Special Tribunal 1/50

ESTHER SEEDIS

v.

CHIEF EXECUTION OFFICER AND SHMUEL SEEDIS

In the Supreme Court sitting as a Special Tribunal under Article 55
of the Palestine Order in Council, 1922.
[July 28,1954]
Before Agranat J., Landau J., and Rabbi Y. Hochman [1)]

Family Law - Husband and wife - Income from wife's property during marriage - "Matter of marriage" - "Suits regarding marriage" - Palestine Order in Council, 1922, *Articles* 51 and 53 - *Jurisdiction - Rabbinical Courts.*

In a suit between husband and wife before a Rabbinical Court, it was held that the husband by virtue of a usufruct accorded to the husband by Jewish law, was entitled to receive the rent of a certain property registered in the Lands Registry in the wife's name. The Rabbinical Court had purported to exercise jurisdiction under Article 51 and 53 of the Palestine Order in Council, 1922, in terms of which "suits regarding marriage" or "matters of marriage" are within the exclusive jurisdiction of the religious courts. The wife petitioned the High Court of Justice to restrain the levy of execution on the property referred to, and as the matter related to the jurisdiction of the religious courts, it was referred by the High Court of Justice to the Special Tribunal constituted under s. 55 of the Order in Council.

[1)] In terms of section 9(1) of the Courts Ordinance, 1940, the Special Tribunal constituted under Art. 55 of the Palestine Order in Council, 1922, to decide whether or not a case is one of personal status within the exclusive jurisdiction of a Religious Court, shall consist of two Judges of the Supreme Court and "the president of the highest court in Palestine of any religious community which is alleged by any party to the action to have exclusive jurisdiction in the matter, or a Judge appointed by such president."

It was held by the Special Tribunal that the expressions "suits regarding marriage" and "matters of marriage" referred to above are not restricted to suits or matters concerning the existence of the marriage tie, but also cover claims for the enforcement of rights, including rights to property, which are derived from the status of marriage, and that the Rabbinical Court, therefore, had correctly assumed jurisdiction in the present case.

Palestine cases referred to:

(1) *S.T.* 1/28 - *Hayeh Sarah Alpert v. Chief Execution Officer, Jerusalem and Others ;* (1920-1933), 1 *P.L.R.* 395.

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

(3) *C.A.* 72/31 - *Ibrahim Elias Nasr v. Nijmeh Elias Nasr;* (1920-1933), 1 *P.L.R.* 648.

Israel cases referred to :

(4) *H.C.* 116/49 - *Esther Seedis v. Chief Execution Officer, District Court, Jerusalem ;* (1950). 4 *P.D.* 266.

(5) *C.A.* 376/46 - *Aharon Rosenboim v. Yona Miriam Rosenboim;* (1950), 2 *P.E.* 5.

(6) *C.A.* 16/45 - *Yosef Albrance v. Yohanan Shmeterling ;* (1950), 4 *P.D.* 573.

(7) *C.A.* 26/51 - *Shimon Cotik v. Tsila (Tsipa) Wolfson ;* (1951), 5 *P.D.* 1341.

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

(9) *C.C.* 367/49 - *Malka Zilbershtein v. Yohan (Yohanan) Zilbershtein ;* (1950/51), 3 *P.M.* 137.

English cases referred to:

(10) *Parapano and Others v. Happaz and Others ;* [1894] *A.C.* 165.

(11) *In re Martin, Loustalan v. Loustalan ;* [1900] *P.* 211.

Cyprus case referred to :

(12) *Despinou Theophilo v. Haralamba Abraam ;* (1895), 3 *C.L.R.* 236.

Levitsky and *Mack* for the petitioner.
Mizrahi for the respondents.

AGRANAT, J. giving the judgment of the court. The question we have to answer is whether the Rabbinical Court, at the time it heard this case, had exclusive jurisdiction to determine the claim of a husband to compel his wife to hand over to him the income of her property of the kind known in Jewish law as *nichsei melog*[1)]. We say "at the time" because counsel for both parties agreed that in view of section 2 of the Women's Equal Rights Law, 1951, the institution of *"nichsei melog"* has no further place in Israel substantive law.

This question has been referred to us for consideration by the High Court of Justice after it had been petitioned by the wife in the case of *Esther Seedis v. Chief Execution Officer, Jerusalem* (4), for an order restraining the Chief Execution Officer from enforcing the judgment of the Rabbinical Court which was given on June 22, 1947. This judgment was to the effect that the wife's property and its income were charged according to Jewish religious law in favour of the husband ; that the husband was entitled to collect from the tenants the rent of a house at 16, Ben Yehuda Street, Jerusalem, which was registered at the Land Registry, Jerusalem, in the name of the wife: and that "the wife could do nothing to prevent him".

We should note at once, however - and counsel for the husband has not contested this - that the judgment of the Rabbinical Court cannot be made effective because of the provisions of Section 10 of the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law, 1953. There are two reasons for this:

(a) The judgment was given before the State came into existence ;

(b) The judgment was given in the wife's absence.

[1)] *Nichsei melog :* Property which belongs to the wife and of which the husband has only the usufruct without any rights to the capital and without responsibility for its loss or deterioration.

For the purpose of our decision we assume - and counsel for the parties have not claimed otherwise - that at the time the claim was entered the parties were members of the Jewish Community and Palestinian citizens.

The High Court in its judgment (4) summarised the contentions of the parties with regard to jurisdiction as follows : -

> "Counsel for the husband claimed that enjoyment of the income of *nichsei melog* was one of four things to which a husband became entitled on marriage, that this right was therefore the result of the marriage tie and that consequently the claim to enforce it was the same kind of claim as was included in Article 53(1) of the Palestine Order in Council, 1922, under the term 'matters of marriage' ; that, furthermore, the Rabbinical Court gave to its judgment the heading of 'Disputes in a matter of marriage'. To this the answer of counsel for the wife was that Article 53(1) mentioned 'matters of marriage' and not 'matters resulting from marriage' nor 'matters connected with marriage'. This meant that if it were correct to consider the right of a husband to the income of *nichsei melog* as a matter resulting from marriage, then a claim to enforce this right was not the same as 'a matter of marriage' but a matter which came under the law of property - and as far as personal status was concerned, it was neither important nor essential but of secondary consideration, and for that reason Article 53 (l) did not apply to such a claim at all."

Counsel for the parties again repeated these arguments in this court. Mr. Levitsky for the wife, however, added a new point. He said that even if this kind of claim must be considered in law to belong to "matters of personal status", although it was not included in the definition contained in Article 51 of the Order in Council, still it was not a "matter of marriage" nor was it one of the matters which were subject to the sole jurisdiction of the Rabbinical Courts as provided in Article 53(1), in which case it might be that the Rabbinical Courts would have jurisdiction to deal with the husband's claim to the income

of *nichsei melog* but that this jurisdiction was subject to the consent of the parties and consequently was not exclusive.

Further, Mr. Levitsky relied on three judgments : -
(a) that of Cheshin, J. in *Rosenboim v. Rosenboim* (5) ;
(b) that of Olshan, J. in *Albrance v. Shmeterling* (6) ; and
(c) that of Kennet, J. in *Zilbershtein v. Zilbershtein* (9).

We should like, first of all, to discuss the problem whether, for the purpose of deciding the question of jurisdiction, it is necessary to consider this kind of claim as a matter of personal status, assuming that the institution of *nichsei melog* was not one of the matters that was included in the definition in Article 51. This question was referred to by Silberg, J. in the case of *Cotik v. Wolfson* (7), but was not decided as it was not necessary to do so. In our opinion the clear language of the second sentence of Article 51(1) of the Palestine Order in Council, 1922 - and particularly the word "means" - leaves no doubt that with regard to status the provisions of this section create a numerus clausus, as Silberg J. aptly puts it.

Also in Article 47, where the legislator conferred jurisdiction on the civil courts in matters of personal status, he emphasised the words "as defined in Article 51". Hence when the legislator apportioned, in the Palestine Order in Council, the jurisdiction of the courts in matters of personal status between the civil courts on the one hand and the religious courts on the other, he meant this to be only in respect of those matters which were set out in Article 51 and no others.

The conclusion, therefore, is that if it is at all possible to consider the claim for the income of *nichsei melog* as a matter of personal status, then this is only because it is included in the term "suits regarding marriage" in Article 51(1) or in the term "matters of marriage" in Article 53(1).

But before we answer the question whether these terms would also cover matters connected with *nichsei melog,* it would be as well to explain shortly the nature of this institution. When a man marries he becomes entitled, according to Jewish law, to the

income of two kinds of property belonging to his wife, (a) *nichsei tzon barzel* and (b) *nichsei melog. Nichsei tson barzel* comprise property which the wife brings as dowry to her husband and for the safety of the capital of which he remains responsible. As the Shulhan Aruh puts it: "If they are lost, it is his loss - and if they increase, it is his increase. Similarly if they depreciate or are stolen - the loss is his." (Shulhan Aruh, Even Ha-Ezer, 85, B.) Property which the wife brings to the husband does not become *nichsei tson barzel* so as to make the husband liable for it "unless its value had been assessed in a definite sum of money or he had expressly assumed responsibility for it" (ibid., C.). *Nichsei melog,* on the other hand, comprise property for which the husband is not responsible and the income of which he is entitled to enjoy. Should the capital decrease or increase, the loss or the profit will be that of the wife. ("Should they be lost, or increase, or depreciate or be stolen - it is she who benefits or loses, as the husband is entitled to receive only the income" (ibid., B).)

With regard to claims from third parties to the income of either kind of property, the husband is entitled to institute the same even without the express authority of his wife. (Tur, Even Ha-Ezer, 85.)

And finally one has to distinguish, of course, between property which the wife brings to her husband as explained above and property which she keeps under her sole control in consequence of arrangements to that effect made between herself and her husband.

As we have already indicated, the problem before us is reduced to the question whether the claim of the husband to the income of his wife's *nichsei melog* should be considered in law as a "suit regarding marriage" or as a "matter of marriage". If that was the intention of the legislator, he would have done well had he given a separate heading to the definition in Article 51(1) as for instance "effects of the marriage" or "matrimonial property" - expressions usually used for the purpose of classification in private international law (see Wolff, Private International Law, 2nd Edition, p. 146, Lorenzen, Selected Papers on Conflict of Laws, p. 88) - or, as counsel for the wife suggested, "matters arising from marriage" or "connected with marriage" or the like.

While this is a consideration which weighs heavily with us in favour of the wife, we do not consider it decisive. For it is inconceivable that the legislator also intended to

exclude from the general connotation of the expression "matters of marriage" claims for restitution of conjugal rights and such claims are certainly in respect of rights resulting from or connected with marriage.

The truth of the matter is that the interpretation of the term "matter of marriage" which is found in Article 53(1) must not be so restricted as to exclude a claim for a right resulting from the status of marriage, that is to say, it must not be restricted to matters that concern the one and only question, namely, the existence or nonexistence of the marriage tie. In other words we must conclude that the term "matter of marriage" has a wider and more comprehensive meaning than that conveyed by the sole word "marriage" and that it also covers claims for rights which certainly come into being as a result of the marriage tie and which give content and significance to the status of marriage.

When we put the problem in this light to Mr. Levitsky, he gave us a twofold answer: (a) That one cannot consider rights which are created by the marriage tie and which have a direct bearing on the married life of the couple, such as conjugal and maintenance rights, as being the same as rights which are essentially in respect of claims for money or property pure and simple even though they too are the result of the marriage status ; (b) that in any event when the legislator intended to grant jurisdiction in a matter of money to the Rabbinical Courts, he gave a separate heading to it and used the word "alimony", therefore it must be presumed that he, the legislator, did not intend to grant jurisdiction to these courts in other matters relating to money or property.

We are of the opinion that neither of these answers solves our problem. As to the first one has to remember that on the one hand it is possible to consider even rights to money or property as having a direct influence on the marriage and it was for just this very reason that these rights were granted by various laws either to the husband or to the wife according to the particular point of view of the legislator of the law applicable ; and this is also the view of Jewish law. The Levush. 85, 17. (Rabbi Mordechai Yaffe) says as follows: -

> "Should the husband wish to part with (literally : sell) land which belongs to the *nichsei melog* of the wife, for several years at a yearly income all of which he proposes to receive in advance, he will not be

> permitted to do so..... 'because of the welfare of her home'. This means that her interests are better served by the land remaining with him and that he should receive a small income yearly in order that the expenses of the home should be adequately provided for.... "

(See also Tur, Even Ha-Ezer, 85.)

On the other hand, the payment of alimony to a wife, during her husband's desertion, whilst she is living apart from him, need not necessarily have any influence on the married life of the couple.

From the point of view of jurisdiction therefore it is difficult to find a logical basis for the distinction between the right to payment of money such as in the nature of alimony and the right to payment of money or to property on a different claim which arises in favour of a husband or wife from the marriage itself. The common feature is that both are claims for the fulfillment of obligations arising from the status of marriage.

The second answer which was suggested by counsel for the wife is more weighty, but again it is not sufficient to turn the scales in her favour. This is because it may well be said that the special emphasis on the term "alimony" was made in the wording of the Article so as to distinguish payments due on account of alimony from those due on account of maintenance. Indeed even if the legislator had not specifically used the term "alimony" we would have been obliged, in the words of Assaf, J. in the case of *Rosenboim v. Rosenboim* (5), "to consider as a matter of marriage the money which a husband is bound to give to his wife for her upkeep..... because it is one of the main obligations resulting from marriage". To this Olshan, J. also agreed in the case of *Albrance v. Shmeterling* (6).

Similarly in the case of *Alpert v. Chief Execution Officer* (l), the Special Tribunal held that the claim of a widow for maintenance from the husband's estate was a "matter of marriage" because her right to "maintenance" resulted from the marriage "and that it was therefore within the exclusive jurisdiction of the Rabbinical Court." Clearly, this interpretation completely contradicts the contention of Mr. Levitsky that monetary rights cannot be included amongst the claims that are within the exclusive jurisdiction of the Rabbinical Court because they were not specifically mentioned in the Order in Council.

Indeed, Mr. Levitsky was not unaware of this contradiction and has therefore suggested that we ignore altogether the rule established in *Alpert's* case (l), as the only way of overcoming the difficulty. But we are of the opinion that this is no way at all, especially as counsel for the wife has given no special reason which would justify our refusal to follow a rule has been valid for many years.

Let us now examine this problem in another light. When the Mandatory legislator divided the jurisdiction in matters of personal status between the courts, his general purpose was to preserve the position as it was during Turkish rule. For this too is one of the tests that we have to consider - in accordance with the opinion which was expressed in the case of *Rosenbaum v. Rosenbaum* (8). In this connection, what Young has to say (in Corps de Droit Ottoman, Vol. II, p. 2) is important. As translated by Smoira, P. in the case of *Rosenboim v. Rosenboim* (5), it is as follows :

> "The various communities of non-Moslem Ottoman subjects have complete jurisdiction to decide all questions which concern each community. . . . . in matters of marriage, including dowers, mohar, maintenance as between husband and wife (nafaka) and divorce".

The importance of these words is twofold. First, Young includes in the word "marriage", dowers, mohar, and maintenance, that is to say, all the range of monetary rights resulting from the marriage tie. Second, the inclusion of suits for dower and mohar within the jurisdiction of non-Moslem religious courts means that, as far as Jews are concerned, the Rabbinical Courts do have jurisdiction to deal with claims concerning properties of the wife which are *nichsei tson barzel* and *nichsei melog.* For as regards jurisdiction, there is no difference in principle between the rights of a husband in these two kinds of property of his wife and the right to "dower" and "mohar".

At the end of the chapter from which the above quotation was taken, Young gives the text of Hatti Humaioun of 1856. This is a political declaration which was made by the Sultan, in paragraph 12 of which he confirmed once more the privileges in juridical matters which the non-Moslem communities had enjoyed from time immemorial in the Ottoman Empire.

And in the case of *Parapano v. Happaz* (10), the Privy Council relied, inter alia, on this declaration by the Sultan, when it held that matters of "marriage, divorce, alimony and dower" were in the Ottoman Empire within the jurisdiction of the religious courts of the non-Moslem communities which, it was presumed from the start, would apply in such cases the religious law of each community.

It is true that the question that had to be decided in the *Para-pano* case (10) by the Privy Council was regarding the law that had to be applied. But in order to come to the conclusion that it was the canon law of the Roman Catholic Church that had to be applied (on a question of legitimacy of an Ottoman subject who was a member of that Church) the Privy Council proceeded from the fact that in the Ottoman Empire the juridical jurisdiction in these matters was in the tribunals of these communities.

But, generally speaking, choosing which law to apply is one thing and deciding which court has jurisdiction is another. Only here both these problems have become tied up together because of the historical background just mentioned.

And following this rule, the Supreme Court of Cyprus held in the case of *Theophilo v. Abraam* (12) that the canon law of the Eastern Church applied to a claim for the return of a dower. In so doing the court defined the term "dower" as understood in that law as follows :

> "..... the object of the dower is to provide a fund for the purposes of defraying the burdens and obligations arising from the existence of the marriage ; that the husband has the control of the property given as dower ; that the property is the property of the wife and must be handed back by the husband on the dissolution of the marriage to the person giving the dower, in those cases where the dower-giver has stipulated this to be done, or to the wife. The husband is only liable for loss or damage to the property, where such loss or damage arises from his own fraud or his own negligence. The husband will not be liable for any loss

> or damage, provided he had shown such care as he ordinarily takes in the management of his own property."

It seems to us that any one who examines this definition of "dower" will notice at once the similarities in essentials that exist between this institution of the canon law of the Eastern Church on the one hand and the rights according to Jewish law of the husband in the property which the wife brings to him on marriage as above described, on the other hand. And does this not make it clear that in the days of Ottoman rule suits concerning the latter as well as the former were within the jurisdiction of the non-Moslem religious courts?

We have found further support for this view - that is that the jurisdiction of the Rabbinical courts was equal in extent to that of the courts of the various Christian communities in this field - in the Firman of August 21, 1854, which the Sultan Abdul Majeed issued to Mr. Albert Cohen, the emissary of the Central Organization of French Jewry (Consistoire Central des Israelites de France). This reads as follows :

> "All the rights, the privileges and all the immunities which had been granted or which will be granted in the future to any Christian community whatsoever shall apply at one and the same time to the Jews as well, for the paternal heart of His Majesty the Emperor will never permit that there should be the slightest discrimination amongst his non-Moslem subjects."
>
> (Extract from Monatsschrift fur Geschichte und Wissenschaft des Judentums, 1854, Vol. 3, p. 346 ; see also Jewish Encyclopaedia, Vol. 4, p. 156, under Albert Cohen ; also Young, Vol. 2, p. 153, note 5).

Also Mr. Goadby, in his book on International and Inter-religious Private Law in Palestine, lays down that according to Article 51 of the Palestine Order in Council, suits regarding marriage include suits regarding "dowry" because "this was the Turkish practice" and "consequently such suits are within the 'exclusive jurisdiction' of religious courts according to Articles 53 and 54 of the Order in Council" (ibid.

pp. 116, 158, 159, note 2).

In short, the examination of the problem in the light of the general tendency of the Mandatory legislator to leave the position in this field as it was during Ottoman rule, leads us to the conclusion - although this must not be taken yet as absolute proof - that a claim by a husband for the income of *nichsei melog* is a matter of marriage which was within the exclusive jurisdiction of the Rabbinical Court.

Let us try to solve this problem in the light of the answer to the question, to which particular branch of the law does the right of the husband to the income of his wife's property belong? It seems to us that if we are bound in law to consider this right as coming under the matrimonial law and not under that relating to property, we will be bound to conclude - for the reason given below - that indeed only the Rabbinical Court had jurisdiction to deal with a claim of this nature. Because we are dealing with laws which were promulgated by an English legislator, we will have to rely on English jurisprudence to find our answer. This means that we would have to ask ourselves the question, to which branch of the law would an English court consider a claim to belong, which resembled in essentials a suit for the income of property like *nichsei melog ?* We have to remember in this connection that according to the common law the husband became entitled on marriage to his wife's movable property and the income of her immovable property was also subject to his absolute control so long as she was married to him (Lush on Husband and Wife pp. 5, 7). It is true that this law was altered by the Married Women's Property Act, 1882. The common law further provided, in its time, that a will made by a woman when she was unmarried, became null and void on her marriage and this rule was adopted by the English legislator in s. 18 of the Wills Act, 1837, which is still valid today. In the case of *In re Martin* (11), the Court of Appeal held that the rule which made a woman's will null and void on her marriage, when applied to a will whereby she disposed of movable property, was part of the matrimonial law. The reason for this is due to the provision of the common law that the movable property of the wife passes on her marriage to her husband and on marrying she loses the power to dispose of it or to leave it by will to another person. As Vaughan-Williams, L.J. put it (at pp. 239-240) :

> "And I think that his wife's property in the movables having thereby ceased, it follows, quite independently of the eighteenth section of the Wills Act, that this loss of the power of disposition put an end to her will while it was still ambulatory... for I think that the rule of English law which makes a woman's will null and void on her marriage is part of the matrimonial law, and not of the testamentary law."

It should be noted, in parenthesis, that in the above case, the marriage which made the will null and void took place before 1882 and thus the judgment shows the position as it was before the enactment of the Married Women's Property Act, 1882.

We learn from this English judgment, therefore, that the general rule of the common law to the effect that the movable property of the wife passes to her husband on her marriage is also part of the matrimonial law. This means that the right of the husband to the income of *nichsei melog*, which he has claimed in the case before us, belongs to this same branch of the law.

If this is correct, it is reasonable to conclude that, at the time, the Mandatory legislator intended that a claim of the kind described above should be determined, in the absence of a general matrimonial law, according to the law of each respective community as far as members of a recognized religious community and Palestine citizens were concerned. And Goadby (at p. 159, ibid.) lays it down that "the effect of marriage upon the property of the spouses in Palestine, whether movable or immovable, will be governed by the personal law." But if the rules of the personal law apply in such a suit, then there is no escaping the conclusion that only a religious court has jurisdiction to entertain it and this for the following reason : let us suppose for one moment that the contrary was the correct conclusion, that is to say that it was the District Court which had jurisdiction in this matter. In that event it would be unable to apply the personal law as required by Article 47 of the Order in Council, in as much as the District Court can apply this law only in matters of personal status as defined in Article 51 and the very grant to the District Court of jurisdiction is based on the assumption that the claim here was not one relating to "marriage" and therefore was not one of the matters included in the definition of personal status which was given in Article 51(1). The conclusion is that the only possible source of

the hypothetical authority of the District Court to determine a claim for the income of *nichsei melog* is to be found in Article 38 of the Order in Council, 1922, and at the hearing the provisions of Article 46 of the Order would have to be applied by the court. It follows also that, as there is no local matrimonial law and as the right of a husband in his wife's property must be decided according to the matrimonial law, the court would have to apply those very rules of the common law which the English legislator had found it necessary to do away with more than 70 years previously. The District Court would also have to act in accordance with the principle which was laid down in the case of *Palestine Mercantile Bank Ltd. v. Fryman* (2), to the effect that where there was no Ottoman provision dealing with any particular branch of the law, the relevant rule of the common law must be resorted to. Now in other branches of the law as well, the prospect also exists in this country of having to resort to certain rules of the common law which are no longer applicable at all in England itself and it is most difficult to believe that the Mandatory legislator intended at the time that this should be the case in connection with the matrimonial law in so far as it would be applicable to members of the recognised communities who were Palestinian citizens.

Further it is very doubtful in our opinion - also because of the judgment in the *Mercantile Bank* case - whether the District Court would have the right to apply the rules of the common law at all to a matter of this kind, and this is because of the proviso at the end of Article 46 of the Order in Council to the effect that these rules apply "so far only as the circumstances of Palestine and its inhabitants . . . . . permit".

For instance, according to the law of her community, the Moslem wife had unfettered control over her property. (Fyzee, Outline of Muhammadan Law (1949) at p. 99 ; also Wilson, Muhammadan Law, 6th edition, at p. 126.) It is inconceivable that the Mandatory legislator intended to impose on her the disabilities of the common law on this subject which we have mentioned.

In such a case, therefore, the District Court would be faced with a lacuna in the local law. It might then be said as was said by Kennet J. in *Zilbershtein v. Zilbershtein* (9), at p. 140, that, "as there was no provision in the civil law to the contrary, the rights of the wife were equal to those of the husband and the marriage had not deprived her of these rights".

Should the District Court be of this opinion and decide the issue in such a case along these lines, then our answer would be that there was nothing in that argument that could weaken the conclusion which must follow from the view - and there can be no other view - that at the time the Mandatory legislator was not willing that there should be a lacuna in connection with the matrimonial law applicable to a married couple who were Palestinian citizens belonging to a recognised community with regard to the relations between them not in connection with the rules regulating the rights which such had in the property of the other. We have to add further that Kennet J. cited Article 1771 of the Mejelle and section 82 of the Ottoman Law of Civil Procedure as authority for saying that the Ottoman Law contained a positive provision to the effect that the wife "had the right to own separate property without any limitation" and that this law had remained unchanged "till now". With all respect, we are not at all convinced by these citations. Article 1771 of the Mejelle concerns the onus of proof when husband and wife "disagree as to the things in the house in which they dwell". It owes its origin no doubt to the rule in Islamic law that a married women has full control over her property. (Vide supra.) For as is well known, the "provisions of the Mejelle are based on the substance of Islamic law". (See the introduction of Frumkin J. to his Hebrew translation of the Mejelle). As regards the second Law that was cited, section 82 is to the effect that the provisions of section 80 of this same Law were not to apply "when the contracting parties are husband and wife". It is obvious that the section concerns only the case where one spouse desires to prove against the other the existence of rights which had been acquired through an oral agreement between them. This is clear also from the judgment of *Nasr v. Nasr* (3), on which Kennet J. relied. For a claim to enforce a right derived from such an agreement does not come under the matrimonial law at all. Consequently it should certainly surprise no one to find that in the course of the hearing of that case "no one disputed nor doubted the fact that the wife had the right to possess separate property without any limit" and we must not conclude from this case that, before the enactment of the Women's Equal Rights Law, such a rule existed in the civil law.

The inevitable conclusion therefore is that the claim which we have been considering for the income of *nirchsei melog* did not come within the jurisdiction of the District Court but that it came within the term "a matter of marriage" and was within the exclusive

jurisdiction of the Rabbinical Court. For the sake of clarity it is as well to summarise the reasons which have led us to this conclusion as follows:

(a) If the claim in question has to be considered at all as a matter of personal status according to the definition contained in Article 51(1) of the Order in Council, then this is because of the terms "suits regarding marriage" and "matters of marriage" which are used in that article and in Article 53(1);

(b) These terms should not be restricted only to suits that are concerned with the existence or not of the marriage tie. They should also cover claims for enforcing certain rights which spring from the marriage status as, for example, restitution of conjugal rights. From the point of view of jurisdiction, there is no logical basis for differentiating claims in respect of these rights and claims in respect of rights in property or money which are also derived from the marriage status;

(c) In the case of *Alpert* (1), too, the claim of the widow for maintenance out of her husband's estate until she received what was due to her under the Ketuba was held to be a "matter of marriage" which was within the exclusive jurisdiction of the Rabbinical Court;

(d) But for the specific use of the term "alimony" in the Order in Council, as already mentioned, it would have been possible to consider as a "matter of marriage" also the claim of a wife for maintenance during the lifetime of the husband;

(e) But because this term was specifically used by the Mandatory legislator in the Order in Council, it does not necessarily follow that when this is not the case we should come to a different conclusion. For it is quite possible that the intention of the legislator was to stress the differences which he had emphasised regarding the kind of claim in connection with alimony and maintenance when he divided the jurisdiction between the civil and the religious courts;

(f) During the period of Turkish rule, the claim of a Jewish husband to rights in his wife's property was considered as a matter of marriage which was within the

jurisdiction of the Rabbinical Court. This fact may serve as a pointer to the intention of the legislator of the Order in Council in view of his well known desire not to make changes, generally speaking, with regard to the jurisdiction which the religious courts of the communities had at that time in matters of personal status;

(g) The provisions of a law which grant to a husband, on his marriage, rights in his wife's property, belong to the matrimonial law. It is logical to suppose that at the time the Mandatory legislator intended that the personal law should apply in the case of a married couple who were members of a recognised community and Palestinian citizens, whereas, according to Article 47, the District Court could not apply the personal law of the parties unless the dispute concerned one of the specified matters of personal status;

(h) We must not ascribe to the Mandatory legislator an intention that the District Court should apply the rules of the common law regarding marriage when deciding on a claim by a husband for rights which he had in his wife's property in a dispute of a married couple of the kind mentioned above. Nor is the common law applicable in such a case as if there were a lacuna in this branch of the local civil law. The inevitable conclusion therefore is that jurisdiction to hear such a case was not given to the District Court but that it was given exclusively to the religious court.

We should like to consider another point. We noted above, where we explained the nature of the institution of *nichsei melog,* that the husband was entitled to claim from third parties the income from this kind of property without the necessity of receiving authority from his wife, that is to say in his own name. In his judgment in *Albrance v. Shmeterling* (6), Olshan J. was of the opinion that the personal law does not apply in a dispute between the husband and a third party. At p. 295, the learned judge says as follows: -

> "Even if we were to suppose that their personal law was Jewish religious law, and even if according to this law every promissory note given to the wife for rent must be considered as 'income' belonging to the husband – it does not yet follow from this, that commercial relations between a married woman and a third party are subject to the personal

> law applicable to husband and wife in their relations with such other. If the position was as claimed by counsel for the respondent, we would reach a conclusion which was unreasonable".

And at p. 296, Olshan J. added:

> " 'A suit regarding marriage', as set out in Article 51, is a suit between two parties to a marriage... The fact that according to Article 47 a dispute in such a case has to be determined according to the personal law of the parties is no evidence that any other person in his commercial dealings with a married woman is, according to the Order in Council, subject to the personal law applicable to a matter of marriage between herself and her husband and according to which each acquires certain concrete rights by virtue of the marriage. The interpretation given to Article 51 by counsel for the husband... is likely to bring choas to the commercial and economic life of the country. It would make every commercial transaction with a married woman dangerous and insecure and this state of affairs would not be confined to just Jewish married women, for Articles 47 and 51... apply to the whole population of the State".

There is no conflict between this view and what we are deciding in this case, because rights which result from the relationship between husband and wife are one thing and the husband's standing vis-a-vis rights acquired by his wife in transactions with third parties is another. The fact that a certain law regulates the relations between husband and wife does not necessarily mean that the same law also regulates the relations between the husband and third parties as regards rights which the wife acquired thereby (compare Wolff, ibid., p. 355). In other words it is not impossible to consider as "a matter of marriage" the husband's claim to the income of his wife's *nichsei melog* when it is made against the wife and to regard the husband's claim to the income of the same property as "a matter which is subject to the law of property" when made against a third party.

We therefore hold that the Rabbinical Court did have jurisdiction to determine the claim which was made by the husband for the income of *nichsei melog* of his wife and to give the judgment it delivered on June 22, 1947.

Judgment given on July 28,1954.