H.C.J 85/47

MOUNEERA SHIBLI

v.

JAMIL SHIBLI and THE CHIEF EXECUTION OFFICER, DISTRICT COURT, HAIFA

In the Supreme Court sitting as the High Court of Justice.
[January l3, 1950]
Before: Smoira P., Assaf J., and Cheshin J.

Family Law - Personal Status - Jurisdiction of Religious Court of Greek Catholic Community - Custody of infant - Chief Execution Officer - Power to change decisions - Limitations on right to hear evidence.

Under the Palestine Order in Council, 1922, a number of Christian "communities", including the Greek Catholic community but not including the Protestant community, were recognised and given the right to hold courts of their own with jurisdiction (which in some cases required the consent of the parties) in matters of personal status over members of their own community.

The petitioner was a Protestant and had married the first respondent, a member of the recognised Greek Catholic community, in a Greek Catholic church. There was one child of the marriage. The parties quarreled soon after the marriage and their disagreements led to incessant litigation. Upon an application by the husband to the Greek Catholic Court for (inter alia) custody of the child of the marriage, the wife refused to recognise its jurisdiction over her, claiming not to have been at any time a member of her husband's community.

The Greek Catholic Court granted custody of the child to the husband, but the wife refused to hand over the infant to him and returned to her mother's house in Nazareth. Since religious courts have no power to execute their own judgments, the only way the husband could recover the child was through the Chief Execution Officer of the civil court to whom an application was duly made by the husband.

The Execution Officer at first refused to order the execution of the order of custody, but after hearing evidence, changed his mind and made an order that the wife should hand over the child to the husband. The wife then petitioned this could to set that order aside, the husband and the Chief Execution Officer being respondents to the petition.

Held: that the Chief Execution Officer could change his decisions:

that the Greek Catholic Court might have had jurisdiction had this been a case where no consent to its jurisdiction was required, but as in this case such consent was required and had not been given, the religious court had acted without jurisdiction: that the Chief Execution Officer was wrong in ordering the execution of the order of custody.

Palestine judgments referred to:-

(1) *H.C.* 52/31 - *Abraham Elmaleh, as administrator of the estate of Jacob Danon v. Chief Execution Officer, Jerusalem and others,* (1918-33), 3 *C.O.J.,* p. 853.

(2) *H.C.* 36/38 - *Ali Sheikh Ahmad Attar and another v. Chief Execution Officer, Magistrate's Court Ramleh and another,* (1938), 1 *A.L.R., p.* 343.

(3) *H.C.* 98/41- *As'ad Mantsour Abd el-Nour v. Chief Execution Officer, Jerusalem and anotherr* (1941) *S.C.J.* 632.

(4) *H.C.* 51/45 - *Anton Shomali v. Chief Execution Officer, Jerusalem and another,* (1945), 12 *P.L.R., p.* 443.

(5) *H.C.* 22/39 - *Zussman Shtark v. Chief Execution Officer, Tel Aviv and another,* (1939), 6 *P.L. R.,* p. 323.

(6) *H.C.* 6/43 - Malakeh *Nasri 'Amer v. Chief Execution Officer, Jerusalem and another,* (1943), 10 *P.L. R.,* p. 78.

(7) *H.C. 7/44 - Labibeh Ibrahim Baqluq v. Salibeh Yacub Baqluq and another,* (1944), 11 *P.L.R.,* p. 128.

(8) *H.C.* 83/46 - *Mary Ni'meh Saffouri v. Shukri Salman and another,* (1947), 1 *A.L.R., p.* 71.

(9) *H.C.* 100/41 - *Elia Shubeita v. Chief Execution Officer Jaffa,* (1942), 9 *P.L.R.,* p. 121.

(10) *H.C.* 105/45 - *Moshe Golddenberg v. Chief Execution Officer, Tel Aviv and another,* (1946), 13 *P.L. R., p.* 180.

(11) *H.C.* 35/46 - *Lana Levi (Hezkia) v. Assistant Chief Execution Officer, Tel Aviv and another,* (1946), 13 *P.L.R., C*. 328.

(12) *C.A.* 60/43 - *Yedidia Mizrahi Barzilay v. Yedidia Tova* (Nee *Bauman),* (1943), 10 *P.L. R.,* p. 241.

(13) *H.C.* 63/44 - *Abed Yousef Salma*n *v. Assistant Chief Execution Officer, Jerusalem and another,* (1944), 2 *A.L. R.,* p. 792.

(14) *H.C. 2/46 - Yousef Habib Khasho* v. *Chief Execution Officer, Jerusalem and another,* (1946), 13 *P.L. R.,* p. 76.

Weil for petitioner,
Klug for first respondent,
Levi for second respondent.

CHESHIN J. This is the return to an order nisi granted by this court, during the period of the Mandate, namely on August 21, 1947, which was directed to the second respondent requiring him to show cause why he should not refrain from executing a judgment of the Religious Court of the Greek Catholic Community for the return of an infant to the custody of the first respondent.

2. The record of the relations between the two principal parties is not in dispute, and the following are the main points :

A. The petitioner, Mouneera Shibli, and the first respondent, Jamil Shibli, were married on September 20, 1942, in the Greek Catholic Church at Nazareth, according to the marriage laws and the ceremonies observed by that Church. Both of them were and still are Palestinian subjects; but the husband was and remains a member of the Greek Catholic Community, while the wife was a member of the Protestant faith before the marriage, and the pivot on which the whole of this case turns, as will duly appear, is whether upon her marriage any change took place in her personal status.

B. The marriage was not a success and, ever since 1944, the husband and wife have been incessantly in the courts. The husband brings his claims before the Religious

Court of his Community, while the wife brings her claims against him before the civil courts for maintenance for herself and for their child. One attempt to resume their domestic relationship, made in consequence of a maintenance order given by the District Court in Haifa, was also unsuccessful, and in due course the wife left her husband, taking their infant child with her, and returned to her mother's home in Nazareth. The husband then sued her in the Greek Catholic Religious Court for an order of restitution of conjugal rights (in Arabic, *houkoum at-ta'a-l-zawjia)*. The wife did not answer the summons of the court, and on December 11, 1945, the court dealt with her husband's case in her absence and ordered her to obey her husband and return to his home in order that they might continue normal marital relations.

C. The wife, who contested the jurisdiction of the Religious Court to try the matter, lodged an objection to the restitution order, and when her objection was rejected, she appealed to the Court of Appeal of the Greek Catholic Community; but her efforts proved to be in vain, and the order of "ta'a" was confirmed by the Community Court of Appeal on July 9, 1946.

D. On July 18, of that year, the wife was called upon by the Execution Office in Haifa, to comply with the order, and when she refused to do so the husband once more applied to the Greek Catholic Court with a request to order the wife to deliver their infant child into his custody. On July 27, the order of custody was granted stating, inter alia, that the husband had reserved the right to demand separation *a mensa et thoro* from his wife and the cessation of her conjugal rights; and when it became clear to the husband that his wife was adamant in her recalcitrance and refusal to return to his home or to deliver the child into his custody, he lodged a further application (his third one) with the Religious Court, claiming an order of separation *a Mensa et thoro*. On November 29, the court acceded to the husband's application and held that the couple were to live separately.

E. In the meantime, the husband continued the proceedings for the execution of the order of custody. The wife objected thereto before the second respondent, namely,

the Chief Execution Officer in Haifa, on the ground that the order could not be executed, because the Religious Court had dealt with the matter without jurisdiction. The second respondent at first decided to uphold the petitioner's objection and directed that the order was not to be carried into effect; but after hearing the evidence of priests of the Greek Catholic Church from Nazareth and Haifa on the question of the wife's personal status, he changed his view, and on June 30, 1947, reversed his previous decision and directed the order of custody to be executed. The petitioner applied to set aside this last order and, as stated, the order nisi was granted.

3. The first question - of lesser importance - to arise in the course of the proceedings before us was : is the Chief Execution Officer entitled to alter decisions previously made by him ?

4. That question has already been considered on a number of occasions by this court (in the time of the Mandate) and answered in the affirmative (see, for example, *Elmaleh v Chief Execution Officer, Jerusalem* (1) and *Attar v. Chief Execution Officer, Magistrate's Court, Ramleh* (2)). The jurisdiction of the Chief Execution Officer to alter decisions previously made by him is based upon article 2 of the Execution Law[1)]; and there is hardly a single matter that comes before the Execution Officer which is not subject to reconsideration by him. Moreover, this court (in the time of the Mandate) has stated several times that before a person petitions this court, he would be well advised to apply first of all to the Chief Execution Officer (or to any other public official of whose acts he complains) with a final request to alter the decision which, in the petitioner's opinion, is in detriment of his rights.

5. Dr. Weil submits on behalf of the petitioner, that even if the Chief Execution Officer is empowered both to reconsider a matter within his purview and also to alter his previous decisions in that same matter, hie is certainly not entitled to turn himself into a judge, hear the testimony of witnesses, receive evidence and proof and give judgment; and in the present case, the second respondent made the order he did after taking evidence from

1) Ottoman Execution Law, Article 2:
The Execution Office will pass orders for execution without awaiting an order from any Court. Any person aggrieved by such orders is entitled to object in writing. If his objection be found good the Court will correct, alter or cancel the said orders.

priests and making findings of fact. That, submits Dr. Weil, is beyond the jurisdiction of one who is appointed to execute, and to execute alone, the judgments of competent courts.

6. No one disputes that the Chief Execution Officer is not a judge trying a case, and he is not entitled to make findings on the actual dispute arising between the parties, or to alter findings made by competent courts. In *Nour v. Chief Execution Officer, Jerusalem* (3), this court (in the time of the Mandate) decided that, "if (an order is) given by a competent court that matter must be executed whatever (the Assistant Chief Execution Officer) may think about its merits or demerits." It is clear, therefore, that the function and powers of the Chief Execution Officer are severely limited: but is he without authority to consider any form of proof before making his decision? Even the case of *Nour* (3), above, does not go as far as that: in that case it is stated that the Chief Execution Officer has to execute judgments and orders made by a competent court, and how can the Chief Execution Officer determine whether a certain court (especially when it concerns a court of one of the religious communities in Israel) was competent to give the judgment under execution, it he does not take evidence and hear proof?

7. This is perhaps a not inappropriate occasion to point out to Chief Execution Officers the necessity for keeping strictly within the framework of the powers conferred upon them, and for taking care not to exceed the limits of those powers; for indeed, it was in this that the second respondent was at fault in the present case, as I will explain.

8. I have already mentioned that since the marriage took place in the Catholic Church and having regard to the Canons of that Church there is no objection to the second respondent hearing evidence on the question of the personal status of the petitioner from priests of the Greek Catholic Community. He did not, however, content himself with that, but went on to hear explanations and commentaries on dicta appearing in the judgment of the Religious Court. Thus, for example, at one point in the judgment, it is stated that: "Whereas she (the petitioner) ...being a non-Catholic, etc. ...accordingly, etc." Those words do not seem to be capable of more than one interpretation. But what did the second respondent do ? He heard a long explanation from a priest - the priest that delivered the judgment - as to the supposedly real intention behind those words, and concluded from that explanation that the fact that the petitioner is not a Catholic does not mean that she has ceased to be a member

of the Greek Catholic Church. But that was not stated, neither expressly nor impliedly, in the actual judgment. Furthermore, that explanation, changing the passage which was quite unambiguous, provided one of the foundations on which the second respondent's final conclusion was based. Now, two ways are open to an execution officer: either the language of the judgment is clear, in which case it must be executed without that officer hearing extrinsic evidence; or it is not clear, in which event the provisions of article 6 of the Execution Law [1)] must be applied. The Chief Execution Officer is not authorised to hear evidence either in order to discover the meaning behind words and their context, or for the purpose of interpreting a judgment which is clear.

9. In that respect, therefore, it seems to me that the second respondent was wrong in reading into a judgment an intention inconsistent with that expressed in clear words. But the question still remains: is this defect by itself a sufficient ground for quashing the second respondent's later decision and restoring his first decision? The answer to that must, in my opinion, be in the negative. For it is not to the second respondent's reasons that the petitioner objects, but to the actual decision itself; and if the material to be found in the affidavits of the parties and in the other exhibits produced to us in fact shows that the decision is erroneous, the court will reverse it in *substantio,* whereas if the decision was right, then the reversal of that decision and the revival of the decision that preceded it Should be like repairing a technical defect by means of a grave injustice - something we are hardly likely to do.

10. The arguments of counsel for the petitioner and the first respondent as to the merits of the case may be summarized thus: counsel for the petitioner contends that the order of custody is not subject to execution, in that it was made by a Religious Court without any substantive jurisdiction, and that the order itself is contrary to the principles of justice and equity. Counsel for the first respondent argues, on the other hand, that the Religious Court of the Greek (Catholic Community was competent to decide what it did, and that the order itself cannot be regarded as offending against justice and equity.

1) Ottoman Execution Law, Article 6.
If the decree be not clear and the Execution Officer think it necessary to obtain further information before executing, he shall apply for information in writing direct to the Court which granted the decree and shall give notice to the judgment-creditor of the objection requiring elucidation. Provided that the objection shall not delay the execution of any part of the decree which is clear and does not depend on the result of the objection.

11. The substantive law which we have to consider is contained in the Palestine Order in Council, 1922. Article 54 of the Order in Council reads, inter alia, as follows:

> "54. The Courts of the several Christian communities shall have:-
>
> (i) Exclusive jurisdiction in matters of marriage and divorce, alimony, and confirmation of wills of members of their community other than foreigners...
>
> (ii) Jurisdiction in any other matters of personal status of such persons, where all the parties to the action consent to their jurisdiction."

Matters of personal status were defined in Article 51 of the Order in Council in these words:

> "...matters of personal status means suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons."

12. Those Articles, therefore, deal with the definition of the nature of matters involving personal status, and determine the exclusive and concurrent jurisdiction of the Religious Courts of the various Christian communities in those matters, relating to members of their community other than foreigners. Before we can solve the question as to whether the Greek Catholic Court was competent to adjudicate in personal disputes between the petitioner and the first respondent, we must necessarily determine first of all what is the petitioner's religion and to which religious community she belongs.

13. No one disputes that before her marriage the petitioner was a member of the Protestant Community. Dr. Weil contends that, for the purpose of determining somebody's personal status, he is not to be regarded as having changed his religion unless he satisfies the

requirements stated in section 2 of the Religious Community (Change) Ordinance. In the present case, he argues, the petitioner's change of religion was not registered in the register of the District Commissioner, as required by section 2(1) of that Ordinance, nor was the certificate, mentioned in section 2(2), sent either to the Greek Catholic Community which, according to counsel for the first respondent, she joined, or to the Protestant Community [1)] which, according to the same submission, she left. Therefore, concludes Dr. Weil, and without taking into account the wedding ceremony that took place in the Catholic Church in accordance with the canons of that Church, the petitioner was and still remains a Protestant.

14. This argument was considered, and even answered, in *Shomali v. Chief Execution Officer, Jerusalem* (4). In that case, the court stated (ibid., at p. 444) : "As Protestants are not mentioned in the second schedule to Article 2, Palestine (Amendment) Order in Council, 1939, they do not belong to a Religious Community"; and further down on the same page : "Before it can be said that section 2(1) of the Ordinance applies, a person must already belong to one of the scheduled Religious Communities. We stress the use of the word "change" his religious community. She (the Respondent in that case), in first, never became a member of any Religious Community till her marriage, so it cannot be said that she ever changed her Religious Community." In other words, the aforementioned requirements in the Ordinance referred to apply only to such persons as belong to one of the religious communities recognised by law and who substitute their religious community for a different religious community which, too, is recognised by law. Exceptions to that rule are persons joining an unrecognised religious community or leaving such a religious community. Such persons are exempt from registering the change in their religious community. The present petitioner, like the second respondent in *Shomali's* case (4), had never belonged to one of the recognised religious communities until she married (and I shall further consider the question as to what extent that marriage affected her personal status at a later stage), and therefore it cannot in any way be said that she altered or changed her religious community. Moreover, to use the language of the court in *Shomali's* case (4), (ibid., at p. 445) : "She may have changed her religion, or to put it in another way, she may have become a member of another Church"; but that fact by itself does not impose on her the

1) Protestants are not a recognised "community". For a list of recognised Christian communities, see the amended schedule to the Order in Council

obligations, nor confer on her the benefits, set out in the Ordinance. That Ordinance does not, in fact, apply to her at all.

15. Accordingly, we must investigate the other circumstances of the case in order to see whether they include any factors likely to affect the petitioner's personal status and to determine the laws applying to that personal status. But fact we shall clarify certain fundamental rules deriving from both written and case law, which can serve as pointers for determining a person's personal status.

16. Dr. Klug, on behalf of the fact respondent, says that the final word on the question as to a person's belonging to a particular community is with those members of that community who speak with authority on its religion. Since in the present case the priests of the Greek Catholic Religion have expressed the view that the petitioner is numbered among their flock, there can be no disputing their opinion. In support of this submission, Dr. Klug quotes the rule laid down in *Shtark v. Chief Execution Officer,* Tel Aviv (5), but that case has nothing to do with the problem in hand. All that was decided there the question of the juridical validity and legal effect of a marriage contracted between a Jew and a Jewess is within the jurisdiction of the Religious Courts of the Jewish Community. The question of the membership or non-membership of either or both the spouses in the Jewish Community did not arise at all, and this court did not so much as hint in its decision that the Religious Court is the final authority on this question.

17. The weakness of Dr. Klug's argument becomes apparent especially in a case such as the one before us; for here the Anglican Church also claims the petitioner for itself, as can be seen from the letter from Bishop Khalil Jamal, head of the Arab-Anglican Community in Nazareth. Who can say which of the opinions of the rival religious heads is to be preferred ?

18. It should be noted in parenthesis that the Palestine legislator - or, more accurately, the constitution-maker for Palestine - foresaw the possibility of such differences of opinion as have been revealed in the present case. In order to settle those differences, he laid the foundation for legislation in the future which would enable these matters to be regulated. By Article 51(2)(b) of Council (which was added in 1989 to the Order in Council, 1922), the legislator was empowered to enact a law "for determining the circumstances in which a

person shall be regarded as a member of any religious community". Such a law, however, has not yet been enacted, and although the Religious community (Change) Ordinance is still in force, as stated in the proviso to Article 51(2)(b) (see Article 9(2) of the Palestine (Amendment) Order in Council, 1939), yet, as has already been stated, there is nothing in that Ordinance which can throw any light on the solution of the problem under discussion here.

19. Article 54 of the Order in Council empowers the Religious Courts of the various Christian communities to try matters relating to personal status. But, whether the jurisdiction conferred on those courts is exclusive as regards the matters set out in subsection (1) of Article 54, or concurrent as regards all other matters relating to personal status, a *sine qua non* for both of them is that the litigants be members of that community before whose religious court they bring their suits. Notwithstanding the plain meaning of that provision, the courts (in the time of the Mandate) were disposed in the public interest not to be too strict, and, in a long line of cases, held that that provision is not absolute, in the sense of *"fiat justitia ruat coelum",* and that there are instances where the public welfare demands that the law should not be strictly applied. Thus, for example, it was held in *'Amer* v. *Chief Execution Officer Jerusalem* (6), that a husband who had conducted himself as a Catholic for several years before his marriage, and whose wedding took place with his consent according to the canons of the Catholic Church, could not be heard to say that he is a member of the Moslem faith and that the Latin Court was accordingly incompetent to try his wife's suit in the matter of alimony. Again, in *Baqluq v. Baqluq* (7), it was held, following *'Amer's* case (6), mentioned above, that a person who had regarded himself as a member of the Latin Catholic Community for twelve years prior to his marriage, and had represented himself at the time of the wedding ceremony as being a member of that community, could not, when sued by his wife in the Latin Religious Court, be heard to contend that he had from the first been a member of the Greek Orthodox Community and that his change of community had not taken place in accordance with the Religious Community (Change) Ordinance. Finally, in *Saffouri v. Salman* (8), this court (in the time of the Mandate) held that a woman, who had married according to the rites of the Greek Orthodox Church and who sued her husband in the Religious Court of the Greek Orthodox Community, which gave its decision on her case, was estopped from arguing afterwards that the court was not competent to decide the matter because she was a Protestant.

20. It appears at first sight that the rule laid down in *Shubeita v. Chief Execution Officer, Jaffa* (9), in *Goldenberg v. Chief Execution Officer, Tel Aviv* (10), and in *Levi v. Assistant Chief Execution Officer, Tel Aviv* (11), is inconsistent with the principle embodied in 'Amer (6), *Baqluq* (7), and *Saffouri* (8), mentioned above. But this "inconsistency" is capable of being explained. In it was decided that the Religious Court of the Greek Catholic (Melkite) Community was not competent to declare a husband, a member of that community, liable to pay alimony to his wife because the wife, who had been a member of the Latin Community before her marriage, had never changed her religious community and the marriage, though celebrated according to the rites of the Melkite Church, was not of itself sufficient to transfer her from one religious community to another. In *Goldenberg* (10), and in Levi (11), it was held that for the purposes of Article 54 of the Order in Council (which corresponds to Article 58 and determines the jurisdiction of the Religious Courts of the Jewish Community), it is essential that both spouses be members of Knesset Israel[1)], so that non-membership of one of them ousts the jurisdiction of the Rabbinical Court. Two facts, however, should be noted : first, both the latter cases concerned Jewish parties, and the question of the membership or non-membership of Jews in Knesset Israel may easily be settled by reference to the register of adults with the proper registering authority, namely, the Va'ad Leumi[2)], which is not the case with the members of other communities; when any doubt arises as to whether a person is a member of one or other of the communities, it cannot be so easily solved. Secondly, and more important, the question in each of the three cases mentioned above was to what extent the consent of the parties to have their case tried before a religious court affects the jurisdiction of that court, and the court held that consent whether given expressly or implied from silence, is insufficient to confer jurisdiction on a religious court when the law does not confer such jurisdiction upon it. The question whether a person is estopped from arguing non-membership of a particular religious community was not dealt with at all. In the case of *'Amer* (6), and in the cases that followed that decision, on the other hand, the question of consent was not stressed at all, and in the present case we have not yet reached the stage of considering that question. The question that was asked there, and which is before us at the present stage of our deliberations is

1) Knesset Israel: lit. "Assembly of Israel". The Hebrew title for the Jewish Community in (Mandatory) Palestine. In the State of Israel "Knesset" means "Parliament".
2) Va'ad Leumi: National Council. The elected representative body of the Jewish Community in Palestine

whether, in given circumstances and for a particular purpose, a person is estopped from arguing that he is not a member of a particular community. The court in the time of the Mandate, as we have seen, answered that question in the affirmative; and that view, with all due respect, seems to be the right one, and I propose to follow it.

21. I shall now pass on to the question whether any factors may be found in the conduct of the petitioner towards the first respondent which can conclusively establish her personal status for the purpose of the litigation with her husband, the first respondent, and what are those factors.

22. Both parties call in aid first and foremost the marriage certificates in their possession. According to what we have been told, those certificates are extracts of entries made at the time when the wedding ceremony took place in the books of the Court of the Greek Catholic Community. The certificate in the possession of the first respondent was apparently given to him shortly after the wedding, whereas the certificate produced by the petitioner was prepared in July, 1947, for the purpose of the present case. It should be said at once that those certificates contain nothing that can throw any light on the problem as they contradict each other on the most important details, even though, as stated, they were both presented as copies of the same original entry. Thus, for example, the copy produced by the wife states that her religion is Protestant, whereas in the copy that was delivered at the time to the husband the wife's religion is not noted at all. The husband says in his affidavit that he himself examined the register of entries in the Greek Catholic Church of Nazareth and discovered that the wife is not registered in it at all as a Protestant. An affidavit made by Archimandrite George Nonni, who delivered the copy to the wife, was also produced in support of the husband's contentions, and in that affidavit he states that the word "Protestant", appearing in the copy given to the wife, was interpolated by him (the Archimandrite) by mistake. What is the origin of that mistake? This is his explanation, in paragraph 8 of his affidavit : "This mistake in filling in the marriage certificate was caused because the petitioner told me then, in July 1947 (the date of the copy) the reason why she needed the certificate, but my attention was not drawn to the real reason which lay behind her contention that she was a member of the Protestant Community". That is a somewhat surprising explanation. It should not be forgotten that the petitioner applied to the Archimandrite, not in order that he might determine her religion, but in order to receive a

certified copy of the entry once made in an official register in the custody and possession of the Greek Catholic Church in Nazareth. One would have thought that there is nothing simpler and easier than copying what is stated in a book precisely as it has been written. But such was not the case here. Details of a person's description were inscribed in a copy which do not appear in the original, and the explanation therefore is that the person requesting the copy did not disclose the real intention behind his contention that those details fit his description. The matter becomes even more puzzling when one considers another statement in Archimandrite George Nonni's affidavit. In paragraph 5 of his affidavit, he declares that "in the description of the marriage in question, appearing in the marriage register, it is not stated what is the religion of the spouses." Those remarks do not fit the facts, for in the body of each certificate - that of the husband and that of the wife - it is stated that the husband is a member of the Greek (in Arabic, the "Roman") Catholic religion. We have not been told whether an error has occurred here as well, but from another paragraph in Archimandrite Nonni's affidavit it may be gathered that the respondent's version is nearer the truth; for in paragraph 6 he declared that "the said register (the register of entries) notes the religion of both spouses only where one of them is not a member of the Greek Catholic (Melkite) Community." If these last words are in fact correct, since one of the spouses, namely, the husband in the present case, is described in the register as a member of the Greek Catholic religion, it may be assumed, on the basis of the Archimandrite's affidavit itself, that the second spouse, namely the wife, was not regarded at the time of the celebration of the marriage as a Catholic. However, those matters remain within the sphere of conjecture only, especially in the light of the abovementioned inconsistencies, and for that reason it would be best to ignore the marriage certificates, both the one in the respondent's possession and the one in the petitioner's possession, and for the purpose of determining the position of the petitioner as regards her personal status, I prefer to consider other factors, the correctness of which is not in doubt.

23. It is not disputed that the fact of the petitioner's being a Protestant before her marriage was not overlooked by the first respondent; but before the marriage was celebrated, the petitioner visited the Church of his community together with the fact respondent in order to participate in a Catholic Mass. The marriage itself took place in the Catholic Church, according to the rites and ceremonies of that Church. From the evidence of Archimandrite Zaton and Father Mosoubah (who based their observations on Canon 1061 of the *Codex*

Juris Canonici) before the Chief Execution Officer, it appears that the Catholic Church does not permit mixed marriages unless certain formalities are previously observed and certain certificates are signed. Thus the two spouses, for example, undertake in writing to baptise the children born to them of the union and to educate them as Catholics, and the member of the alien religion has to declare and announce, when the ceremony of marriage takes place, that he elects to adhere to his own religion even after the wedding. Those formalities were not observed in the present case, the undertaking was not signed and the marriage took place as if between two Catholics. In point of fact, the petitioner behaved as a Catholic after the wedding too; she came to the Catholic Church to pray, and the child that was born to them was baptised with the consent of the Melkite Church. It should be emphasised - as was emphasised in *Baqluq* (7), mentioned above - that we are not dealing with a case of change of religion and with the determination of the membership of one of the parties in one religious sect or another, but with the question of the rights and duties as regards the spouses and in relation to each other, flowing from the marriage bonds created between them. In the light of the principle laid down in *'Aztec (6), Baqlua* (7), and *Saffouri (8*), above mentioned, my opinion is that, for the purpose of investigating the question of personal status as between the petitioner and the first respondent, the petitioner is estopped from alleging that she is not a member of the Greek Catholic (Melkite) Community. I have not overlooked the fact that there is in that conclusion a certain extension of the scope of the principle that was laid down in *'Amer* (6), and in the cases that followed that decision, but, in my view, the essential principle remains the same.

24. Having reached the conclusion that the petitioner is, in the circumstances of the case, estopped from arguing that she is not a member of the Greek Catholic (Melkite) Community. I have still to see whether the Religious Court of that community was competent to try the matter brought before it, in view of the other factors upon which the jurisdiction of a court is made conditional by Article 54 of the Order in Council.

25. It is clear - and no one disputes the fact - that if the matter in question falls within the compass of subsection (i) of Article 54, the Religious Court has exclusive jurisdiction to try it, and its judgment will be valid and effective even in the absence of consent on the part of the petitioner to have her case tried by that court; whereas if, on the other hand, it is held

that subsection (ii) applies to the matter in question, the jurisdiction of the Religious Court is conditional upon the consent of the parties.

26. This case concerns the custody of an infant. Even though that matter is not expressly referred to among the matters enumerated in Article 54(i), it has nevertheless been held by this court (in the time of the Mandate) that where the application for the custody of infants is subsidiary to another suit involving a matter of personal status, which is subject to the jurisdiction of the Religious Court, that same court is competent to decide the question of custody also (see *Yedidia v. Yedidia* (12), *Salman v. Assistant Chief Execution Officer Jerusalem* (13), *Khasho* v. *Chief Execution Officer, Jerusalem* (14), and the authorities there cited). But the question is whether the fact respondent's suit before the Religious Court for the custody of his infant son was in fact subsidiary to some other suit in a matter of personal status which was before that court, and which the court was competent to try.

27. Dr. Klug submits that the remedy of custody was subsidiary But if one speaks of "subsidiary", there is a presumption that there is a "principal" claim too. What is the principal claim in the present case? As stated, two orders were made by the Greek Catholic Court on the suits of the first respondent, in addition to the custody order : one of them was the "ta'a", before the custody order, and the other was the separation order, after it. "Ta'a" is, in substance, certainly a matter flossing from the marital relationship, within the meaning of Article 54(i); but custody can by no means be said to be subsidiary to it. For the very essence of the "ta'a" is that it is a vehicle for restoring the domestic peace of the couple. Had the petitioner, for example, complied with that order, the first respondent would not have had recourse to the action for custody. Those two remedies, therefore, are really a "contradiction in terms" and are, by their very nature, incapable of existing under one roof. The one may, at the very most, provide an alternative remedy to the other, that is to say, either a "ta'a" order or an order for custody. But apart from the fact that two alternative remedies are sought in one application and, when granted, are granted in the body of one single order, in the present case they were sought in two separate applications and granted in two separate orders. The custody order was not made until after the "ta'a" had been made final, when it was apparent to everyone that the petitioner would not comply with the directions contained therein. Apart from that, the very concept of an "alternative" remedy indicates that it is not consequential upon some other remedy, the main one, nor is it

subsidiary to it, but stands on its own and only serves as a substitute for some other remedy, some main remedy, particularly where that main remedy cannot be granted. It is the failure of the application for the granting of the main remedy that gives rise to the application for the alternative remedy. Can then, that latter remedy be called subsidiary?

28. Further, can custody of a child be regarded as subsidiary to separation of husband and wife? A custody order may be subsidiary to a separation order. When does that occur? When the application contains a main prayer for separation and a consequential prayer for custody, or when the application for custody is no more than the natural continuation of an application for separation or of a separation order. Here, the custody order was made on July 27, 1946, and in the body of the order it was emphasised that it was final, whereas the separation order was only made two months or more later. Can the later order be regarded as a natural continuation of the earlier one? Dr. Klug contends that the custody order is no more than a single, intermediate chapter in one painful episode, that lasted over a period of time and terminated in the making of the separation order. No one disputes that. But from the very nature of things, each chapter in that episode has to be read independently, the object of one being different from that of the others. Each chapter must stand by itself, one independent of the other, though the story may be a single whole. Accordingly, this is not a case of a principal and a subsidiary claim, but a number of independent principal claims. When lodging the application for custody, it may be that the husband at no time considered that at some later stage he would have to ask for separation also. It may be that the main object of the application for custody was in order to force the wife to carry out the order of "ta'a" that preceded it, so that there would be no necessity either for separate custody or for living separately. At all events, each of the remedies the husband sought, and obtained, was designed for a particular end; and whilst this is a case of proximity of events, it is not a case of a principal and a subsidiary claim.

29. That being so, the question of custody was not within the exclusive jurisdiction of the Religious Court.

30. Here Dr. Klug submits that a distinction should be drawn between "guardianship" and "custody", and that the Codex Juris Canonici only recognises the institution of guardianship.

31. It is not essential for the purposes of the present case to investigate and examine the distinctions that Dr. Klug draws between those two concepts, for even if we are at one with him that the Religious Court made an order for the guardianship of the infant boy, and not for his custody, that does not further his principal argument. For guardianship is not included among the matters of personal status set out in subsection (i) of Article 54 and, as was stated earlier, since the application for this remedy was not joined as consequential relief to the other, the principal remedy, which is within the exclusive jurisdiction of the Religious Court, subsection (ii) of Article 54 is the one applying to the application for guardianship; and for the purpose of the matters stated in that subsection, the parties must consent to submit to the jurisdiction of the Religious Court. The petitioner did not consent to that jurisdiction and is adamant in her objection thereto to this very day. Hence, the order made by the Religious Court, be it an order for custody or for guardianship, was made without any jurisdiction, and cannot therefore, in my view, be carried into effect.

32. In the light of that conclusion, we are, in my opinion, relieved from the necessity of dealing with the other arguments of counsel for the petitioner, namely, that a Religious Court cannot grant a subsidiary remedy unless the parties submit to the jurisdiction and that in the case of custody of an infant the jurisdiction is conditional upon the infant's agreeing through his guardian, and that in the present case the benefit of the child demands that he should remain with the mother.

SMOIRA P. I had the advantage, when considering this case, of having before me the comprehensive judgment of my learned colleague, Cheshin J. I concur in his conclusion that we must make the order nisi absolute, and it is my intention to add, for my own part, only a few observations.

I agree with his view that, generally speaking, the Chief Execution Officer is entitled to alter previous decisions made by him, especially in cases such as *Elmaleh* (1), and *Attar* (2). But in the case under consideration, the Chief Execution Officer would, in my opinion, have been better advised if, after giving his first decision, in which he refused to order the execution of the judgment of the Religious Court, he had referred the party that was not satisfied with his decision, namely, the husband (the first respondent) to the Supreme Court,

instead of giving a second decision in the case. However, I do not wish to go into this point at length, for, in my opinion, our decision does not turn on it.

I am in entire agreement with what my learned colleague said in paragraphs 25 to 32 of his judgment concerning the merits of this case. I consider, with respect, that my colleague demonstrates conclusively in that part of his judgment that in any case the Religious Court had no jurisdiction to try the question of tile custody of the infant son without the consent of both parties, as the question was not tried by the Religious Court as subsidiary to another suit in a matter of personal status. Since that ground is sufficient and decisive for making the order absolute I regard myself, together with my colleague, as relieved from the necessity of dealing with the submissions of Dr. Weil, counsel for the petitioner, mentioned in paragraph 32 of the judgment of Cheshin J., and relieved also from the necessity of considering the arguments dealt with by my colleague in paragraphs 13 to 23 inclusive of his judgment, namely, the question of the construction of section 2 of the Religious Community (Change) Ordinance, and the question whether the petitioner is estopped, by reason of her conduct, from arguing that she is a member of the Greek Catholic (Melkite) Community.

I reserve to myself, therefore, the right to express my view, when the occasion calls for it, on these two questions, namely:

(1) If Dr. Weil was right in his contention that section 2 of the Ordinance also applies when a Protestant *enters a* recognised community, was the Supreme Court correct in its judgment in *Shomali* (4) ?

(2) Should the rule that follows from the judgments in *'Amer* (6), *Baqluq* (7), and *Saffouri* (8), be preferred to the rule which follows from the judgments in *Shubeita* (9), *Goldenberg* (10), and *Lev*i (11) (see the citations in the judgment of my learned colleague, Cheshin J., in paragraphs 19 and 20), in regard to the question whether a person is estopped, by reason of his behaviour, from arguing membership of a certain religious community.

I cannot conclude without saying, on behalf of my colleagues and myself, that the court is indebted to Dr. Weil for volunteering to act as counsel for the petitioner, who appeared

before us at first without any legal assistance, and that the court was greatly assisted by the able arguments of Dr. Weil and Dr. Klug.

ASSAF J. I agree, as to the main part of the judgment, with the opinions of my learned colleagues, and at the same time concur in the observations of the learned President.

Order nisi made absolute.

Judgment given on January l3, 1950.