H.C.J 5/48

LEON & OTHERS

v.

ACTING DISTRICT COMMISSIONER OF TEL AVIV (YEHOSHUA GUBERNIK)

In the Supreme Court sitting as the High Court of Justice
[October 19, 1948]
Before: Smoira P., Olshan. J., and Assaf J.

Mandatory legislation - Enforceability in Israel - Validity of Mandatory Emergency and Defence Regulations - Requisition of flat - Interference by High Court in exercise of discretion by Competent Authority.

The Law and Administration Ordinance 1948, provides that the law which existed in Palestine on May 14, 1948, "shall remain in force... subject to such modifications as may result from the establishment of the State and its authorities".

The Acting District Commissioner of Tel Aviv, as the competent authority under the Defence Regulations of 1939, made pursuant to the (English) Emergency Powers (Defence) Act 1939, requisitioned a flat situated at no. 3, Chen Boulevard, Tel Aviv, by order dated 6 September 1948. The requisition was for the benefit of the Attorney-General who, previously to his then recent appointment to that office, had resided in Haifa, but who upon such appointment found it necessary to reside in Tel Aviv, where he had been unable to find a suitable flat.

Objections to the order were made by the landlord of the flat and an incoming tenant, and were based mainly on the grounds that (a) the Regulations under which the order was made had never been in force in Palestine, or if ever in force, that their validity had expired upon the establishment of the State of Israel, (b) the competent authority was never legally appointed as such; and that in any event he had exceeded his authority and had acted capriciously, in bad faith and without due regard to the principles of reason and justice.

Held, discharging an order nisi previously granted by the court calling upon the competent authority to show cause why the order of requisition should not be set aside,

(l) The Mandatory powers of legislation for Palestine were unrestricted, and unless contrary to the terms of the Mandate such legislation is enforceable in Israel, the "modifications" referred to in the Law and Administration Ordinance 1948 being confined to technical and not to basic modifications.

(2) The regulations were valid, the competent authority had been validly appointed as such, and had acted fairly and reasonably in the circumstances.

General observations on when the High Court will interfere with the exercise of a discretion vested in a Government official.

Palestine cases referred to :

(1) *H.C.* 18/47 *Dinah Kazak v. The District Commissioner, Haifa District:* (1947), 14 *P.L.R.* 87.

(2) H.C. 118/44 Zeev *Poms & others v. The District Commissioner, Lydda District, & Mordechai Gileady:* (1944). 11 *P.L.R.* 574.

English case referred to:

(3) *Carltona Ltd. v. Commissioners of Works & others* (1943) 2 *All E.R.* 560.

R. Nohimovsky for the Petitioners.

H. H. Cohn, State Attorney, and *J. Kokia,* Deputy State Attorney, for the Respondent.

SMOIRA P. giving the judgment of the court. On September 23, 1948, after Mr. Nohimovsky had submitted his arguments on behalf of Mr. Leon and Mr. Kleiman, an order nisi was issued by this court against the respondent, Mr. Yehoshua Gubernik, the Acting District Commissioner of Tel Aviv (Urban Area), calling upon him to show cause why an Order of Requisition issued by him on September 6, 1948, should not be set aside. In terms of that order, the respondent acquired possession of the flat of Mr. Leon on the second storey of the building situated at No. 2, Chen Boulevard, Tel Aviv, as from the date of its

vacation. The flat in question was requisitioned for the benefit of Mr. Ya'acov Shapira, the Attorney General of Israel.

When the parties appeared before us on the return to the order nisi, Mr. Nohimovsky gave notice of an amendment of the Petition since it appeared that his Power of Attorney had been signed by Mr. Kleiman, the owner of the building, alone. He accordingly requested us to delete the name of the first petitioner, Mr. Leon, the tenant of the flat. On the other hand Mr. Nohimovsky asked us to join as a petitioner Dr. Boris Tamshas who, in terms of an agreement of September 8, 1948 with the second petitioner, the owner of the building, had acquired the right to enter the flat after it had been vacated by Mr. Leon.

The State Attorney, Mr. Haim Cohn, who appeared on behalf of the respondent, did not oppose the amendment sought, and it was accordingly decided by the court to delete the name of Mr. Leon as a petitioner, and to join Dr. Tamshas in that capacity.

The result is that on the return there appeared before the court Mr. Kleiman, the owner of the building, and Dr. Tamshas, who wishes to enter the flat in question as a tenant, both represented by Mr. Nohimovsky.

Before entering upon the merits of the case we must deal with the first submission of counsel for the respondent who argued that the court should dismiss the petition in limine. His contention is that the petitioners have not come into court with clean hands in that Mr. Nohimovsky lodged a Power of Attorney purporting to be signed by Mr. Leon and Mr. Kleiman while in fact it was signed by Mr. Kleiman alone. It follows that the petition contains declarations in the name of Mr. Leon which he never made; and since Mr. Kleiman speaks in his affidavit of the "contentions of the petitioners" this declaration is incorrect, since Mr. Leon does not appear as a petitioner nor does he submit any contentions. According to the Advocates Ordinance, the argument proceeds, an advocate is responsible for the signature of his client. He who comes to this court with unclean hands, Counsel submits, cannot receive any relief whatsoever.

It is indeed an important rule that this court will not grant relief to a petitioner who does not approach it with clean hands but we do not think that the rule applies to the

present case. True, it is the duty of an advocate to ensure that a Power of Attorney is signed by all those in whose name it purports to be given and for whom he acts. In the present case, however, we assume that the omission was due rather to carelessness and haste than to an intention to mislead, and we have decided therefore to deal with the application on its merits.

While mentioning the duties of advocates we also wish to add that it is the duty of an advocate to set out in his petition the main points of his -argument. An advocate, therefore, who wishes to submit in a petition of this kind that the Order of Requisition has no legal foundation, since the law upon which it purports to be based has been repealed, does not discharge this duty simply by alleging that "the Order of Requisition is illegal, has no force and is of no effect whatsoever". The petition must be framed in such a way as to inform the respondent of the case he has to meet.

The law which requires a reply to an order nisi demands that the Petition be so clear as to leave no room for speculation. The law is directed to every citizen whether he represented by counsel - who may have a genius for guessing - or whether he appears without counsel. The submissions as framed in the petition in this case do not disclose the ground upon which it is said that the Order of Requisition is illegal. The opinion of the petitioner that the requisition is illegal may be inferred by the respondent from the very fact that an application has been brought to this court. The ground for that opinion, however, which was stressed in the petitioner's argument after the respondent had replied, could not have been discovered by the respondent in the petition. This court is not an arena for a duel of surprises between litigants but a forum for the basic clarification of disputes between parties. Such clarification after proper preparation by the parties is only possible if the submissions are properly defined and do not hide more than they disclose.

I pass now to the merits of the case. The full text of the Order of Requisition of September 6, 1948, with which we are concerned, is as follows: -

"State of Israel
Provisional Government.
Offices of the Commissioner

(Urban Area)
Tel Aviv.

File No. 1/7/SK.
Mr. Yuval Leon,
2, Chen Boulevard,
Tel-Aviv. (The tenant)

Mr. Kleiman,
2, Chen Boulevard,
Tel-Aviv.

ORDER OF REQUISITION

Whereas it appears to me, Yehoshua Gubernik, Competent Authority, to be necessary and expedient so to do in the interests of the public safety, the defence of the State, the maintenance of public order and the maintenance of supplies and services essential to the life of the community:

2. I therefore inform you herewith that pursuant to Regulation No. 48 (I) of the Defence Regulations, 1939, (Amendrment No. 2 of 1945),[1)] I hereby take possession as from the date upon which it will be vacated of the property described below:

Description of Property

Flat occupied by Mr. Yuval Leon on the second storey of the building situate at No. 2 Chen Boulevard, Tel Aviv.

September 6, 1948

Y. Gubernik
Competent Authority."

1) See infra pp. 54, 55.

Copy to Chairman
Central Housing Board,
District Engineer's Department,
Tel Aviv,
Mr. Ya'acov Schapira.

And these are the main submissions of counsel for the petitioners:

(a) The Defence Regulations of 1939 have never been in force in Palestine and, in any event, have not been in force in Israel since the establishment of the State. These regulations derive their validity from an English statute, namely, The Emergency Powers (Defence) Act, 1939, and it was never legally possible to apply this statute to Palestine. If it has ever been valid, its validity expired with the establishment of the State of Israel.

(b) Even if we assume that the Defence Regulations of 1939 are still in force, regulation 48[1)] - upon which the Order of Requisition is based -has in any case been repealed by regulation 114 of the Defence (Emergency) Regulations, 1945[1], and for this reason too the Order of Requisition has no legal foundation.

(c) Even if we assume that regulation 48 is still in force, the respondent was never legally appointed as a Competent Authority for the purposes of that regulation.

(d) The respondent abused his office in that he exceeded his authority, infringed the rights of the petitioners, and issued the Requisition Order, not in good faith but capriciously and without paying due regard to the principles of reason and justice.

It should be pointed out that counsel for the petitioners did not raise the first two submissions set out above in his argument before us on the date of the issue of the order nisi, but then confined himself to the third and fourth submissions alone. It is no wonder, therefore, that counsel for the respondent dealt in his reply with the two last-mentioned points only. He contended that Mr. Gubernik had been lawfully appointed as a Competent

1) See infra, pp. 54, 55.

Authority for the purposes of regulation 48, which is still in force, and had issued the Order of Requisition in good faith and in the reasonable exercise of his discretion. He further submitted that the question whether the requisition was necessary for the maintenance of services essential to the community was one for the discretion of the Competent Authority with which this court would not interfere.

In his detailed argument in support of his first submission. counsel for the petitioners contended that the Defence Regulations of 1939 have been of no effect since May 14, 1948, the date of the establishment of the State of Israel. He contends further that these Regulations were made by the High Commissioner for Palestine on the basis of the Emergency Powers (Defence) Act, 1939, and if there is no longer any legal basis for this English statute in Israel then the foundation of the Defence Regulations of 1939 also falls away.

Counsel for the petitioners bases this argument upon section 11 of the Israel Law and Administration Ordinance, 1948, which provides: -

> "The law which existed in Palestine on May 14th,1948, shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities."

His argument is twofold. Firstly, he contends that the words "The law" at the beginning of section 11 do not include a well-known series of statutes which the King of England - and through him the High Commissioner for Palestine - legislated for Palestine, purporting to exercise powers which were at no time his. Secondly, he submits that such statutes have in any case been repealed by the concluding words of the section, namely, "and subject to such modifications as may result from the establishment of the State and its authorities". Counsel wishes us to distinguish between two classes of Statutes and Orders in Council: those which were enacted specifically on the basis of the Mandate or with special reference to Palestine, and those which were enacted by the English legislature (as distinct from the Palestine legislature) or by the King and which have no connection with the Mandate or

special reference to Palestine but which were enacted *solely* under the powers conferred by the Foreign Jurisdiction Act, 1890[1)]. The first class mentioned, the argument proceeds, includes The Palestine Order in Council, 1922 (Drayton, Laws of Palestine, Vol. III, p. 2569), The Palestinian Citizenship Order, 1925 (ibid. p. 2640), The Palestine Currency Order, 1927 (ibid. p. 2615) and The Palestine (Western or Wailing Wall) Order in Council, 1931 (ibid. p. 2635). To the second class, counsel contends, belongs the Order in Council of 1939 which applied the Emergency Powers (Defence) Act, 1939, to various parts of the British Empire, including Palestine. This statute, which was passed by the British Parliament, has no connection with the Mandate and no special reference to Palestine, and the relevant Order in Council was made under section 4 of the Statute and under the powers conferred by the Foreign Jurisdiction Act. Since, in any event, this Statute ceased to be in force in Israel after the establishment of the State, the Defence Regulations of 1939 also ceased to be valid. The same applies to the Supplies and Services (Transitional Powers) Act, 1945 (Palestine Gazette, 1946, Supp. 2, p. 229), and the Order in Council of January 10, 1946, which followed in its wake (ibid. p. 234), and to the Emergency Laws (Transitional Provisions) Act, 1946 (ibid. p. 573), and the relevant Order in Council of February 19, 1946 (ibid. p. 591). Counsel for the petitioners submitted that while English statutes which were applied to this country by Orders in Council and which belong to the first class mentioned are still in force, statutes which belong to the second class have ceased to be valid because of the modifications which, as he argues, have resulted from the "establishment of the State and its authorities". When asked to express his opinion on the validity, for example, of the English Copyright Act of 1911 (Drayton, ibid. p. 2475), which was introduced into Palestine by the Order in Council of 1924 (ibid. p. 2499), Counsel at first replied that that Statute was still in force. Later, however, he retracted this opinion and submitted that the Act no longer applied since it is not mentioned in the Palestine Order in Council of 1922. and the Order relating to the Copyright Act does not refer to the Mandate but speaks only of those countries which are under the King's protection. Palestine, he argues, was never under the King's protection and the Order relating to Copyright flows in fact from the powers conferred by the Foreign Jurisdiction Act, 1890.

[1)] The Palestine Order in Council, 1922, which gave Mandatory Palestine its first Constitution attempted to create a Legislature. This never came into existence. In the palestine (Amendment) Order in Council, 1923, by Article 3, power was given to the High Commissioner for Palestine, to promulgate ordinances, subject to disallowance by His Majesty, and "without prejudice to the powers inherent in, or reserved by this Order to His Majesty", (17)(i)(a)). Under part IV of the 1922 Order in Council “The enactments in the First Schedule to the Foreign Jurisdiction Act, 1890 shall apply to Palestine... "

Counsel for the petitioners further submits that the English statutes referred to which empowered the thigh Commissioner (by Orders in Council) to make Defence and Emergency Regulations possess a dictatorial character - even an anti-Jewish character - to the extent that they were directed towards destroying the National Home and the development of the country by the Jews[2)], and towards stemming the flow of Jewish immigration into the country. Since the State of Israel is a democratic state and a Jewish state there have come about modifications within the meaning of the words "and subject to such modifications as may result from the establishment of the State and its authorities" - modifications, he submits, which make it impossible for these Statutes to be given validity in Israel.

In summing up his first submission Mr. Nohimovsky asked the court to decide whether the Defence Regulations of 1939 are still in force seeing that their very foundation, namely, the validity in Israel of the English Statutes upon which they are based, has ceased to exist. These are revolutionary times and in the Opinion of counsel it is for the court to accelerate the process of releasing the State of Israel from the binding force of that class of English Statutes to which he referred.

Mr. Nohimovsky asked us not to leave this fundamental question open and decide the case on some other point. We are also of opinion that it is desirable for us to deal with this question, since it is indeed the duty of this court to give its reply to the view - which appears to be widespread - that the Supreme Court is competent to decide upon the validity of certain well known Statutes because they are not in accord with the spirit of the times. There are undoubtedly certain laws objectionable to the Jewish community because of the way in which they were employed in the time of the Mandate. It is true, moreover, that the abuse of these laws was fought both inside and outside the courts, and it was even argued that these laws were invalid because they were inconsistent with both the language and the spirit of the Mandate. It would be wise, therefore, to deal at some length with this problem which has already been raised a number of times since the establishment of the State and will undoubtedly come before us again.

2) The hand Transfer Ordinance of 1940 forbade the purchase by Jews of land in large areas of Palestine.

The basis of the reply to this question is in our opinion section 11 of the Law and Administration Ordinance, 1948, the full text of which has already been cited. That section lays down a clear and important rule, namely, that the law which existed in Palestine on May 14, 1948, shall remain in force. The exceptions laid down in section 11 are as follows:

(1) Laws which are repugnant to the Law and Administration Ordinance itself shall not remain in force.

(2) Laws which are repugnant to those which may be enacted by or on behalf of the Provisional Council of State shall not remain in force.

(3) Previously existing laws shall remain in force subject to such modifications us may result from the establishment of the State and its authorities.

This analysis of section 11 requires that we first interpret the rule before we deal with the exceptions, and the question that arises in the present case is whether the Defence Regulations of 1939 were a part of "the law which existed in Palestine on May 14th 1948". If the reply to this question is in the negative there will be no necessity to consider the exceptions laid down in section 11. If, however, the reply is in the affirmative it will be necessary to determine whether the validity of the regulations has ceased in accordance with one of the exceptions referred to.

One of the Ordinances which is undoubtedly still in force is the Interpretation Ordinance of 1945, and the words "The law which existed" in section 11 of the Law and Administration Ordinance must therefore be interpreted in accordance therewith. The Interpretation Ordinance contains a definition of the word "Law" which includes, inter alia, "such Acts or parts of Acts. and such Orders) by His Majesty in Council or parts of such Orders, whether passed or made before or after the commencement of this Ordinance, as are now, or have heretofore been, or may hereafter be, in force in Palestine".

We are to assume, therefore, that the words "The law" in section 11 include Statutes of the Parliament of England which were applied to Palestine by the Order in Council no less

than Ordinances made by the High Commissioner for Palestine. Nevertheless, we are not unmindful of the submission of Mr. Nahimovsky that such Statutes include some which were inconsistent with the Mandate and which were therefore invalid. The courts of Palestine during the Mandate were not prepared to accept this submission on the ground that the Mandate was not part of the law of the land, save in so far as it had been introduced by an Order in Council. This court inclines to a different opinion and is prepared to consider whether a law passed in Palestine during the Mandate contradicts the terms of the Mandate. We are unable, however, to accept the contention of counsel for the petitioners that every Imperial Statute which has no direct connection with the Mandate or no special reference to Palestine and which was applied to Palestine by Order in Council is wholly invalid. We find no such limitation in any provision of the Mandate. On the contrary, the first provision of the Mandate lays down that "The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate". The distinction drawn by counsel for the petitioners between Imperial Statutes based upon the Mandate or having special reference to Palestine and other Statutes applied to Palestine finds no support in the text of the Mandate or in the basic Constitution of Palestine, namely, the Palestine Order in Council, 1922, or in section 11 of the Law and Administration Ordinance of 1948. Such a distinction, moreover, would lead to absurd results as, for example, the invalidity in Israel of the Copyright Act since the Order in Council which applied that Act to Palestine is not expressly based upon the Mandate nor does the Statute contain matters applying specifically to Palestine. The simple answer to counsel's argument is that article I of the Mandate**, as** I have mentioned, confers full legislative powers and there was no need to make special reference to the Mandate in applying a particular Statute. By virtue of article I of the Mandate laws were made for Palestine in two ways. The usual method was by Ordinances issued by the High Commissioner in Council, and the second method was by the application of an English Statute to Palestine by Order in Council. There is no basis in constitutional law for the argument that the latter method - which we shall call the Imperial method - was any less effective than the former. It follows, therefore, that even without relying upon the Interpretation Ordinance of 1945 we must include Statutes within the expression "The law" in the first part of section 11 of the Law and Administration Ordinance, 1948.

It would appear that all these rationalistic arguments directed towards distinguishing between different classes of legislation are in fact based more upon emotion than upon reason - indeed, counsel was even prepared to sacrifice so innocent a statute as the Copyright Act for the sake of consistency. The real attack, however, is directed against the Defence Regulations and the English Statute from which they derive.

We do not think that the legislature of a democratic state is precluded from passing a law which enables the making of Emergency Regulations. Laws such as these are to be found in the most democratic of Constitutions as, for example, the Constitution of the Weimar Republic of Germany. The example closest to as, however, is to be found in our own Ordinance, the Law and Administration Ordinance, 1948, which includes in section 9 a specific provision relating to Emergency Regulations[1)]. The governing consideration here is not the existence of Emergency Regulations but the manner in which they are employed. There is no room today for the submission that Emergency Regulations made in the time of the Mandate are no longer in force because they were then used for anti-Jewish purposes.

Let us take, for example, from the period of the Mandate, the Lands (Acquisition for Public Purposes) Ordinance, 1943. There is no doubt that according to the test of counsel for the petitioners that Ordinance is still in force. let us assume - *purely for the sake of clarifying the matter* - that the mandatory authorities used this Ordinance capriciously for the expropriation of the property of Jews alone. The argument is inconceivable that this Ordinance - which, in its terms, contains no discrimination whatsoever - is invalid because it was employed capriciously.

This argument is untenable for yet another reason. It cannot be said - as is often suggested - that the purpose of all these Defence Regulations was dictatorial repression and so forth. The English who, within their own land, are certainly lovers of freedom and jealously guard the rights of the citizen - found it proper to make Emergency Regulations similar to those which exist here and which include, inter alia, provisions for the expropriation of the property of the individual in the interests of the public.

1) This section provides for a Declaration of a State of Emergency and for the making of Emergency Regulations pursuant thereto.

Having reached the conclusion that the Defence Regulations of 1939 made under the Emergency Powers (Defence) Act, 1939 are included within the expression "The law" at the beginning of section 11, we must examine whether they fall within one of the three exceptions set forth above in our analysis of that section. Counsel for the petitioners did not argue that these Regulations are repugnant to the Law and Administration Ordinance or to any Law enacted by the Provisional Council of State. He did contend, however, with great emphasis, that we should declare the Regulations invalid by virtue of the words "subject to such modifications as may result from the establishment of the State and its authorities". He submitted that these words empower the court to declare a particular law invalid provided only that this course can be justified by some change brought about by the establishment of the State.

This argument is quite unreasonable. It would require that this court first determine that the establishment of the State has brought about some change and the nature of the change; and then consider whether this change requires that a particular law be invalidated. All this would then have to be embodied in a judgment, declaring that the law in question is no longer in force. It is precisely this, however, which is the duty of the legislature; and it is not to be assumed for a moment that the legislature of Israel, in using the words quoted, intended to delegate part of its duties to the courts.

The legislature would not have concealed within the words "subject to such modifications as may result from the establishment of the State and its authorities" a matter of such importance as the invalidation of a whole series of Defence and Emergency Regulations. In section 13 of the Ordinance the legislature expressly repealed the provisions of the White Paper of 1939, namely, sections 13 to 15 of the Immigration Ordinance, 1941, and Regulations 102 to 107 of the Defence (Emergency) Regulations, 1945, and also the Land Transfer Regulations, 1940. Had it been of opinion that it was also necessary to repeal the Defence Regulations of 1939 or the Defence (Emergency) Regulations of 1945, either wholly or in part, it could have followed the simple course of repealing them expressly as it did in section 13 of the Ordinance in the case of the Regulations there mentioned. But it did not do this. If we read Chapter Four of the Law and Administration Ordinance in its entirety we shall see that the words "subject to such modifications as may result from the

establishment of the State and its authorities" were intended to refer to technical modifications without which the law in question could not be applied after the establishment of the State and its new authorities. The word "modifications" was intended by the legislature to refer to such modifications as would necessarily flow from the very fact of the establishment of the State and its authorities. It was not intended to refer to modifications which demand special consideration such as the repeal of one of a series of existing laws. For example, according to an Order by the Director of the Department of Immigration in regard to Places of Entry to Palestine, 1943 (Palestine Gazette, Supplement 2, No. 1249, p. 125), as amended, Allenby Bridge is one of the lawful places of entry into Palestine. Although in terms of section 15(a) of the Law and Administration Ordinance, 1948, the word "Israel" is to be substituted for the word "Palestine" wherever it appears in any law, it is clear without any necessity for special consideration that the establishment of the State and its authorities necessitates the deletion of Allenby Bridge[3)] from the Order referred to.

This restrictive interpretation of the words referred to may also be derived from section 16 of the Ordinance which empowers the Minister of Justice to issue a new text of any law which existed in Palestine on May 14, 1948, and which is still in force in the State, such text to contain "all the modifications resulting from the establishment of the State and its authorities". It is clear that section 16 was never intended to vest in the Minister of Justice the powers of the legislature to repeal existing laws on the basis of "modifications which may result from the establishment of the State and its authorities". Section 16 can only have been intended to refer to technical modifications. On the general principles of interpretation it cannot be assumed that the same words used in the same chapter of an Ordinance are to be read in different ways and it necessarily follows, therefore, that the words relating to "modifications" mean technical modifications in section 11 as well.

As we are indeed living in a period of change and as we stand upon the threshold of the new State - we desire, in concluding this part of our judgment, to add a few general comments on the duty of a judge when he comes to interpret the law. The doctrine of the division of powers within the State is no longer as rigid and immutable as it was when once formulated by Montesquieu. In the field of jurisprudence the opinion has prevailed that in

3) Now in Jordanian territory.

cases to which neither law nor custom applies it is for the judge to fulfil the function of the legislature rather than to force the facts before him into the narrow confines of the existing law, which in truth contains no provision applicable to them. This conception has found its classic expression in the first section of the Swiss Code which provides expressly that if the judge can find neither law nor custom which applies to the case before him, he is to lay down the law as if he himself were the legislature. But this principle only applies where in fact no law exists. It is a far cry from this to require that judges, in the exercise of their judicial powers, should repeal laws which undoubtedly do exist but which are unacceptable to the public. We are not prepared to follow this course, for in so doing we would infringe upon the rights of the existing legislative authority in the country, the Provisional Council of State. The courts are entitled to decide that a particular law is invalid as exceeding the powers of an inferior legislative body which enacted it. So, for example, if the Council of State were to delegate to a Minister the power of making regulations within certain limits, it would be for the court to examine in a particular case whether a regulation so made exceeded the limits laid down.

This is the well-known doctrine of ultra vires. It is often suggested these days - as has been argued before us by counsel for the petitioners - that the Defence Regulations in general, and those Regulations relating to the requisition of property in particular, were put to improper use during the Mandate against the Jewish community. In addition to what we have already said on this point, it is our opinion that there is no room for this contention when considering the validity of these Regulations in the State of Israel. It cannot be disputed that despite the harshness which the use of these Regulations sometimes involves, an orderly community in a state of emergency cannot exist without emergency regulations which, in their very nature, place the interests of the public above the freedoms of the individual. The question of the extent to which the court may interfere in the discretion of the Competent Authority which applies these regulations will be considered when we deal with the fourth submission of counsel for the petitioners.

Our conclusion on the first point is that the Defence Regulations of 1939 were valid in the time of the Mandate and that they are still in force by virtue of section 11 of the Law and Administration Ordinance, 1948.

The second submission of counsel for the petitioners is that even if we assume that these Regulations are generally still in force, the validity of regulation 48 expired in September, 1945. with the making of the Defence (Emergency) Regulations, 1945. Counsel contends that regulation 48 of the Regulations of 1939 (which was amended on February 23, 1945, Palestine Gazette Supplement 2, No. 1394, page 161 of March 1, 1945) was impliedly repealed by regulation 114 of the Regulations of 1945. We shall quote the text of the two regulations.

Regulation 48, sub-section 1, of the Defence Regulations 1939, as ascended on February 23, 1945, provides: -

> "A competent authority may, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, defence, or the efficient prosecution of the war, or of maintaining supplies and services essential to the life of the community, take possession of any land, and may at the same time, or thereafter, give such directions as appear to the competent authority to be necessary or expedient in connection with, or for the purposes of, the taking, retention or recovery of possession of that land".

Regulation 114(1) of the Emergency Regulations of September 22, 1945, provides: -

> "A District Commissioner may, if it appears to him to be necessary or expedient so to do in the interests of the public safety, the defence of Palestine, the maintenance of public order or the maintenance of supplies and services essential to the life of the community, take possession of any land, or retain possession of any land of which possession was previously taken under regulation 48 of the Defence Regulations, 1939, and may, at the same time or from time to time thereafter, give such directions as appear to him to be necessary or expedient in connection with, or for the purposes of, the taking, retention or recovery of possession of the land."

Counsel for the petitioners contends that these two Regulations deal with the same matter, that is to say, the requisitioning of land for the benefit of the community, and that the earlier regulation, therefore, has been impliedly repealed by the latter. It follows, he submits, that an order of requisition may today only be issued by the District Commissioner under regulation 114 and not by the Competent Authority under regulation 48. He submits further that the High Commissioner could not revive regulation 48 by the Supplies and Services (Transitional Powers) Order, 1946 of February 22, 1946 (Palestine Gazette, Supplement 2, No. 1477, p. 348) since the Order in Council in regard to Supplies and Services (Transitional Powers) (Colonies etc.), 1946, of January 10, 1946, empowers the High Commissioner to extend and give effect only to those regulations which were still in force at the date of the Order (see paragraph (c) of the First Schedule of the Order) (Palestine Gazette, Supplement 2, No. 1473, p. 236). It follows, says counsel, that the High Commissioner could not revive a regulation on February 22, 1946, the validity of which had already expired on September 22, 1945. We shall first examine the question raised by counsel as to the validity of regulation 48 without considering the argument that it has been impliedly repealed.

(1) As we have already menti*oned* in dealing with the first submission of counsel for the petitioners, the constitutional basis of the Defence Regulations of 1939 is the English Statute (of August 24, 1939) known as the Emergency Powers (Defence) Act.1939. That Act empowers the King of England to make by Order in Council such "Defence Regulations" as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of the war, and for maintaining supplies and services essential to the life of the community. The power of the King to take possession of any property is mentioned expressly in section I(2) of the Act. In terms of section 4(I) (d) of the Act the King is empowered to direct by Order in Council that the provisions of the Act shall extend to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by him and is being exercised by his Government. Section 11 of the Act provides that it shall continue in force for a period of one year from the date upon which it was passed (August 24, 1939), and that it shall then expire, provided that upon the request of Parliament the King may, by Order in Council, extend its validity from time to time for additional periods of one year.

(2) By an Act of May 22, 1940, section 11 of the original Act of 1939 was amended so as to introduce a period of two years instead of one year as the initial period of validity of the statute. The Act was to remain in force, therefore, until August 24, 1941.

(3) In 1939 the King, acting under the powers conferred upon him by section 4(1) of the Act of 1939, directed by Order in Council that the Act apply to Palestine and that the power of making regulations conferred by the original Act upon the King in Council be exercised in colonies and mandated territories by the Governors of such colonies or territories (article 3 of the Order). This constitutes the basis of the power of the High Commissioner to make the regulations which he issued on August 26, 1939, and which are called the Defence Regulations, 1939.

(4) By an Order in Council of June 7, 1940, the King extended the validity of the Act of 1940 to colonies and mandated territories.

The original Act thus acquired validity until August 24, 1941, in Palestine as well.

(5) Thereafter the validity of the original Act, which had also been applied to Palestine, was extended by Orders in Council from year to year for additional periods of one year until August 24, 1945.

(6) On June 15, 1945, a special Act called the Emergency Powers (Defence) Act, 1945, was passed in England to extend the validity of the original Act of 1939 "for periods of less than one year". This Act provided that for section 11(I) of the original Act there shall be substituted a provision which lays down that the original Act shall continue in force until the expiration of the period of six months beginning with August 24, 1945 - that is to say, until February 24, 1946 - and shall then expire. The Act also provided that it could be cited together with the original Act and the Act of 1940 as the Emergency Powers (Defence) Acts, 1939-1945.

(7) On December 10, 1945, an Act was passed in England called the Supplies and Services (Transitional Powers) Act, 1945. This Act was published in Palestine in the Palestine Gazette 1946, Supplement 2, No. 1473, p. 229. In the Long Title of the Act its

objects are defined, inter alia, as follows: An Act to provide for the application of certain Defence Regulations for purposes connected with the maintenance, control and regulation of supplies and services, for enabling Defence Regulations to be made for the control of prices and charges, for the continuation of Defence Regulations so applied or made during a limited period notwithstanding the expiry of the Emergency Powers (Defence) Acts, 1939 to 1945. Section 1 of this Act provides that the King in Council way direct that certain Defence Regulations shall continue to have effect whether or not they are for the time being necessary or expedient for the purposes specified in sub-section (1) of section one of the original Act of 1939. Section 5(4) empowers the King to apply the Act to colonies and mandated territories in the same way as the original Act.

(8) In pursuance of the last mentioned provision the King in Council made an Order on January 10, 1946, in which he applied the Act of 1945 to Palestine (Palestine Gazette Supplement 2, No. 1473, p. 234), and conferred the power of making regulations upon the High Commissioner.

(9) Pursuant to the powers conferred upon him as described in the preceding paragraph, the High Commissioner issued an Order on February 22, 1946, called the Supplies and Services (Transitional Powers) Order, 1946, in which he set forth a series of regulations which were to remain in force as above stated, including regulation 48 of the Defence Regulations, 1939.

It follows, therefore, that the High Commissioner issued this Order two days before the original Statute and the Defence Regulations issued thereunder ceased to be valid. He acted, therefore, in accordance with Section C in the First Schedule to the Order in Council of January 19, 1946, which provides that the power to extend the validity of Defence Regulations applies only to such Regulations as are still in force on the date of the issue of the Order, that is to say, January 10, 1946. This then was the position in law.

But we must still deal with the argument of counsel for the petitioners that regulation 48 was impliedly repealed by regulation 114 of the Emergency Regulations of 1945.

Counsel relies upon the well-known principle that *Lex posterior derogat legi priori* and upon Maxwell, Interpretation of Statutes, 9th Edition, p. 171. The general answer is that there can only be an implied repeal where there exists a logical inconsistency between the first and the second legislative provisions - in which case the first is impliedly repealed by the second - or, if there is no inconsistency between the two provisions, where there is no justification for the continuance of the two.

It cannot be said in the present case that such a logical inconsistency exists. It must be assumed that it was the desire of the legislature to confer the powers in question upon the Competent Authority under the Defence Regulations of 1939, and upon the District Commissioner under regulation 114. It cannot be said, moreover, that these two sets of provisions cannot stand together. There is a reason which explains the existence of two sets of regulations, namely, that the Defence Regulations of 1939, were designed to deal with a situation created by external factors, such as war, while the regulations of 1945 were made to deal with a situation created by internal factors. That this is so is apparent from the position that had existed previously. Before the Emergency Regulations of 1945 there existed the Emergency Regulations of 1936 which were not repealed by the Defence Regulations of 1939. That is to say that even before 1939 there existed two sets of Regulations although up to 1945, during the period of the war, the authorities employed the Defence Regulations of 1939. And as far as the authority of Maxwell is concerned, that writer, under the heading "Consistent Affirmative Acts" seems rather to support the opposite opinion. He says, at page 173: -

> "But repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments on the Statute book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention" .

Counsel for the petitioners also pointed to a line of cases which indicate that from the date of the publication of the Emergency Regulations of 1945 the authorities used regulation 114 of those Regulations and not regulation 48 of the Regulations of 1939, since all those cases deal with regulation 114. There is no need to deal at length with the point that this fact cannot constitute the repeal of regulation 48.

The conclusive answer to the contention of Counsel for the petitioners is provided by the Defence (Emergency) Regulations of 1945 themselves. Regulation 5 provides that, subject to the provisions of the Regulations, their provisions, and the powers conferred by them, shall be in addition to and not in derogation of the provisions of, or the powers conferred by, any other law. Moreover, regulation 7 sets forth in detail those regulations which shall be revoked upon the coming into force of the Regulations of 1945, and neither the Defence Regulations of 1939, nor any part of them, are mentioned in regulation 7. We therefore reject the submission of counsel for the petitioners that regulation 48 of the Defence Regulations, 1939, cannot constitute the basis of the Order of Requisition issued by the respondent.

We are also of opinion that Counsel's third submission, namely, that the respondent was not lawfully appointed as a Competent Authority, is without foundation. Regulation 3 of the Defence Regulations, 1939, provides that the Competent Authority shall be the person appointed by the High Commissioner in writing. In a Notice concerning the powers of Ministers pursuant to the Law and Administration Ordinance, 1948, published in Official Gazette, No. 5, page 24, it is notified for public information that the Provisional Government has decided to confer the powers formerly exercised by the High Commissioner as follows: under the Defence Regulations, 1939 - upon the Minister of Defence: under regulation 3 of the Defence Regulations, 1939-upon the Ministers of Finance, Agriculture, Trade and Industry, Labour and Building, and Communications.

Counsel for the petitioners wishes to deduce from the terms of this notice that in the case of the appointment of a Competent Authority under regulation 3 the Minister of Defence must also act together with one of the other Ministers mentioned. In our view this contention is without substance. The true intention is clear. In general the Minister of Defence must be substituted for the High Commissioner throughout the Defence

Regulations, but in the case of regulation 3 the other Ministers mentioned must also be added.

The appointment in the present case, a copy of which is annexed to the affidavit of the Respondent, was made in writing by the Minister of Labour and Building on September 3, 1948.

Counsel for the petitioners also argued that the appointment was invalid as it was not published in the Official Gazette. Such publication, so he contended, is rendered necessary by section 20 of the Interpretation Ordinance which provides:

> "All regulations having legislative effect shall be published in the Gazette and, unless it be otherwise provided, shall take effect and come into operation as law on the date of such publication".

Counsel also drew our attention to the definition of "regulations" in section 2 of the Ordinance[1)] and argued that the appointment of a Competent Authority for the requisition of land has legislative effect.

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1) Section 2 of the Interpretation Ordinance provides (inter alia):

2. In this Ordinance, and in all other enactments (as hereinafter defined) now in force or hereafter to be passed, made or issued, the following words and expressions shall have the meanings hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided -

"law" includes –

(a) such Acts or parts of Acts, and such Orders by His Majesty in Council or parts of such Orders whether passed or made before or after the commencement of this Ordinance, as are now, or have heretofore been, or may hereafter be, in force in Palestine; and

(b) orders, regulations, rules, byelaws, proclamations, directions, notices, or other instruments, not being enactments, made or issued. whether before or after the commencement of this Ordinance, under any such Act, Order, or part thereof as is referred to in paragraph (a) of this definition, being orders, regulations, rules, byelaws, proclamations, directions, notices, or other instruments, which are now, or have heretofore been, or may hereafter be, in force in Palestine ; and

(c) enactments; and

(d) Ottoman law, religious law (whether written or unwritten), and the common law and doctrines of equity of England, which is or are now, or has or have heretofore been, or may hereafter be, in force in Palestine.

"enactment" means any Ordinance, or any regulations, whether passed, made or issued before or after the commencement of this Ordinance: Provided that in any enactment passed, made or issued before the commencement of this Ordinance, the word "enactment" has the same meaning as it would have had if this Ordinance had not been passed.

"regulations" means any regulations, rules. byelaws, proclamations, orders, directions, notifications, notices, or other instruments, made or issued by the High Commissioner or the High Commissioner in Council or

The reply to this submission is twofold.

(a) The Defence Regulations (Amendment No. 4) of 1945 provide expressly that section 20 of the Interpretation Ordinance shall not apply to the Defence Regulations.

(b) Regulation 3 of the Defence Regulations contains a special provision in regard to the form of the appointment of a Competent Authority, namely, an appointment by the High Commissioner *in writing*, and there is no mention of the necessity for publication. The fact mentioned by counsel for the petitioners that in recent times such appointments have sometimes been published in the Official Gazette does not alter the legal position. We have no doubt, therefore, that the appointment of Mr. Yehoshua Gubernik as a Competent Authority for the purposes of regulation 48 was valid.

In the result, therefore, we are of opinion that the Defence Regulations of 1939 in general and regulation 48 in particular were constitutionally valid in Palestine and are still so valid in the State of Israel and that the respondent, who exercised the powers conferred by regulation 48, was a Competent Authority. It remains for us, therefore, to give our decision on the fourth submission of counsel for the petitioners, namely, that the respondent exercised his powers not in good faith but capriciously and vexatiously, and without having regard to the principles of reason and justice.

Before considering this argument we must call attention to certain facts in greater detail.

The flat in question was requisitioned for the benefit of the Attorney-General of Israel, who is a married man with three children. It consists of four rooms, an entrance hall, and the usual conveniences, and is not far from the offices of the Government. Mr. Leon, who is referred to in the original petition as the First Petitioner and who lives in the flat at present, leased it from the owner of the building in 1947 and moved into it with his family.

any other authority in Palestine (whether before or after the commencement of this Ordinance) under the authority of any Act or any Order by this Majesty in Council or of any Ordinance; and includes orders, directions, notifications, notices or other instruments, made or issued, whether before or after the commencement of this Ordinance, under any such regulations, rules or byelaws: Provided that in any enactment passed, made or issued before the commencement of this Ordinance, the word "regulations" has the same meaning as it would have had if this Ordinance had not been passed.

According to the statement before us of Mr. Kleiman, the owner of the building, Mr. Leon informed him in July, 1948, that he was about to leave the flat and that Mr. Kleiman was at liberty to let it to whom he wished. In fact, as we mentioned at the beginning of our judgment, Mr. Leon does not appear at all as a petitioner in this case. Dr. Boris Tamshas, who was joined in the proceedings after the issue of the order nisi, entered into contract of lease - through his agent - with Mr. Kleiman on September 3, 1948. Dr. Tamshas is a doctor from Cairo who fled to France following the latest political disturbances in Egypt. When the petition was filed Dr. Tamshas was in Paris and was already about to leave for Israel with his family. In terms of the agreement mentioned, the owner of the building was to hand over the flat to Dr. Tamshas not later than September 25, 1948.

Dr. Tamshas, his wife and three children, reached Israel on September 23, 1948. He was born in this country and studied medicine overseas. He practiced as a physician in Cairo, but was in Palestine from 1936 to 1940. He then returned to Egypt and resumed his profession. He now wishes to settle in Israel and continue in medical practice.

The case before us, therefore, is not one in which the Competent Authority Is about to eject a tenant in order to introduce another tenant into the flat, for the present tenant is about to move to Haifa where the flat of Mr. Ya'acov Shapira has been offered to him. The petitioners before us, therefore, who complain that the competent Authority has requisitioned the flat for the Attorney-General, are the owner of the building and a proposed new tenant.

Many arguments were addressed to us in support of this fourth submission of the petitioners, and counsel himself, in the course of his argument, counted twelve points that he had raised. We shall not deal, however, with each point raised, but will consider the matter generally on its merits.

Counsel for the petitioners well appreciates that according to the law as laid down during the Mandate this court will not interfere with the discretion of the Competent Authority if, in effecting the requisition, that Authority has acted within the limits of its powers. The court for its part will not consider whether the making of the requisition was proper or otherwise. The opinion has been expressed that the court will interfere only where it has been shown that the requisition has been effected maliciously or against the principles of reason and justice. Counsel for the petitioners submitted that we are not bound by the

tradition established by decisions from the time of the Mandate but that, on the contrary, it is our duty to depart from that tradition.

Counsel for the petitioners contends that the respondent did not exercise his discretion in good faith, but that he acted capriciously and against the principles of reason and justice. He spoke of a conspiracy between the respondent and Mr. Shapira. He relied upon the facts that Mr. Shapira approached Mr. Gubernik at the end of August in connection with the requisitioning of a flat for his use, and that Mr. Gubernik approached - not the Ministry of the Interior of which he is an official - but the Ministry of Justice; and that after a few days, on September 3, he received his appointment as a Competent Authority from the Minister of Labour and Building.

We fail to see in this any suggestion of a conspiracy. It is only natural that an official who is in need of a flat and who, despite persistent efforts on his part (and we have heard that Mr. Shapira has been living since the beginning of July in one room in the Hotel Gat-Rimmon and has been unable to bring his wife and three children from Haifa to Tel Aviv) has been unable to find one, should take legal steps and approach his Government in order to. secure accommodation.

Counsel also leveled strong criticism against Mr. Gubernik for informing Mr. Leon by letter on September 5th, the day before the issue of the Order of Requisition, that his flat was about to be requisitioned for the purposes of the Government and requesting him not to let the flat or transfer it to another authority without his confirmation. This letter, however, has no effect upon the issue and need not detain us now.

When examined on his affidavit by Counsel for the petitioners, Mr. Gubernik stated that he offered a specific sum of money to Mr. Leon in order to facilitate the transfer of his home from Tel Aviv to Haifa, his intention being to recover a similar sum from Mr. Shapira. Counsel attempted to argue before us that in so doing Mr. Gubernik committed a criminal act in contravention of section 109A of the Criminal Code.[1)] We can only say that this submission has no substance at all.

1) The obtaining by a Public Servant of an improper reward in respect of business transacted by him as a Public Servant is made an offence by this section.

Counsel for the petitioners also argued that Mr. Gubernik had used an old English form drafted in accordance with regulation 114 of the Regulations of 1945, and that he had simply copied the language of the form out of habit and without consideration.

If we are to understand counsel's argument to mean that the manner in which the Order of Requisition is drafted shows that the respondent did not consider the merits of the matter and therefore did not exercise his discretion in accordance with the rules of Justice and reason, then it cannot be accepted. It has already been decided in England, in the case of *Carrtona Ltd. v. Commisioners of Works and Others*, (3), that a Notice of Requisition has no constitutional effect. In that case - which was also a case of requisition under regulation 51(1) of the Defence (General) Regulations in England which correspond to our regulation 48 - the Competent Authority did not emplay in the Notice of Requisition the language of the regulation, but said that it was essential to take possession of certain buildings "in the national interest". It was argued that the notice was invalid since it gave a reason for the requisition which did not appear in the regulation. The regulation speaks of the public safety, the defence of the realm or the efficient prosecution of the war or the maintaining of supplies and services essential to the life of the community, while the notice speaks of a requisition effected because it is essential in the national interest. In commenting upon this aspect of the case Lord Greene M.R. said, at page 562:

> "...in order to exercise the requisitioning powers conferred by the regulation no notice is necessary at all and, therefore, the question of the goodness or badness of a notice does not in truth arise. The giving of notice is not a pre-requisite to the exercise of the powers and, accordingly, the notice must be regarded as nothing more than a notification, which the Commissioners were not bound to give, that they are exercising those powers. The notice is no doubt for what it is worth, evidence of the state of mind of the writer and those by whose authority be wrote, and it is perfectly legitimate to argue that this notice suggests, on the face of it, that those who were directing their minds to this question were directing them to the question whether the action proposed was in the national interest and not to the specified matters

> mentioned in reg. 51. But the notice is no more than evidence of that, and when an assistant secretary in the Ministry of Works gave evidence it was perfectly clear that he was using that phrase - and this letter was written on his instructions - as a sort of shorthand comprising the various matters in reg. 51 upon which the requisition would have been justified . . . That point appears to me to have no substance at all".

These remarks of Lord Greene contain the answer to the argument of counsel for the petitioners in this case. Mr. Gubernik stated candidly in his evidence that he could have omitted the words "in the interests of the public safety, the defence of the State" in the Order of Requisition and been satisfied with the words "in the interests of the maintenance of services essential to the life of the community" and perhaps also "the maintenance of public order". We therefore reject all the submissions of counsel based upon the manner in which the notice called an "Order of Requisition" was framed.

Counsel for the petitioners also argued that although he greatly values the work of Mr. Ya'acov Shapira, the Attorney-General of Israel, such work is not covered by regulation 48. His contention before us was that the words "maintaining supplies and services essential to the life of the community" must be read in close association with the words "the public safety, defence, or the efficient prosecution of the war" which precede them, and he asked us to interpret the regulation in accordance with the rule of *ejusdem generis*.

The simple answer is that section 4 of the Interpretation Ordinance lays down the very opposite, namely, that us a general rule the word "or" is not to be interpreted *ejusdem generis*. We accordingly have no doubt that the work of the Attorney-General may be included within the expression "services essential to the life of the community" within the meaning of regulation 48.

We cannot agree with counsel for the petitioners that the regulation enables the requisitioning of a flat for the purposes of a government department alone - in this case the Ministry of Justice - and not for the purposes of a flat for the private use of the Attorney-General. We are not unmindful of the fact that the requisitioning of a flat by the ejectment of a tenant who is in occupation (which is not the case here) is a cruel and very serious

matter which must be weighed thoroughly by the Competent Authority before it exercises its powers. Counsel for the petitioners, however, has overlooked the fact that in terms of regulation 48 the discretion in regard to the requisition of a flat resides in the Competent Authority and in no other person. The condition mentioned in regulation 48 is "if it appears to the *Competent Authority*" and not simply "if it appears". Were we to accept the submission of counsel for the petitioners we should have to decide that it appears to *us* that the requisitioning of this flat is not necessary for the maintaining of services essential to the life of the community. In so doing, however, we should be acting contrary to the law which binds us and whose amendment, if desirable at all, is a matter for the legislature.

It would seem that this submission was advanced by counsel only to show that the decision of the Competent Authority in this case had no reasonable basis whatsoever. He did not weigh the matter at all. This court would then be entitled to interfere. Now in the opinion of the Competent Authority an official, in order adequately to discharge his duties to the State, must have a flat of his own and not be separated from his family for a protracted period. The securing for him of a flat, therefore, without which his services to the State are liable to be adversely affected, is a matter which is necessary for the maintaining of services vital to the life of the community. It cannot be said that this opinion is quite unreasonable, even if there may be some people who disagree with it.

Counsel for the petitioners has also complained of the fact that the respondent requisitioned the flat although he knew that it had already been let to Dr. Tamshas. This argument too is unsound. If the Competent Authority is empowered to requisition a flat which is actually occupied by a tenant he must be empowered *a fortiori* to requisition a flat where he does not thereby affect the rights of a tenant who was in occupation up to that stage. In the present case, the tenant is about to move to another flat, and he will not suffer as a result of the requisitioning. The only person who will suffer is the new tenant who wishes to enter the flat. Here lies the striking difference between this case and the majority of cases of requisitioning, in which the Competent Authority is compelled to harm the tenant who is actually occupying the flat. This is hardly the case, therefore, in which the law. which has previously been laid down in such matters should be completely reversed.

Counsel for the petitioners urged repeatedly that regulation 48 was employed in the time of the Mandate when the rights of the individual took second place. He cited, in particular, some judgments relating to requisition in which there existed some political element. We agree that in some judgments delivered during that period in connection with requisition the political element undoubtedly prevailed over sound reason and judicial sense. It is sufficient to mention the judgment of the High Court of Justice in *Dinah Kazak v. The District Commissioner, Haifa District,* (1). There were also judgments, however, given against the individual in favor of the Competent Authority where there was no hint of a political element. It is sufficient to mention here *Zeev Poms and others v. District Commissioner, Lydda District. and Mordechai Gileady,* (2), in which the facts were very similar to those in the present case. In such matters the Courts of Palestine followed the decisions of the English Courts relating to the same type of requisitioning under the Defence Regulations. These English judgments, in any event, are completely free of any suspicion of political influence. Instead of citing a number of judgments delivered in Palestine we wish to quote here some remarks of Lord Greene from his judgment in the *Carltona Case* (3) to which we have already referred. Lord Greene said, at page 563:

> "The last point that was taken was to this effect, that the circumstances were such that, if the requisitioning authorities had brought their minds to bear on the matter, they could not possibly have come to the conclusion to which they did come. That argument is one which, in the absence of an allegation of bad faith - and I may say that there is no such allegation here - is not open in this court. It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no court can interfere. All that the court can do is to see that the power which it is

> claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

These remarks of Lord Greene also furnish the answer to the argument of Counsel for the petitioners that the housing situation in Tel Aviv and Jaffa did not make it necessary for this requisition to be effected. If there was to be a requisition, it was possible to requisition a flat in a building which had not yet been completed. This is undoubtedly a matter of housing policy in which this court cannot interfere. It is not the function of this court, moreover, to investigate whether the Competent Authority could not have employed the method of billeting in accordance with regulation 72 of the Regulations of 1939. In the result there has not been the slightest proof before us *of mala fides* or capriciousness on the part of the Competent Authority, so the fourth submission of counsel for the petitioners must also be dismissed.

We desire to point out in conclusion that in spite of the decision which we have reached in regard to the fourth submission of counsel for the petitioners it was essential for us to deal in detail with his first three arguments which could be determined on points of law alone. Had the petitioners been correct on any one of their first three points they would have succeeded in the case for, in such event, the owner of the building could have protested against any interference with his property and demanded that the order nisi be made absolute without any regard to the particular facts of this matter.

As we have dismissed the three legal submissions of the petitioners and, after consideration of the facts, have also rejected their fourth submission, the order nisi will be discharged.

As in this case, for the first time since the establishment of the State of Israel, legal points of general importance to the community have been raised, no order as to costs will be made against the petitioners.

Order Nisi Discharged.

Judgment given on October 19, 1948.