorney – I wonder whether I can order the Respondents to register the Petitioner as married, after I have stated my opinion, in this very decision, that she is *not* married.

I therefore reject the second argument, as well, and recommend that we rescind the order nisi and deny the Petition.

12. This concludes my opinion, but I wish to direct a few words to the legislature, and draw its attention to the fact that the case before us is but a sad part of a much broader problem, which urgently requires a clear statutory arrangement. I testify before heaven and earth that I was but a hair's breadth from a converse ruling. For were only one detail of the many details in the present case different, I would have been obligated, as a judge of a civil court, to find in favor of the validity of this marriage.

I shall clarify. In the present case – which we shall call hereinafter the *Schlesinger* case – no evidence was presented as to the whether Belgian law adopts the cumulative or distributive approach to the spouses' personal law. We imputed the cumulative system to Belgian law on the basis of the "presumption of identity", after showing the position on this matter of the Common Law, and of Israeli law pursuant thereto. But there are various legal scholars who argue in favor of the distributive system. The opponents of the cumulative system point to its absurd outcome that the marriage is sometimes voided because of the wife's pre-marital domicile, whereas were the marriage not compromised, the saw would exalt itself against him who saws with it [Isaiah 10:15], and the marriage itself would void the domicile that voids it. This is because, as we know, the domicile of the married woman follows the domicile of the husband. However, if clear, explicit evidence demonstrated in the *Schlesinger* case that the Belgian legislature follows the distributive approach, then we would have been required to recognize the validity of the marriage in regard to *the Belgian subject*, and to order the Respondents to register her as married.

Or change a different detail, which also would have reversed the result of the judgment. English judges are divided on the question of what is this "law of domicile" that determines the validity of the marriage? Is it the law of the antenuptial domicile of each of the spouses, or is it the law of the domicile of both spouses following the marriage that prevails, or – in other words, and perhaps by a different intention – "the intended matrimonial domicile". This question should not be determined as a matter of course, as there are arguments and authority for both alternatives, although most of the case law seemingly tends toward the former.

In the *Schlesinger* case, we did not address this question at all, as it was not material. The State of Israel was both the antenuptial domicile of the husband, as well as the intended matrimonial domicile, as appears from the all the circumstances, and thus the marriage is *in any case* invalid.

But let us imagine a different "*Schlesinger* case", which is slightly different in terms of this detail. The man, a Jewish resident of Israel, travels to Cyprus for a short period of time, where he marries a non-Jewish woman in a civil ceremony, and returns with her to Israel in order to prepare papers and documents for the purpose of immigrating to England – a country that, as we have seen under the *Lepre* matter [21], does not prohibit marriage because of differences in the partners' faith, regardless of the position of the laws of state of domicile on the matter. Were this the case, we would have been required to first get into the thick of the aforementioned dispute in the case law. Then, were we to determine in favor of the intended matrimonial domicile – we would have to find that the marriage was valid under our civil law, both for the non-Jewish wife and for the Jewish husband.

Moreover, in our country, as we know, there is no general territorial law on matters of personal status (aside for some morsels such as the distribution of an estate and guardianship of children under the Woman's Equal Rights Law, 1951) and at times – as I have written elsewhere – the law is a "function" of the adjudicator.

For example: a Jewish man, resident of the United States, enters a civil marriage there with a divorced Jewish woman who married her previous husband in a Jewish ceremony and divorced him by a civil divorce. The spouses immigrate to Israel and enquire as to their personal status and whether they are married or single. Were the issue brought directly before the Rabbinical Court under sec. 1 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, the decision of the court would be that they are not married, as according to Jewish law, she would still be married to her previous husband, and a marriage to a married woman is invalid. On the other hand, should the woman apply to the District Court prior to the Rabbinical Court's decision, in a suit for maintenance from the man under sec. 4 of the above statue, the court would incidentally find (under sec. 35 of the Courts Law, 1957), that the plaintiff is lawfully married to her husband by virtue of the Common Law rules that establish the validity of the marriage under the law of the couple's domicile at the time of the solemnization of the marriage, and would order the defendant to pay maintenance. The question then

arises: what should the registration officer properly do when asked to register the above couple's personal status?

Another example: Jewish spouses, who reside permanently in France, marry there in a Jewish ceremony in accordance with Jewish religious law and then move to Israel. The Rabbinical Court would recognize the validity of the marriage retroactively from the day of its performance, as it is valid under the Jewish law (compare CA 158/37 *Nosse Chen v. Nosse Chen*) [13]. The civil court – were it not to accept the dissenting opinion of my honorable colleague Justice Agranat in the *Skornik* appeal, CA 191/51, IsrSC 8, 141 [3], 175-78 – would void that marriage (while considering it *incidentally*), relying on another ruled of English private international law which states that the form of the ceremony is considered, for better or for worse, according to the location where it is celebrated, and the laws of France – if my memory serves me right – do not recognize the validity of a religious marriage ceremony. This case is the *inverse* of the previous case: there the marriage is invalid in the eyes of the religious court and valid in the eyes of the civil court; here it is valid in the eyes of the religious court and invalid in the eyes of the civil court. Is this not a case of the law becoming a "function" of the judge?! And again the question arises, how must the registration officer proceed in registering the personal status of the above couple?

I, therefore, offer the following simple suggestion that would effectively remove the painful sting form the vast majority of difficult cases. When the marriage was solemnized *abroad*, the registration officer should be permitted and even obligated to add the words "in a civil ceremony" or "in a religious ceremony" after the word "married", as the case may be. This innovation requires an explicit statutory provision, *because as the law presently stands, the registration officer must register the legal family status of the person registering*, which presents him with a complex web of legal questions from which he may not always be able to extricate himself. Clearly, what is recorded in the certificate of identity will not obligate or bind the religious or the civil court if they later adjudicate – directly or incidentally – the issue of the marriage's validity. But it shall provide some small but important satisfaction to spouses whose marital status is in doubt,

and would spare them shame and considerable discomfort whenever they must present their certificate of identity. Let us not further strain the already tense relations between the religious and the "free" sectors of the population, nor pour oil on the fire that might erupt around this issue in Israeli society.

Therefore, I found it necessary to make the above comments, in hope that the Israeli legislature consider them when it addresses this painful question.

My opinion, as presented at the end of the previous paragraph, is that the order nisi should be rescinded and the petition denied.

Justice Sussman:

The Petitioner, a Christian subject of Belgium, married Mr. Israeli Schlesinger, a Jewish citizen of Israel, on December 21, 1961. The marriage was solemnized in a civil ceremony in Nicosia, Cyprus, and was evidenced by a copy of the marriage register confirmed by the Cypriot Minister of Interior. After marrying Mr. Schlesinger, the Petitioner went to the Belgian Consul General in Limassol, who registered her marriage in her Belgian passport. He further registered that due to her above marriage, her name was changed to Schlesinger, her husband's name. The Petitioner did not suffice with this registration. On July 26, 1962, she presented herself at the Belgian embassy and made a declaration that was registered in the Embassy's personal status register (*Registre matricule*). The registration details the Petitioner's personal details and attests to her marriage in Nicosia, in reliance on the marriage certificate issued to her by the district officer in Nicosia, and in reliance on the registration in her passport by the Belgian Consul, as noted.

2. On December 12, 1961, the Petitioner arrived in Israel as a tourist. She initially sought a permit for permanent residency, however her request was denied, and she was permitted to remain in Israel only until March 17, 1962. Two days after that, on March 19, 1962, she applied to the Tel Aviv registration office for a certificate of identity. To

this end, she submitted all the information required under the Registration of Inhabitants Ordinance, 1949. The outcome of the application was that the Petitioner was summoned to the said office for "clarification". The purpose of the "clarification" was to inform the Petitioner that she could not be issued a certificate of identity that would state that she was married, and accordingly, the name "Schlesinger" could not be entered. This notice was given to the Petitioner orally, and her request that she be given written notification went unanswered. An additional request for a certificate of identity, submitted by the Petitioner's attorney to the Ministry of Interior in Jerusalem on April 30, 1962, received no response. The Petitioner therefore brought her matter before this Court, which granted an order nisi instructing the Respondent – the Minister of Interior – to show cause why he maintains his refusal to recognize the Petitioner as a married woman whose name is Schlesinger, and why he maintains his refusal to issue her a certificate of identity as requested, as well as a permit for permanent residency.

Only in its response to the order nisi did the Respondent grant the Petitioner's request for a permanent residency permit, so that one issue has now become moot. Still, the Respondent maintains his refusal to register the Petitioner as a married woman, arguing that according to the laws of personal status that apply to the Petitioner and her husband, they are not a married couple. In this context, it should be noted that the Petitioner's husband was registered in the Register of Inhabitants as married, on the basis of that same marriage ceremony celebrated between him and her in Cyprus, but the Respondent's investigation into the Tel Aviv registration office revealed that this registration was made in error, and that the officer who registered the husband's marriage was not familiar with the web of contradictory instructions given over the years by his superiors.

3. It would not be superfluous to emphasize already at this stage – at the outset of our remarks – that we are not concerned here with the validity or voidance of the marriage. The issue before us is the question that arises from the what was stated in the order nisi, that is: whether there is justification for the refusal of the registration officer to

register the Petitioner as a married woman who, as a result of her marriage, bears the name of her husband.

4. In order to respond to the above question, we shall turn to the Registration of Inhabitants Ordinance, 1949. According to sec. 2 of the above Ordinance, a Register of Inhabitants was established in the territory of the state, and the roles of the registration offices are defined in sec. 3 of the Ordinance. These duties are:

(a) To keep a Register of Inhabitants containing the particulars of registration enumerated in section 4;

(b) To issue, renew and enter changes in certificates of identity;

…

As an "inhabitant", according to its meaning in sec. 1 of the above Ordinance, the Petitioner must, under sec. 5(a), provide the registration office with the details listed in sec. 4 of the Ordinance. These details include, inter alia, her name (sec. 4(a)), and her family status (sec. 4(d)), and there is no doubt that she is required to provide correct details, as providing incorrect details is punishable under sec. 12(a)(2) of the Ordinance. These are the details which the registration officer must register, and issue the inhabitant a certificate of identity according to them, as stated in sec. 7 of the Ordinance.

5. In the course of the hearing, my honorable colleague Justice Berenson raised the question: what is the registration officer to do when a person comes before him and provides, for the purpose of registration, details that are not acceptable to the registration officer, such as when a person wishes to register his son as five years old, and the registration officer sees the boy and believes that he may be twenty years old?

Section 6 of the Ordinance speaks of the "procedure of notification", and instructs that anyone providing details of registration must, at the request of the registration officer, "produce any relevant document" as well as "affirm, either orally or in writing, the correctness of the particulars furnished or produced by him".

The learned State Attorney, who argued on behalf of the Respondent, did not touch on this question, except for a single incidental comment. He said that a public officer is not under a duty to enter incorrect information in a register that he maintains, and in any event, this Court will not order him to do so, as we held in HCJ 237/61 [4]. I accept this argument, but it concerns an incorrect registration that is manifest and not subject to reasonable doubt. I do not question that a public officer must not exercise his authority in order to be a party to an act of deception. When a person who is undoubtedly an adult presents himself and wishes to register as a five year old child, what doubt is there here that the registration is false and this person's act is fraudulent? In such a case, the registration officer is correct to refuse to register the details, and this Court certainly will not exercise its power, under sec. 7 of the Courts Law, 5717-1957, to require the registration officer to "falsify" the Register of Inhabitants.

But consider a different case, in which the officer indeed has suspicions as to the age of a person, but the matter is uncertain. Recently, a matter came before this Court concerning a person of Yemenite origin who, according to his certificate of identity, was already 18 years old, and thus, in accordance with his registered age, he was subject to military conscription. He reported for a medical examination in accordance with the Defence Service Law, 5719-1959, and the medical committee that examined him found that he was only 14 or 15 years old. The boy's father, too, supported the finding of the medical committee, but nevertheless did not object to his son be conscripted immediately, apparently in the belief that it would be best that when the son is 18, he would already be exempt from the obligation for regular service and could assist him in his work or business. In light of the finding of the medical committee, the calling-up officer petitioned the District Court, in accordance with sec. 4 in the Appendix to the said law, for a declaration as to the age of the person reporting for military service. The District Court collected testimony and declared the registration in the certificate of identity was correct and the boy was 18 years old. The calling-up officer appealed to this Court, and we held that the registration was incorrect and that the boy was still 14 years old (CA 85/62 [5]).

6. The same question that worried the calling-up officer may arise before the registration officer when registering a resident under the above Ordinance. When that same person I discussed in sec.. 5 above presents himself and asks to register his son as 15, and the officer believes, according to what he sees, that the boy is already 17 years old, what is he to do? Needless to say, such cases are possible, whether because of a false registration was made in order to allow a person to avoid military service, or for any other purpose. When the registration officer wishes to determine the age of a person when the issue may cut both ways, the question arises: who authorized you? The matter in dispute may be difficult and complex, as the difference of opinions between the two courts in the above matter demonstrates. Have registration officers been granted judicial authorities? Has the Ordinance authorized them to decide upon matters of registration? It is clear beyond doubt that the task of the registration officer, under the above Ordinance, is but that of a collector of statistical information for the purposes of keeping the Register of Inhabitants, and he holds no judicial authority. What, then, is a registration officer to do in such a case? Should the registration officer register despite doubts as to the correctness of the registration – whether in terms of age or in terms of a different matter, such as one's family status – or should he refrain?

It would appear that the registration officer was given "instructions" in this regard by the Ministry of Interior, but those instructions were changed from time to time. The instructions that were in effect until March 1958, were replaced at that time by other instructions given by the Deputy Director General for Immigration and Population in the Ministry of Interior, with the approval of the Minister of Interior (exhibit M2). These instructions also include provisions in regard to the registration of family status. On January 1, 1960, things changed again, and the Minister of Interior personally ordered the cancellation of previous instructions for registering mixed marriages. On May 2, 1962, the above Deputy Director General in the Ministry of Interior ordered, pursuant to this order of the Minister of Interior to the district commissioners, that "since the registration of mixed marriages…requires examination on a case by case basis", registration officers must accept the notifications of requesting parties, but they must refrain from registering

this in their certificate of identity and personal documentation and "transfer the personal file of the couple to the department for determination."

7. The determination of the department in regard to the Petitioner's marriage was made on March 15, 1962, and it was passed on to the Immigration and Inhabitants Registration Office in Tel Aviv, as follows:

> (2)… It should be clear that the civil marriage performed between him and Miss Funk is not valid for him. The personal law that applies to him is the Rabbinical Courts Jurisdiction Law, and this statute does not permit mixed marriages.
>
> (3) Since the marriage is not valid, Miss Funk must not be considered his wife and she must not be registered as married. The parties – should they wish to do so – may apply to the District Court for a determination on the matter by way of a motion for granting an order. The background for the decision should be explained to Dr. Schlesinger.

This determination of the Registration of Inhabitants Department in the Ministry of Interior is flawed in at least two ways. First, I wonder what source the Respondent or his subordinates found specifically in the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953,[2] – it and none other – that "does not permit mixed marriages." Section 2 of the above Law states:

> Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.

The law addresses the marriage of Jews, and only a marriage conducted in Israel. The Petitioner is not Jewish, and her marriage was conducted outside of Israel. Second, if

[2] 7 L.S.I. 139.

a judicial decision is required, why should the Petitioner specifically turn to the District Court? Could she not submit the matter for decision by a competent religious court?

I think it appropriate to note, at this point, that the authority of the Minister of Interior to instruct the registration officers as to when to perform a registration and when not to was not disputed before us. There is no mention of such authority in the above Ordinance itself, and the Respondent did not argue that he relied upon regulations he made by virtue of sec. 10 of the Ordinance. However, in light of the position taken by the Petitioner's attorney, I will assume that the Respondent was empowered to issue such "instructions".

What was said in the instructions?

Exhibit M2 – that is, the instructions given by the Respondent on March 10, 1958, in accordance with the opinion of the Attorney General – states, inter alia, as follows:

> 1. **Defining the Role of the Registration Officer**:
>
> The registration officer is solely an administrative authority and he must, therefore, register the personal details of a person required to provide them for registration according to the above statutes, both for himself and for his minor children.
>
> The registration officer is not the judicial authority that determines the personal status of the person, and it is not for him to determine legal or religious questions.
>
> If every determination of a legal question is beyond the scope of the role and competence of the authority tasked with implementing the laws – then that is certainly so for a determination of a religious nature. Whether one converted according to Jewish law, or married a wife according to Jewish law, or whether one was divorced by her husband according to Jewish law, or whether one may be considered Jewish under

Jewish law – these are all religious questions, and their determination is within the purview of the religious authorities.

The considerations of the registration officer are solely administrative, and he is not charged with the implementation of religious law.

The civil administrative authorities are not ordered, are not able, and thus *are not even permitted* to carry out religious law or determine what is permitted or forbidden under religious law.

2. **What is the Registration Officer to Register?**

The registration officer only registers what the citizen who is required to register tells him to register.

3. **The Duty of Investigation and Examination of the Registration Officer**

The registration officer must not be charged with a duty to investigate and inquire that he cannot and should not meet before registering the details provided to him by the resident who must register.

It is true that the registration officer must exercise caution in fulfilling his duties. But "it (that is, this caution) is not but that same caution required of any public servant when fulfilling his *administrative* role.

4. **The Duty of Warning by the Registration Officer**

The Registration officer shall warn the person required to register that he registers only what he is told, and that the registration does not serve as legal evidence of the truthfulness of the registered details, but only evidence of meeting the obligation to register. It must be explained to the declaring person that any

court or tribunal, and even any administrative authority, may reject the details as a finding, and even disregard them.

In particular, he must be warned that, according to the standing rules of the Chief Rabbinate and the Ministry of Religion of 1950, rabbis who serve as registrars of marriages are obligated not to rely only on the information registered in the certificate of identity, but to investigate themselves those who come before them to marry, or to demand that they submit a certificate that they are unmarried from an authorized rabbi or religious court. In practice, rabbis follow these instructions all the time.

5. The Registration Officer's Duty to Register the Details

After the registration officer has given the above warning, he must register the details provided to him:

a. If he sees no *prima facie* reason to doubt the details provided to him.

b. If, after any doubt arose as to a particular detail, he requested evidence and the details were *prima facie* proven to him.

The registration officer must always bear in mind that he is not a judge and that he is not an arbiter, *but that he is solely a registration officer*, and he registers only what the citizen required to register tells him to register. The law authorizes the registration officer to refuse to register what seems to him as false or misleading. For this purpose, he is granted the authority to demand from the person required to register documents and other evidence to prove what he claims ought to be registered. But when the registration officer sees no *prima facie* reason to doubt the details provided to him by the person required to register, or – after such doubt has arisen and he has demanded such evidence – should he

be satisfied that these details were *prima facie* proven to him, then the registration officer must register them. The fact that the certificate he issues as to the registration will be deemed valid, and that it may serve to prove its content, is of no consequence to him at all.

6. **The Citizen's Declaration – Presumption of Truth**

The registration officer must presume the citizen's declaration to be true, and particularly if he has warned the citizen. The registration officer may not raise unsubstantiated suspicions. Doubt must be based on a reasonable foundation.

This is a rule: the registration officer is required to respect the citizen, *but he is not required to suspect him*.

7. **What is a Reasonable Foundation for Suspicion?**

A reasonable foundation may be based upon the conduct of the declaring citizen, inconsistencies in his declarations, apparent flaws in his documents, knowledge the officer has in regard to the citizen or the documents – and so forth.

8. **Anyone Seeking Amendment bears the Burden of Proof**

When a person seeks to amend the registration – he must prove that there is indeed a mistake that requires correction and should be corrected. Here, the registration officer is not generally permitted to forego the evidence.

9. **An Official Document Presumed to be Valid**

In the absence of special reasons (see below) to rebut the presumption of validity, the registration officer must not second

guess an official document, but must act to register in accordance with it.

What constitutes an official document –

Any document created by a public servant (government, legal or administrative, civil or religious, in Israel or abroad) in the course of his duties, and in this regard, anything recorded in the Register of Inhabitants and the certificate of identity itself, is presumed true.

Therefore, the authorities competent to execute the laws may and must presume the validity of any official document, whether from Israel or from abroad, that is presented to them as proof of a certain fact, and it is immaterial whether the document is a birth certificate or a passport or a marriage certificate or a divorce decree or a death certificate or probate order. Such documents prove *prima facie* not only the underlying fact for which they were issued (such as a marriage certificate or a divorce decree), but also all the other details written in them. The agency issuing the document is presumed not to have issued a document in which it recorded something that is incorrect.

10. **Rebutting the above Presumption**

However, this presumption is rebuttable. It is only *prima facie* evidence. For example, should the registration officer sense a forgery of a document (uncertified additions or amendments or redactions), the officer may demand additional evidence.

11. **The Value of Decisions by the Registration Officer**

The decisions of the registration officer are valid and binding only for the purpose of implementing the Registration of Inhabitants Ordinance (or one of the other above statutes). They

have no binding legal force for the implementation of other statutes.

Even in those cases where the registration officer demanded evidence to prove a certain detail, the satisfaction of the registration officer does not bar a court or any other administrative authority from rejecting that very same evidence and to not be persuaded thereby.

……

16. **The Marriage of Spouses, One of whom is not Jewish, before a Consul**

A consul has no authority to perform a civil marriage ceremony for a couple where *both* partners are Jewish, but the said consul retains authority to perform a civil marriage ceremony for a couple when one partner is not Jewish, provided that the consul is so authorized by the laws of his state to perform the marriage ceremony.

Any certificate issued by a foreign consul in Israel in regard to any person who is a citizen of the country that the consul represents, and which concerns the personal status of that person (such as marriage, birth and so forth, but not divorce), must be accepted as a basis for registering that detail that the certificate addresses.

9. I agree with what is been presented above from exhibit M2, which also includes the answer to the question how the registration officer is to proceed when he harbors doubt as to the accuracy of the details that the declaring citizen provided to him. Section 3 of the above regulations aptly states that the registration officer must act with caution, and I have already called attention to sec. 6 of the Ordinance, which establishes that he may investigate and inquire. But once the officer is presented with *prima facie* evidence,

he must suffice with it, because being an administrative authority, he would exceed his authority should he seek to determine a legal dispute. And should he not seek to be an arbiter, then he must register the details as presented by the requesting citizen, even if he is not persuaded of their accuracy. Should a citizen seeking registration, as in the example in sec. 6 above, insist that his son is 15 years old, the registration officer shall register him as declared by the requesting citizen.

As said in the instructions above, a citizen coming before an administrative authority is presumed to speak the truth, and the registration officer must not forget that should he seek to exercise judicial authority and make a determination in a matter that he believes requires determination, he has not been granted the tools to do so. And since the above Ordinance requires the citizen to submit details for registration, and requires that the officer register them and issue a certificate of identity, the matter cannot end in a draw. There is no choice but to say that the registration officer must register what the citizen tells him.

The above Ordinance did not attribute to the registration in the Register of Inhabitants the force of evidence or proof of anything. The purpose of the Ordinance is, as was said in HCJ 145/51 [6], to collect statistical information. This material may be correct or incorrect, and no one guarantees its accuracy. In order to establish one's age for the purposes of conscription into the military, the registration in the Register of Inhabitants serves as prima facie evidence, not by force of the above Ordinance, but by force of the Appendix to the Defence Service Law, 5719-1959. A certificate of identity is issued to a resident, according to sec. 7 of the Ordinance, as a "means of identifying." But no one is obligated to act according to it, and no one is obligated to identify the holder of a certificate of identity by means of that document. Holding a certificate of identity grants its holder no right whatsoever (HCJ 155/53 [7]).

Just as registering an age in the certificate of identity does not serve as proof of age except to the extent established by a statute, the same holds true for the registration of family status, inasmuch as which law – like the Defence Service Law, 5719-1959, for the

purposes of proving an age – permits a person to use his certificate of identity to prove whether or not he is married? Section 4 of the M2 directives says that according to the standing rules of the Chief Rabbinate and the Ministry of Religion, a marriage registrar does not rely on the registration for purposes of fulfilling his duties, and may act accordingly. Who, then, must rely on the registration?

10. Consider the case of some Jewish man who married some Catholic woman in a civil service in some country, and who presents a marriage certificate to the registration officer. A civil court would establish the sufficiency of the ceremony under the law of the country of solemnization. However, that would not be the case in a religious court, which would not recognize a civil ceremony. How must the registration officer form his opinion, according to the district court or according to the religious court? I dare say that for the purposes of the validity of such a mixed marriage, no one in Israel can predict in advance whether or not it is valid.

Let us even assume that the man is an Israeli citizen, and the woman (like the Petitioner) is not. The District Court is not authorized to invalidate this marriage, in light of the restriction in art. 64 of the Palestine Order-in-Council, while MApp20/43 [14] held that this restriction denies the court the authority to declare this marriage void *ab initio* by reason of the spouses being ineligible to marry each other. But not only can the matter come before the District Court in a different action that would require it to rule on the question of the marriage's validity, but there are two religious courts in the country that, while not competent to invalidate the marriage, can declare its existence and validity. Their authority would be contingent upon the consent of the parties to be judged by a religious court, and the President of the Supreme Court would then exercise his authority under art. 55 of the Palestine Order-in-Council to determine which court would be authorized to hear the matter. In light of art. 65 of the Palestine Order-in-Council, there is no bar to a foreign citizen consenting to the jurisdiction of a religious court (MApp 39/57 [1]. In this case, the validity of the marriage will depend upon how the President of the Supreme Court exercises his discretion, because once the authority of the religious court has been established, so has the substantive law that applies to the matter, as the law

follows the judge (CA 238/53 IsrSC 8, 4, 36 [8]). Were the President of the Supreme Court to authorize the Rabbinical Court to rule on the matter, it would invalidate the marriage, since Jewish religious law does not recognize civil marriage, and certainly not a mixed marriage between a Jewish man and a Christian woman. But the President of the Supreme Court might authorize the Catholic Court to adjudicate the matter, and were he to do so, the validity of the marriage would be determined according to the Catholic religious law. And what would the Catholic Court rule? The law of the Catholic Church is established by the CODEX JURIS CANONICI of 1917. According to sec. 1014 and sec. 1070(2) of the above Codex, the Catholic Church, like a civil court, also follows the rule of *semper praesumitur pro matrimonio* (see *Spivack v. Spivack* (1930), 142 L.T. 492 [23]; and CA 191/51, IsrSC 8, 141, 149 [3]), and presumes every marriage to be valid as long and the opposite has been demonstrated. It is true that the law of the Catholic Church also requires, though not with the same severity of Jewish law, solemnizing a marriage in a religious ceremony. Additionally, according to sec. 1070 of the above Codex, the Church bars a mixed marriage between Catholic and Jewish partners, by reason of *disparitas cultus*, but this is not an absolute prohibition. According to sec. 1070 of the above Codex, it is possible to secure a dispensation from the prohibition on mixed marriages, and the questions and answers collected in the CANON LAW DIGEST, vol. 3, p. 420*ff.* reveal that such dispensation is not such a rare occurrence. Moreover, even were the mixed marriage solemnized without obtaining a dispensation, the marriage would not inherently be void, but only flawed for violating the prohibition of *disparatis cutus*, and the priest is authorized to cure the flaw and "heal it in the root" (*sanatio in radice*) by retrospectively forgiving the sinner, according to secs 1138 to 1141 of the above Codex. And once he has done so, the marriage is given validity in retrospect, see EICHMANN-MORSDORFF, LEHRBUCH DES KIRCHENRECTS, 5th ed., sec. 161 (2) (b) at p. 286. And as for form, even the duty to hold a religious ceremony does not originate from the scriptures, but is "rabbinic",[3] because before the decrees of the Council of Trent in the 16th century, the Catholic Church, too, recognized not only the validity of a marriage ceremony be expressing consent to marry *per verba de praesenti* without religious

[3] Ed: Justice Sussman employs the terminological distinction in Jewish law between "scriptural" and "rabbinic" law.

format, but also the sanctity of a marriage conducted in this manner (*sacramentum*), see *Dalrymple v Dalrymple* (1811), 161 E.R. 665, 669 [24].

But even now, although the Church establishes the principle of a religious ceremony for solemnizing a marriage, it does not completely rule out a marriage for not meeting the religious requirements. Once the flaw is made known to a religious authority, it has the primary responsibility not to bring about the invalidation of the marriage, but rather, to the extent possible, to seek its validation, see EICHMANN-MORSDORFF, *ibid*., sec. 159, at p. 281. And even this flaw may be corrected in retrospect by means of "healing in the root", *ibid*., sec. 161, p. 287.

11. Let us now slightly change the facts of the above example, and assume that the woman was a Protestant at the time that she married the man, but that she converted after her marriage and joined the Catholic Church. We can disregard the provision of sec. 4(2) of the Religious Community (Conversion) Ordinance, whether by assuming that the woman converted prior to arriving in Israel, or whether due to the fact that the Protestant church does not seek its own jurisdiction, but leaves jurisdiction to the state and has not established its own courts. For the purpose of jurisdiction, the situation at the time of initiating the action is determinative, and thus the President of the Supreme Court may authorize the Catholic Court to adjudicate the matter of this couple as well. Because of its "catholicism", that is, its universality, the Catholic Church accepts into its fold anyone baptized into Christianity (sec. 87 of the CODEX), but it is lenient with a Christian who is not a Catholic, and exempts him, under sec. 1099(2) of the CODEX, from the obligation to solemnize a marriage ceremony in accordance with its law, and suffices with the civil ceremony that was held, see EICHMANN-MORSDORFF, *ibid*.,, sec. 132, p. 146. But not only is the religious form not required, but such a mixed marriage is not at all flawed, and there is no need for forgiveness or sanation by way of "healing in the root". Preventing the marriage, for reasons of *disparitas cultus*, according to sec. 1070 above, was established only for a case where one of the spouses was a Catholic. If he was not, but was a Christian of another faith and married a Jew, the marriage would be completely valid, *ibid*., sec. 141, at p. 186.

12. I have expanded on the different possibilities for addressing mixed marriages as valid or invalid in order to show that the question of their validity or their invalidity is extremely weighty, and once a couple approaches the registration officer in order to be registered according to the Registration of Inhabitants Ordinance, 5709-1949, it is impossible to know how the matter would be decided. The registration officer cannot anticipate which court would decide the matter, or how the President of the Supreme Court may exercise his authority under art. 55 of the Palestine Order-in-Council, and he cannot predict whether the marriage's validity would be recognized or not.

Furthermore, my honorable colleague Justice Silberg conducted in-depth research into the validity of the marriage, and reached the conclusion that it is invalid. However, in sec. 12 of his opinion, he testifies before heaven and earth that only a but a hair's breadth stood between him and a converse ruling. When this is the declaration of a Supreme Court justice, is it conceivable that an administrative clerk, such as the registration officer, would even consider such a problem? Were you to say yes, then the conclusion must be that only one who is an expert in the rules of conflicts of law – which are among the most complex of jurisprudence – may be appointed as a registration officer under the above Ordinance. Had the legislature intended this, I wonder why it honored the holder of such duties merely with the modest title of "registration officer".[4]

I tend to the opinion that when registering the family status of a resident, it is not the duty of the registration officer to consider the validity of the marriage. The legislature is presumed not to have charged a public agency with a duty it is not capable of fulfilling. It suffices that, for the purposes of fulfilling his duties and registering the family status, the registration officer was presented with evidence that the citizen held a marriage ceremony. The question of the validity of that ceremony may, at times, cut both ways, and determining its validity exceeds the scope of the Inhabitants Registry.

[4] Ed: Note that the original Hebrew term *pakid*, translated in the authorized L.S.I. translation as "officer", is more commonly translated as "clerk".

We should explain that the marriage register maintained by the Rabbinate only testifies that a Jewish marriage ceremony was held between a man and a woman. The document testifies to the conducting of the ceremony (compare *In re Peete* (1952) [25]). It is possible that a properly performed ceremony was void *ab initio*, and possible that it was valid. The registration demonstrates neither one nor the other. The presumption of the legitimacy of the marriage, which I discussed in a different context, that is, the presumption of the validity of the marriage, results from the conducting of the ceremony rather than from the registration that the ceremony was conducted, or from a document attesting that fact, and it is rebuttable. If this is the case for the marriage register maintained by the Rabbinate, it is all the more so the case for the Register of Inhabitants of the Inhabitants Registry. And there is no need to say that if the duty of the registration officer for purposes of registering the family status is limited to checking whether a marriage ceremony was held, there should be no concern whatsoever that the Register of Inhabitants may comprise inaccurate information and attest to a valid marriage where it was void *ab initio* due to a substantive defect or flaw. As we see, the definition of the purpose of the Register of Inhabitants, and preserving the boundaries of the role of the registration officer are sufficient to prevent mishaps. The result is that under no circumstances must the requesting resident supply the registration officer with more than *prima facie* evidence. The Petitioner presented the registration office with the marriage certificate. She secured the confirmation of the Belgian Embassy, which registered her marriage in the embassy's personal status record, as well as in her passport. What more could she have done in order to satisfy the burden of proof? As long as the marriage has not been found void in a judicial process, the Petitioner must be considered a married woman for the purpose of the Register of Inhabitants.

I shall here allow myself the liberty to say that not only is there no statutory source for investigating and inquiring to uncover a flaw in the marriage, but it is also improper form an administrative perspective that a citizen coming to provide details for statistical purposes, and whose only sin is that his marriage is invalid, must stand before a suspicious officer who will delve into the depths of his past. There are marriages that are voidable and yet the spouses live together in peace until the end of their days. What

interest does the administration have in raising problems as to its validity? Needless to say, the instructions from May 2, 1962, which instruct the registration officer to pass the matter of mixed marriages on to the "determination of the department", are unfounded inasmuch as the department has nothing to determine.

13. The conclusion I have reached absolves me from the need to address the question whether the marriage was indeed invalid on the grounds of the spouses' ineligibility to marry one another, and I will only make as few comments on this issue:

(a) The State Attorney did not argue before us that the marriage was invalid because it was performed in a civil ceremony. There was no place for this argument since this Court has already ruled that we follow the law of the place of the ceremony in regard to the form of the marriage (CA 191/51[3]), and in the absence of evidence to the contrary, a ceremony conducted in a foreign country is presumed to have been conducted lawfully.

(b) Were the question of the marriage's validity to be raised because of questions as to incapacity to marry, it would first be necessary to decide upon the proper law in the matter. For such purposes we cannot make recourse to the provision of art. 64(ii) of the Palestine Order-in-Council, which refers us to the "the law of the nationality of the foreigner concerned", because the parties have no single national law. The law that would apply in such a case would be determined by the rules of conflicts of laws.

(c) The State Attorney argued for the English rule that follows the parties' domicile for purposes of their capacity to marry, but honestly noted that American law establishes one law for the form and the substantive validity of the act, and the law of the location where the marriage was solemnized applies for both of them, see RESTATEMENT, CONFLICT OF LAWS, sec. 121; *Loughran v. Loughran* (1934) [33[; *Hastings v. Douglas* [34].

(d) Not only is the American rule easier to apply and more practical, because it prevents the need to split the discussion when the spouses did not have a single domicile (a split that might lead us to the strange outcome, as my honorable colleague Justice Silberg noted, where the husband would be married to his wife, whereas she would not married be to him), but the American rule is actually the English Common Law rule, which remained in its original form in the United States, whereas it transformed in England itself. Indeed, it is the rule that was followed by the Ecclesiastical Courts that held jurisdiction over matters of marriage until the enactment of the Matrimonial Causes Act, 1857. In England itself, different rules applied as to the form and in regard the capacity of the parties, see: *Dalrymple v. Dalrymple* (1811), 161 E.R. 665 [24]; *Middleton v. Janverin* (1802) [26]; *Simonin v. Mallac* (1860) [27].

(e) The change in the English rule can already be discerned, in effect, in the decision of the Court of Appeal on the matter of *Sottomayer v. De Barros* (1879) 41 L.T. 281, 282 [20], where Justice Cotton said as follows:

> The law of a country where a marriage was solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted, but as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil.

(f) This rule was, as Professor Beale put it in his article *The Law of Capacity in International Marriages*, 15 H.L.R. 382, 286 – "an ignorant error."

I have cited these words in the name of their author, but in defense of Justice Cotton, it can be said that hints in support of his view are found in the opinions of Lord Campbell and Lord Cranworth in the matter of *Brook v. Brook* (1981) 4 L.T. 93 [16]. However, the remaining justices in the matter of *Brook* joined the conclusion of their colleagues for other reasons (see p. 99, 101, [16] *ibid*.). For more on the *Sottomayer* rule, see *Sottomayer v. De Barros* (No. 2.) 1879, 41 L.T. 283, 285 [20]; *Ogden v. Ogden* (1907) [17]; *Hay v. Northcote* (1900) [28]. In all three, the courts refrained from ruling

according to Justice Cotton, though they employed more temperate language than Professor Beale.

(g) The said change in the rule is inconsistent with the provision of sec. 22 of the Matrimonial Causes Act, 1857, which has since been replaced by sec. 32 of the Supreme Court of Judicature Act, 1925, because according to it, the court was required to continue to decide upon matters of marriage as the Ecclesiastical Courts would have ruled when they still held jurisdiction. And as was already made clear, the Ecclesiastical Courts decided marriages under one law for the form and for the capacity of the parties.

(h) When the Israeli Court sets out to determine the Israeli rule, we are not required to adopt the English rule specifically. And for my part, I do not see myself as obligated to correct the English rule which – even if the result of a mistake – is now accepted in England, though it has yet to be tested in the House of Lords. If the English rule suits our needs, we can accept it as the rule in Israel. However, it is possible that the American rule is more suitable. The English judges who considered the issue relevant to our matter cited the words of American commentators and judges at length, see *Brook v. Brook* (1861) [16], and *Ogden v. Ogden* (1907) [17], and many others as well. If English courts do so, why would we not do the same, and draw inspiration also from common law sources outside of England?

(i) It would not be superfluous to note that the incapacity of a Jewish man to marry a Christian woman, even if it is a lack of capacity, is not an actual "status". Schlesinger's status is that of an adult man, and he is competent for any legal act, including marriage. Only the religious law that applies to him invalidates his action if he marries a Christian woman, and such marriage would be a nullity. In this regard, Professor Martin Wolff states in his book PRIVATE INTERNATIONAL LAW, 2nd ed., sec. 259, at p. 278:

> To be married is a status; to be married to Mr. X is not.

He terms such inability to marry a particular woman "relative incapacity". In the meantime, the idea of the uniformity of one's status for all purposes has been done away with in England. It was already decided in the matter of *Baindail v. Baindail* (1946) [29] that a person may be married for the purposes of barring a second marriage, and at the same time may not be married for the purposes of granting a divorce decree. Such relative incapacity was addressed by the court in the matter of *Chetti v. Chetti* (1909) [30], from which it arises that there are times when the law does not consider it. Should the Petitioner, for example, seek maintenance from her husband in the District Court, I am not at all certain that such relative incapacity would lead the court to absolve the husband from the obligation to support his wife.

(j) When a man lacks legal capacity in his domicile, he will also be barred from performing any legal act in any other location, according to the statement of Justice Cotton in *Sottomayer*, which is not limited to capacity for marriage. As a result, if a 23 year-old person, who has yet to reach the age of majority in his domicile, were to arrive in Israel and make some transaction, the transaction would be invalid. However, in that regard, sec. 77 of the Capacity and Guardianship Law, 5722-1962, provides that while the validity of such a transaction would indeed be subject to the law of the minor's domicile, a person in Israel who was unaware of the minor's incapacity may be entitled to the defense under sec. 77(1), and the transaction may remain in effect despite the person's minority.

From the above law's provision we learn that the Israeli legislature intends to follow the law of the domicile, but subject to exceptions, rather than in every case.

14. In the matter of *Brook v. Brook* (1861) [16], and in the matter of *Mette v. Mette* (1859) [15], the marriage of a widower who married the sister of his late wife abroad was ruled invalid. Such a marriage was then prohibited in England under an explicit statute that purported to reflect Divine law, deeming the marriage as incestuous in violation of Leviticus 18 (as was mistakenly interpreted by way of expansion in the Christian tradition).

There was no general incapacity to marry here, as was already clarified in sec. 13(h) above, but in light of the English statute, the marriage was in violation of English moral sensibility, and recognizing it was in violation of public order. The fact that in the matter of *Brook*, the court relied upon the opinion of Judge Creswell in that same matter in the trial court proves this (*Brook v. Brook* (1858) 65 E.R. 747 [31]). In addressing the question of the capacity to marry, the same judge said in the matter of *Simonin v. Mallac*, (1860) 2 L.T. 327, 330 [27] as follows:

> It is very remarkable that neither in the writings of jurists nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestions offered to establish the proposition that the tribunals of the country where a marriage has been solemnized in conformity with the laws of that country should hold it void because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed.

Every legal system refuses to recognize the validity of a legal act if it may harm the public order in that country, and even the United States, despite its liberal attitude to the validity of a marriage, is no exception to this rule. In sec. 132(b), the RESTATEMENT denies the validity of a marriage that was valid in the location where the marriage was solemnized, in this case:

> … incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil.

This is none other than the English rule that derives from the judgments in *Brook* [16], *Mette* [15], and others.

15. Does Israeli public order demand the denial of the validity of mixed marriages? This is a question that the courts may be be required to consider when the time comes,

but I would argue that we not jump to a hasty conclusion as a result of the English *Brook* [16] precedent. There are several rationales for this.

Any country that wishes to live among the family of nations must, to that end, forgo the implementation of some of its legal rules when a foreign element arises and intervenes in a legal act. For example, we do not believe that a surety must be found invalid because it was given orally, and the prevailing law regarding Jews in Israel does not require the determination of a court in order to dissolve a marriage, but rather the granting of a *get* [a Jewish bill of divorce – ed.] and its acceptance suffice. In other countries the law is different, but this difference does not infringe public order in Israel, and just as we ask other nations to recognize Israeli law, we do not invalidate a transaction that is subject to foreign law that is different from our law. When the rules of conflict of laws refer us to foreign law, Israeli law yields. But there are cases – exceptional cases – where giving effect to a foreign law and to its outcome would significantly infringe the public order by which we live, and only when a foreign law stands in contrast to the sensibilities of justice and morality of the Israeli public would we be required to invalidate it. This is the well-known distinction of the learned Savigny in SYSTEM DES ROEMISCHEN RECHTS, vol. 8, p. 35, that led to the distinction between *ordre public interne* that yields before the rules of conflict of laws, and *ordre public externe* (international,) which yields to nothing.

The fact that Jewish religious Jewish invalidates mixed marriage does not necessarily compel the conclusion that when we come to consider a person's matter according to foreign law, we will invalidate the marriage because it is a mixed marriage. The marriage would be found invalid if its invalidation is required for reasons of external (international) public order, as we explained above, that is, when an Israeli judge, giving expression to the sentiments of the Israeli public, would be compelled to say that the validity of such a marriage does not comport with our way of life, wherever the ceremony was solemnized. When in doubt – the validity of the act must benefit from such doubt.

The invalidity of the marriage according to religious law would be a very weighty consideration, but it must not be the sole consideration. The Israeli public is currently divided into two camps. One camp, which observes the religious precepts – or most of them – stands opposed to a different camp which stresses the difference between a state under the rule of law and a state under Jewish religious law. The views of the two camps are in direct opposition to one another. Public order in Israel does not mean that the judge would compel the view of one camp upon the other. Life requires an attitude of tolerance for the other, and consideration for his different views, and thus the judge must be guided by balancing *all* of society's prevailing views.

In the matter of *Brook* [16], the court emphasized (*ibid*., p. 98) that the unlawfulness of an incestuous marriage does not stem from God's law but from what Parliament has explicitly pronounced, mistakenly or not, as God's law. A similar question recently stood before the English court. Another man, a Jew, married his brother's daughter. Such a marriage is still prohibited in England, on the grounds of consanguinity, according to the Marriage Act, 1949. And it was proven to the court that this is not the Christian approach alone, but that a similar approach has been adopted by Islam and in India. But the marriage was lawful in Egypt, where the spouses were married, and the prohibition against such marriage within England – so held the court – does not necessarily establish the demands of public order for purposes of addressing a ceremony conducted outside of it (*Cheni v. Cheni* (1963) [32]).

16. Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, is the law of the land, but it only provides for the marriage of Jews in Israel. This is the internal public order, that is the public order that prevails within the country. But what is the public order when the marriage was not solemnized in the country?

Since this Court held, in CA 191/51 [3], in regard to the form of the ceremony, that the law of the location where the ceremony was performed is determinative, there are hundreds – perhaps thousands – of couples in Israel who did not enter into a Jewish marriage but rather married in a civil ceremony. The state recognizes this, but the religion

does not. I fear that from the perspective of an observant Jew, this is an offense that is no less serious than that of a mixed marriage. Recognizing the validity of such a marriage is inconsistent with his world view and is an egregious offense to his sensibilities. But this is a compromise required from such a Jew in exchange for the compromise required from the other camp for the sake of a common life as one nation. The stream of immigration continues to bring to Israel couples from all the countries of the world, among them some who did not marry in accordance with Jewish law in their countries of origin. Should the public order of such a country of immigrants interfere with the welfare of such families and declare all of these cases as simply concubinage? This is a weighty question that requires consideration, but the answer is not required for the matter before us.

I will only say this: neither English law nor American law invalidates a marriage on the grounds that the couple went abroad to solemnize a marriage that they could not celebrate in their own country. See *Simonin v. Mallac* (1860) *ibid*., [27], *McDonald v. McDonald* (1936) [35].

In the present case, it is clear that the Petitioner's husband traveled to Cyprus and married her there because he could not marry her here, but we do not invalidate a marriage for that reason alone.

In conclusion:

1. For the purpose of registering the family status of the Petitioner in the Register of Inhabitants, the marriage ceremony that was performed is determinative, and investigation into the validity of the marriage is not the concern of the registration officer.
2. Prima facie evidence of the ceremony is sufficient in order to require the registration officer to register a marriage ceremony that was performed.
3. In addition, it cannot be determined with certainty that when the question of the validity of the marriage comes before a civil or a religious court – a mixed marriage would be found to be invalid.

I would, therefore, make the order nisi absolute.

Justice Berenson:

I agree that the order nisi must be made absolute for the reasons given by my honorable colleague Justice Sussman in the first part of his opinion, addressing the question of the status, duties and authorities of the registration officer. I, too, am of the view that the instructions assembled in document M2, presented in their entirety in the opinion of my honorable colleague, provide a correct response to this issue. The registration officers would, therefore, do well to continue to keep these instructions in mind, and follow them, even though they apparently do not yet constitute official directives of the Minister of Interior.

Justice Witkon:

I, too, concur in the opinion of my honorable colleague Justice Sussman that for the purposes of registering the Petitioner in the Register of Inhabitants, there was no reason to raise the complex question as to whether her marriage is valid or invalid in terms of the law to which she is subject. With this, I, like my honorable colleague Justice Berenson, leave the answer to this question for future consideration.

Justice Manny:

I concur in the opinion of my honorable colleague Justice Sussman that is neither the function, nor within the capability of the registration officer to decide as to the validity of a marriage proven to be legitimate by prima facie evidence presented to him by the party seeking its registration. For this reason, I, too, am of the view that the order nisi should be made absolute.

Decided by a majority to make the order nisi absolute.

The Respondent will pay the Petitioner a sum of IL 250 as costs for the petition and attorney's fees (in total).

Given this day, 28 Shevat 5723 (February 22, 1963).