

*Privy Council Appeal No. 72 of 1945.*

**Khalil Rajih Khalil and others** - - - - - *Appellants*

*v.*

**Tova Rutman of Hudera and others** - - - - - *Respondents*

FROM

**THE SUPREME COURT OF PALESTINE**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY, 1948

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*Present at the Hearing :*

LORD UTHWATT

LORD MACDERMOTT

SIR JOHN BEAUMONT

*[Delivered by SIR JOHN BEAUMONT]*

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This is an appeal from the judgment of the Supreme Court of Palestine, sitting as a Court of Appeal at Jerusalem, dated the 21st July, 1943, allowing an appeal by the respondents from the decision of the Settlement Officer, Haifa Settlement Area, dated the 30th March, 1943, in case No. 1/Kefar Brandeis.

The appellants are inhabitants of the village of Raml Zeita, situate in the sub-district of Tulkarem. Their claim as plaintiffs before the Settlement Officer was to be registered for their appropriate shares as owners in village Masha (common ownership) of certain lands forming part of the village and formerly known as Khor el Wasa' but now known as Kefar Brandeis. The respondents as defendants before the Settlement Officer claimed to be the owners of the lands in question relying on their registration as such owners in the Land Registry at Haifa. The decision of the Settlement Officer was in favour of the appellants, so far as the respondents were concerned. The Supreme Court reversed the decision and gave judgment for the respondents. The question in issue in this appeal is whether the Settlement Officer was competent, and if so justified, in finding in favour of the appellants and thereby over-riding the registered title of the respondents.

Disputes as to the ownership of Khor el Wasa' have been proceeding since the year 1922 and the full history of the matter is long and complicated, but the facts essential to the determination of this appeal can be compressed within reasonable limits.

The first stage of the dispute began in September 1922 when seven villagers of Raml Zeita instituted an action in the Land Court of Nablus, Samaria District, against 44 other inhabitants of the same village. The plaintiffs claimed that the defendants were attempting to transfer to the Jewish Colonisation Association the whole of the Raml Zeita lands. They claimed that the lands in Khor el Wasa' were "Masha" from time immemorial, and they asked for a declaratory judgment to that effect. There were at that time 906 inhabitants of the village, and the plaintiffs owned 7 shares out of this number. Eventually, after a re-trial of the case had been ordered by the Court of Appeal, the Nablus Land

Court, on the 14th April, 1924, held that the five plaintiffs (two of the original seven plaintiffs having withdrawn from the case) had each proved title to one of the 906 shares, and these five shares were ordered to be registered in the respective names of the plaintiffs in the Tapu register. The judgment was affirmed by the Supreme Court in appeal on the 20th January, 1925. In this case, which will be referred to as "the Nablus case," no question as to the boundaries of the village of Raml Zeita arose, and it is the respondents' case that the decision did not cover the lands in Khor el Wasa'; the appellants' case is that it did.

The next stage in the dispute commenced on the 29th March, 1925, when Abdul Fattah Mari el Samara, who was one of the two plaintiffs who had withdrawn from the Nablus case, and his three sons, commenced an action in the Land Court Haifa against three Jews, as defendants, claiming ownership of the lands in Khor el Wasa' on the basis that the land was in the village of Hudera (sometimes called Khudeira or Hudeira) in the Haifa district. An extract from the Turkish Register of Deeds dated 1890 was produced by the defendants in support of their alleged title. This extract appears to show that two of the defendants were each entitled to  $2\frac{1}{2}$  shares out of a total of 286 shares in the land comprised in the register. Assuming that this land included Khor el Wasa' there appears to have been no evidence as to the ownership of 281 out of 286 shares. The defendants did not appear at the hearing and the court, on the 6th April, 1925, decreed the plaintiffs' case on the ground that they were in possession and cultivating the land in dispute, and directed the land to be registered in the Land Registry in the names of the plaintiffs. In pursuance of this Order the names of the plaintiffs were duly entered in the Register of Deeds, Haifa on the 4th June, 1925, and a sale of part of the lands on the next day in favour of respondents 1 and 2 in this case was also entered. It is under this registration that the title of the respondents is made. It is the contention of the appellants, and was so held by the Settlement Officer, that the decision in this case (which will be referred to as "the Haifa case") was based on the fraudulent concealment by the plaintiffs of the fact that Khor el Wasa' was not within the jurisdiction of the Haifa Land Court, and that had the court been told the true facts it would have dismissed the action.

The next stage in the proceedings commenced in the year 1930 and will be referred to as "the 1930 proceedings." By virtue of a Settlement Notice made under section 5 of the Palestine Land (Settlement of Title) Ordinance, 1928 and published in the "Palestine Gazette" on the 2nd May, 1929, the land of Hudera village and other localities were declared under settlement. The effect of this Notice was that jurisdiction in actions concerning rights to land within the boundaries of the village of Hudera was conferred upon the Settlement Officer in accordance with section 6 of the Ordinance. On the 6th November, 1930, one Hasan Mustafa Abu Jabara of Zeita and 86 partners of Zeita instituted proceedings in the Court of the Settlement Officer, Jaffa and Hudera areas, against the present respondents 1 and 2 and others, claiming that Khor el Wasa' lay within the boundaries of the village of Zeita, Tulkarem sub-district, and formed part of the Masha Lands of Raml Zeita, and did not lie within the boundaries of Hudera, and therefore was not within the jurisdiction of the Settlement Officer Jaffa Settlement Area. This case, therefore, directly raised the question whether Khor el Wasa' was at that time within the village of Hudera, which was in the Haifa district, or in the Tulkarem district.

On the 26th June, 1931, the Settlement Officer, Mr. Lowick, delivered judgment. His decision, so far as relevant to the present case, was that Khor el Wasa' was outside the boundaries of the village of Hudera and therefore not within his jurisdiction, that the Nablus case dealt with the lands of Khor el Wasa', that the judgments in that case and in the Haifa case were in direct conflict, and that the judgment in the Haifa case had been procured by fraud practised upon the court to which fraud one, Nissan Rutman, through whom the respondents claimed, was a party. He refused to accept that judgment and directed that the effect of his

decision should be noted in the Haifa Land Registry. In appeal from that decision to the Land Court that court agreed with the Settlement Officer that Khor el Wasa' did not lie within the boundaries recorded in the Kushans of Hudera. There was then an appeal to the Supreme Court, which held that no appeal lay. An appeal was then brought to this Board by special leave, but the leave was granted on the undertaking that the Settlement Officer's decision as to the boundaries should not be questioned in the appeal, and that the appeal should be confined to a challenge of the decision of the Settlement Officer in so far as it affected the title of the appellants. The decision of the Board was expressed in these terms:

" In defining the boundaries of the village of Hudera, the Settlement Officer was entitled to find that the area of Khor el Wasa' was not in Hudera, but within the boundaries of Zeita and/or Attil; that was a purely administrative finding. But, in the opinion of their Lordships, the judgment of the Settlement Officer of the 26th June, 1931, ought to be varied by excluding from the findings any finding that the area of Khor el Wasa' is masha land, and also the orders as to entries in the Land Registries of Haifa and Tulkarem. . . . It is right that their Lordships should make clear that their decision is confined to the question of the jurisdiction of the Settlement Officer in settling the village of Hudera; it does not involve any expression of opinion on the merits of the appellants' claim to part of Khor el Wasa'. The matter will be entirely open to the Settlement Officer, when the villages of Zeita and Attil are under settlement." The findings of the Settlement Officer relevant to this appeal therefore remained in force.

The next stage in the proceedings commenced in the year 1941. On the 18th December, 1940, the High Commissioner had proclaimed Kefar Brandeis (Khor el Wasa') to be a village unit within the sub-district of Haifa. On the 28th October, 1941, a notice of intended settlement of these lands was published in Palestine Gazette No. 1137, and on the 18th November of the same year a notice of commencement of settlement was published in Palestine Gazette No. 1142. On the 5th December, 1941, the appellants instituted proceedings before the Haifa Settlement Officer (Mr. Kenyon) claiming ownership of the lands of Khor el Wasa' as Masha lands. In the claim the present appellants were plaintiffs, the respondents, except the third respondent, and 77 other persons were defendants, and the third respondent and certain other persons were third parties. The question before the Settlement Officer on this claim was whether the lands of Khor el Wasa' were part of the Masha lands of Zeita village, or whether the registration of title of the respondents founded on the judgment in the Haifa case should prevail.

Before discussing the judgment of the Settlement Officer it will be convenient to notice the Scheme of the Land (Settlement of Title) Ordinance, 1928, under which the proceedings before the Settlement Officer were taken. The Ordinance gives directions for bringing parties interested before the Settlement Officer and in Section 10, subsection (2) the Settlement Officer is given power to hear and decide any dispute with regard to the ownership or possession of land in a settlement area. Under subsection (2) he is to apply the land law in force at the date of the hearing but he is to have regard to equitable as well as legal rights to land and is not to be bound by any rule of the Ottoman law or by any enactment issued by the British Military Administration prohibiting the courts from hearing actions based on unregistered documents or by the rules of evidence contained in the Ottoman Code of Civil Procedure or the Ottoman Civil Code. Under section 12 the Settlement Officer is to settle any doubt or dispute as to the boundaries of a village or block within the settlement area. Under section 21 the Settlement Officer is to draw up a schedule of claims, and under section 27 he is to investigate publicly all claims included in the schedule of claims and may determine conflicting claims between two or more claimants, and may decide which claimants are to be plaintiffs and which defendants. Section 31 sub

section (1) provides that after the investigation of such claims to rights as are undisputed, the Settlement Officer shall draw up a schedule of rights and shall transmit a signed copy thereof to the Registrar, and sub-section (2) provides that upon the determination by the Settlement Officer of any disputed claim after the schedule has been sent by him to the Registrar, the Settlement Officer shall inform the Registrar of his decision in such matter, and the Registrar shall thereupon enter particulars of the right which was in dispute in accordance with such decision in the appropriate page of the new register. Section 35 provides that no fresh entries relating to land in a village shall be made in the existing land registers after the publication of the schedule of claims as to the land of the village or any part of the village. Section 36 provides that a new register, in a form to be prescribed, shall be opened for each village, and, notwithstanding any appeal which may be pending, the land shall be registered by the Registrar in such register in accordance with the schedule of rights as provided in sub-section (1) of section 31 and in accordance with the decisions of the Settlement Officer in the case of rights shown as disputed in the schedule of rights. Section 43 is in these terms:—

“ Save as provided in this Ordinance, the registration of land in the new register shall invalidate any right conflicting with such registration.”

Section 54 (a) provides that if a Settlement Officer is satisfied that land has been in the possession of any person for such period and under such conditions as will prevent any action for recovery being heard and that no person is registered as the owner, he shall enter in the schedule of rights the name of the person in possession as owner of the land.

In the hearing of the claim the Settlement Officer reached the same conclusions as had Mr. Lowick in the proceedings of 1930, that is to say that there was a direct conflict as to the title to the lands in Khor el Wasa' between the judgments in the Nablus case and in the Haifa case, and that the judgment in the latter case was obtained by fraud to which the said Nissan Rutman was a party. He came to the further conclusion on the evidence before him that Khor el Wasa' was part of Raml Zeita. He expressed his ultimate conclusions in these terms:

“ The Settlement Officer comes to the conclusion that the registration of Abd el Fattah es-Samara and partners was obtained by fraud, that Nissan Rutman was aware of the matter and a party to the fraud and in consequence the registration ordered by the Land Court of Haifa should be set aside and the judgment of the Land Court of Nablus confirmed in the Settlement. This is the decision in respect of defendants Nos. 1 and 4.”

Defendants Nos. 1 and 4 were the present respondents Nos. 1 and 2. The Settlement Officer also disallowed the claims of respondents Nos. 4 and 5 as to one parcel of land, and the claim of respondent No. 3. The claims of the other defendants and third parties were allowed on the ground that they were bona fide holders and had been in possession for more than the statutory period.

In an appeal by the respondents to the Supreme Court it was held that the Settlement Officer had no power to set aside a judgment of the Haifa Land Court on the ground of fraud, a course which could only be taken by the Haifa Land Court itself. The appeal was allowed on this ground. The learned judges further intimated the view that no fraud was proved which would justify any court in setting aside the judgment of the Haifa Land Court. It is of course clear that the Settlement Officer had no power to set aside a judgment of the Haifa Land Court, nor in fact had he purported to do so. What he purported to set aside was the registration ordered by the Haifa Land Court. This again he could not do in terms, but the effect of registration of the appellants' title in accordance with the findings of the Settlement Officer would be to over-ride the registration of the respondents' title under section 43 of the Ordinance. It is unfortunate that the learned judges of the Supreme Court did not appreciate the real nature of the question for decision.

Under the Ordinance the Settlement Officer is required to determine the title to lands within the settlement area. There is nothing in the Ordinance to suggest that he is bound by judgments inter parties of civil courts, though he would naturally pay great attention to the views of judges affecting title to lands within the area. The judgments in the Nablus case and in the Haifa case were both judgments inter parties, and not in rem, and they did not bind the parties before the Settlement Officer. On the view which he took, and which their Lordships see no reason to doubt, that the Nablus case dealt with the land in Khor el Wasa', the Settlement Officer was confronted with two conflicting judgments of courts of co-ordinate jurisdiction and, apart from any question of the effect of registration, he was entitled to follow the judgment which he thought was right. As to the effect of the registration of the respondents' title in the Haifa registry the new register to be compiled under the Ordinance had to be based on the findings of the Settlement Officer, who is not in terms bound by entries in the old register. It was, however, laid down by this Board in the case of *Mamur Awqaf of Jaffa v. Government of Palestine* (1940 A.C. 503 at p. 511) that:

"the latest tapu register is competent evidence as to the character of the land in question and . . . the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect: otherwise the provisions for a new register would be made to unsettle titles in disregard of the land law."

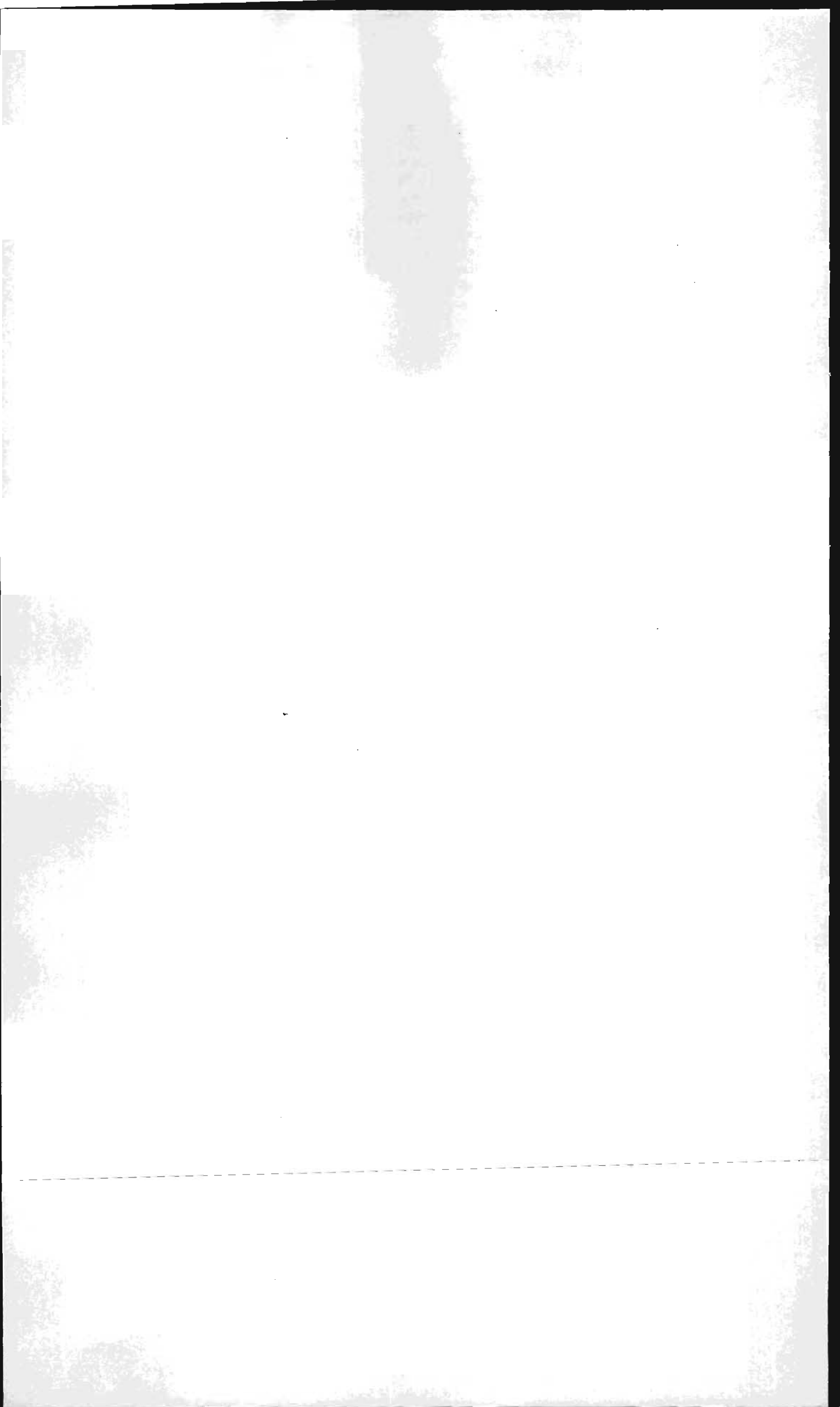
This principle was again affirmed by this Board in Appeal No. 23 of 1945 *Yehoshua Hankin v. Zaki Rashid Esh Shanti* delivered on the 2nd July, 1947. Bearing this principle in mind the question for determination is whether the Settlement Officer was justified in ignoring the registration of the respondents and holding in favour of the title claimed by the appellants. On the view which the Settlement Officer took, from which again their Lordships see no reason to differ, that the judgment in the Haifa case was made without jurisdiction since it affected the title to land outside the territorial limits of its jurisdiction and that the registration ordered by that judgment was not in accordance with the true title to the land, their Lordships think that the Settlement Officer was justified in ignoring the existing registration and in accepting the title claimed by the appellants. As the order of the Haifa Land Court was passed without jurisdiction it is unnecessary to decide whether it was induced by fraud.

The appellants have also relied upon a title by prescription. It would appear from the Order made by the Settlement Officer that as to some of the defendants he was satisfied, within the meaning of section 54 of the Ordinance, that the land had been in the possession of such defendants for such a period and under such conditions as would prevent any action for their recovery being heard; and that he was not so satisfied in respect of the respondents. Limitation is governed in Palestine by Article 20 of the Ottoman Land Code which provides (Tute's translation) that "in the absence of a valid excuse according to the Sacred Law, duly proved, such as minority, unsoundness of mind, duress, or absence on a journey actions concerning land of the kind that is possessed by title-deed the occupation of which has continued without dispute for a period of ten years shall not be maintainable." Ongley's translation uses the word "opposition" in place of the word "dispute." Whether the Settlement Officer thought that the Article would not avail the respondents because their title was founded on fraud or because their possession had not been without dispute or opposition is not disclosed in his judgment. Their Lordships think that, leaving fraud aside, there was dispute or opposition to the title of the respondents in the 1930 proceedings, and that it is impossible to say that the Settlement Officer ought to have entered their names in the schedule of rights as owners of the land under Section 54 of the Ordinance.

In support of their contention that the settlement officer had no power to go behind the registration ordered by the Haifa Land Court the respondents have relied strongly on a decision of this Board in Appeal No. 25 of 1943 *Bahiya Levi v. Amin Nicolas Khoury* delivered on the 24th July, 1947. In that case the appellant had challenged before

the Settlement Officer certain powers of attorney which had been made and authenticated in and before the Sharia Court Nazareth District, and under which the title of the respondents had been registered, on the ground that such powers were forgeries. The Settlement Officer refused to consider the question of forgery of documents which had been authenticated by a competent court. In appeal, the Supreme Court dismissed the appeal on a technical ground. On an appeal to the Privy Council the Board agreed with the decision of the Supreme Court on the technical point and on that ground dismissed the appeal, but the Board then made some observations upon the merits of the case. It is the contention of the respondents that the Board expressed the view that a Settlement Officer has no power to disregard anything based on a decision of a court. Their Lordships think that the observations of the Board, which were in part based on the decision of the Supreme Court in the present case, did no more than affirm that a Settlement Officer has no power to undo what has been done by a competent court. In their Lordship's view there is nothing in the case under discussion calculated to prevent a Settlement Officer in a proper case from disregarding an order of a court passed without jurisdiction, or induced by fraud practised upon the court. The case has no bearing on the present appeal.

For the above reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the decision of the Supreme Court dated the 21st July, 1943, be set aside and that the decision of the Settlement Officer Haifa Settlement Area dated the 30th March, 1943, in case No. 1/Kefar Brandeis be restored. The respondents must pay the costs of the proceedings in Palestine and of the appeal to this Board.



In the Privy Council

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KHALIL RAJIB KHALIL AND OTHERS

v.

TOVA RUTMAN OF HUDERA  
AND OTHERS

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DELIVERED BY SIR JOHN BEAUMONT

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