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At the Supreme Court Sitting as a court of Civil Appeals **CA 54/82**

Before:	**Honorable Deputy President M. Ben-Porat** **Honorable Justice A. Barak** **Honorable Justice A. Halima**
The Appellants:	**1. Edmond Levy** **2. Zeev Golan**
	v.
The Respondents:	**1. Estate of the late 'Afaneh Mahmoud Mahmoud (Abu-Sharef)** **2. Estate of the late 'Othman Ahmed Sharef** **3. Custodian of Absentees' Property** **4. State of Israel** **5. Land Registrar** **6. Hashem Khalil al-Sa'id** **And cross appeal on behalf of respondents 1-2**
Civil Appeal	
Session date:	February 19, 1986
Representing the Appellants (the Respondents in the Cross Appeal):	Adv. H. Siton
Representing Respondents 1-2 (the Appellants in the Cross Appeal):	Adv. H. Strauss
Representing Respondent 3:	Adv. Hason, Director of Fiscal Division at the State Attorney's Office
Representing Respondent 4:	Adv. M. Tilkin
Representing Respondent 6:	Adv. M. Gadot

Judgment

Justice A. Halima

1. The relevant facts to the appeal at bar are as follows:

   Plots 20 and 21 in block 29505 (hereinafter: the **plots**), underwent land settlement proceedings under the Land Rights Settlement ordinance [New Version], 5729-1969, upon the termination of which the plots were registered in the names of:

   'Afaneh Mahmoud (hereinafter: **'Afaneh**)

   'Othman Ahmed Sharef (hereinafter: **Sharef**).

   These two owners are residents of the Jordanian Kingdom who lived in 'Akab village. After the six days war, the two plots constituted part of the territory of the state of Israel, by virtue of the Order for the Application of Israeli Law of 1967 to the area in which the plots are located, whereas the owners, whose names were specified above, continued to reside in 'Akab village.

   It is agreed that 'Akab village is under IDF rule, but Israeli law has not been applied thereto.

2. The proceedings, which lead to the filing of the appeal at bar, commenced when:

   a. Hashem Khalil al-Sa'id (hereinafter: **al-Sa'id**)
   b. Edmond Levy (hereinafter: **Levy**)
   c. Zeev Golan (hereinafter: **Golan**)

   turned to the Jerusalem District Court (Motion for Summary Judgment 664, 630/76).

   In these motions the court was requested to grant orders against the respondents in both motions, which would state, that Levy and Golan were entitled to take any action for the registration of the above two plots in their names (Levy and Golan) with the Land Registration Office.

   The respondents in the above two motions were the following:

   1. The above mentioned Sharef and 'Afaneh, with respect of whom it was noted, near their names, that they were represented by the Custodian of Absentees' Property (hereinafter: the **custodian**).
   2. The custodian
   3. The land Registrar.

   The grounds for the request in both motions, as set forth in the affidavit of al-Sa'id which was attached to the motion notices, were as follows:

   The registered owners (Sharef and 'Afaneh) sold on November 19, 1965 the two plots to al-Sa'id, and both of them signed, for the affirmation of the transaction, an irrevocable power of attorney, before the notary public in Aman – Jordan. According to said power of attorney dated July 26, 1975, al-Sa'id was empowered to take any action in the plots as he deemed fit.

   It should be noted that the application to the court was preceded by the receipt of a permit from the custodian (hereinafter: the **permit**) pursuant to section 22(a)(3) of the Absentees' Property Law, 5710-1950, according to which permission was granted to act according to the power of attorney dated July 26, 1975 and to register the transfer under the name of al-Sa'id. The permit which was

given by the custodian included a condition, according to which the plots would not remain registered under the name of al-Sa'id, and ownership therein should be transferred by him to Levy and Golan, and that all actions which were permitted by him would be carried out contemporaneously.

The court of first instance granted the requested orders (with the consent of all parties whose names appeared on the motion notices) and accordingly, the above mentioned transactions were executed in the registration office. In a hearing dated October 20, 1977 the court was informed of the transfer of full ownership in the two plots to the state of Israel.

3. The action, being the subject matter of the appeal at bar, was initially filed as a motion for summary judgment (1401/76) by the heirs of the previous owners ('Afaneh and Sharef), in which they have requested the court to revoke the orders which were granted on June 1, 1976 in the two motions (664, 630/76). The court was also requested to cancel all actions which were taken based on said orders and following their issuance, and to reinstate the original registration of the two plots.

   The respondents in the above referenced motion for summary judgment were the following:

   1. Al-Sa'id, 2. Levy, 3. Golan, 4. The custodian, 5. Land Registrar, 6. The state of Israel. There was an additional respondent called "Bardarian" but the request which concerned him was denied as soon as the hearing began.

   The court ordered that the motion for summary judgment would be heard as a regular action. The state of Israel, on its part, sent a third party's notice to the defendants Levy and Golan and demanded that the monies which they received in consideration for the transfer of the plots to the state's name, would be returned, should judgment be given against it (the state).

   The hearing in the action terminated and a judgment was given on November 24, 1981, in which the court of first instance ruled as follows:

   a. To revoke the orders which were issued in the above referenced motions 664, 630/76.

   b. To cancel the registration of the ownership in the names of Golan and Levy, and consequently, to cancel the registration in the name of the state;

   c. The two plots would be registered in the names of the previous owners ('Afaneh and Sharef) together with a note, that the two plots were transferred to the custodian;

   d. Levy, Golan and the state were ordered to bear the costs of the owners' heirs (the plaintiffs).

   e. With respect to the third party's notice which was sent by the state, the court ordered to transfer the file to the president of the district court, so that the notice would be heard separately by another judge, as the honorable president would determine.

4. An appeal and cross appeal against the judgment of the court of first instance were filed with this court. The original appeal was filed by Levy and Golan (the appellants) against all other parties who appeared before the court of first instance, in which this court was requested to repeal the judgments and all aspects thereof and reinstate the registration, namely, as it was before the judgment being the subject matter of the appeal was given.

   The cross appeal was filed by the estates of the late 'Afaneh and Sharef. The request arising therefrom is: to repeal the determination of the court of first instance according to which the plots were

Absentees' Property in accordance with the provisions of the Absentees' Property Law; and accordingly, to cancel the registration of the notice which the court of first instance ordered to add in the books according to its above determination.

The arguments in the appeal and in the cross appeal were presented to us by written summations.

In view of the fact that the arguments and contentions which were raised before us are interrelated and cannot be separated, I will not discuss each appeal separately, but will rather discuss the arguments themselves, and my conclusions will apply to both appeals.

5. This appeal is premised on the determination of the court of first instance that the documents, which were attributed to the registered owners, and based on which the orders in motions 664, 630/76 were issued, were forged, and that the argument which was made before the court, as if the sale agreement and the power of attorney were signed by the original owners ('Afaneh and Sharef), had no basis in reality.

The determination of the court on the issue of forgery was not appealed against, neither in the original appeal nor in the cross appeal. Therefore we must assume that the determination of the court concerning the fact of the forgery became final.

However, even if the statement which appears in item 15 of the original notice of appeal, should be regarded as an appeal on the forgery issue (despite the fact that the forgery issue was not specifically referred to in appellants' written summations), even then, the conclusion of the court of first instance in paragraph H of its judgment entitled "The defects in the orders the revocation of which is sought by the appellants", should be upheld. As specified therein, in criminal proceedings which were instituted based on the fact of forgery, and which were heard and determined by the Jerusalem District Court (CrimFile 230/78), al-Sa'id was convicted of forgery of the documents with which we are concerned. The court of first instance relied on the judgment, which was given in the criminal proceeding, by virtue of the provisions of section 42A of the Evidence Ordinance [New Version], 5731-1971, and I accept the comment made by the honorable judge, that in their summations before the court of first instance the two appellants (Levy and Golan) failed to raise any argument which refuted the fact of the forgery. And indeed, a fundamental rule, which is followed by this court, is that if a litigant fails to raise in his arguments a certain argument, it means that even if such argument has been previously raised by him, he is deemed to have waived it (CA 401/66 **Bruria Marom v. Ben-Zion Marom**, IsrSC 21(1) 673).

As noted above, the appellants (Levy and Golan) did not refer to the forgery issue in their summations, and as aforesaid the position of the court of first instance on the issue of forgery should be upheld.

In view of the above conclusion, I see no reason to decide on the validity of the signature of an "absentee", as this term is defined in the Absentees' Property Law, as far as the provisions of section 22(c) of said law are concerned, of documents which pertain to ownership of property, which was also an "Absentees' Property" when such documents were signed. I also see no reason to discuss the actions taken with respect to the case at bar as far as section 19 of said law is concerned. I will only say that the court of first instance was right in its determination that the orders which were issued in motions 664, 630/76 were fraudulently obtained, based on forged documents. At least with respect to al-Sa'id, there is reason and basis to say that he has deceived the court maliciously and in bad faith, and even caused the court to believe him that the plots being the subject matter of the appeal, were sold to him by their previous registered owners ('Afaneh ad Sharef), which in fact, was not true (see the typed page 13 of the judgment).

In view of the above circumstances the following question arises: Are the registered owners precluded from requesting the court to revoke the orders, as a result of which they were deprived of their ownership of the Plots, which were fraudulently obtained from the court based on forged documents?

6. The above question would not have arisen under ordinary circumstances: obviously, it is sufficient that orders were fraudulently obtained by way of forgeries, to justify the application of the party who was injured by these orders (such as the respondents in the original appeal) to the competent court in a request to revoke them; since the fraud pertains to the cause of action itself and it would be just to hear the action of the party who was injured by such deeds (CA 254/58 motion 194/58 **Ingster v. Langfus and cross appeal**, IsrSC 13 449 page 456 across the letter A; IsrSJ 38, 103).

The difficulty in the case at bar arises from the fact that the court of first instance concluded that the respondents in the appeal at hand (the plaintiffs in the court of first instance) were "absentees" in the sense of the Absentees' Property Law. Two questions arise as a result of said determination:

a. Were the respondents "absentees"?

b. A positive answer to question (a) necessarily leads to the second question, which is: are they entitled, as absentees in the above referenced sense, to appear before the court by themselves rather than through the custodian?

I shall discuss these questions in an orderly fashion:

7. The absenteeism issue:

The court of first instance determined, as a matter of fact, that the respondents (the plaintiffs in the court of first instance) were "absentees" according to the Absentees' Property Law. Respondents' successors refute said determination, and the controversy which was created by them stands at the heart of the cross appeal.

Indeed, we all agree that the custodian issued an absentees' confirmation (hereinafter: the **confirmation**) by virtue of his authority under section 30(b) of the Absentees' Property Law, in which the custodian certified that the two plots were "absentees' property" for the purpose of the law. Said confirmation constitutes (as provided in section 30(e) of said law) "*prima facie* evidence of the facts stated in the confirmation, unless the court has otherwise directed." The question now is, has this *prima facie* evidence been refuted?

"Absentees' property" as defined in section 1(e) of the Absentees' Property Law means: property, the legal owner of which was an absentee, at any time during the period between the 16th Kislev, 5708 (29th November, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 5708-1948, that the state of emergency which was declared by the Provisional Council of the State on the 10th Iyar, 5708 (19th May 1948), has ceased to exist, or which, at any time as aforesaid, was held or enjoyed by an absentee, whether by himself or through another…".

This means that if it turns out that the registered owners of the plots (the late 'Afaneh and Sharef) were "absentees" on the relevant date, the confirmation issued by the custodian should remain in force, with all ensuing consequences.

Absentees' Property Law explicitly provides (section 1(b)(1)), that the definition of "absentee" means:

> "A person who, at any time during the period between the 16th Kislev, 5708 (29th November, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 5708-1948(1), that the state of emergency declared by the Provisional Council of State on the 10th Iyar, 5708 (19th May, 1948)(2) has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during said period -
>
> (i) …
>
> (ii) was in one of these countries or in any part of Palestine outside the area of Israel, or
>
> (iii) …".

The phrase "the area of Israel" which appears in the above definition means (section 1(i)):

> "the area in which the law of the State of Israel applies".

Now, as all relevant definitions are before us, we can examine the legal status of the estates of the late 'Afaneh and Sharef (the cross appellants) and of the plots themselves, as follows:

8. We found that the two deceased persons were, during the relevant period, permanent residents of 'Akab village in the Judea and Samaria area, and there is no dispute that this area constitutes part of Palestine within the meaning of section 1(b)(1)(ii) of the above law.

The question which was examined by the court of first instance was whether the law of the State of Israel applied to this area, in which case it is considered as an "area of Israel"; or not – in which case it is not considered as such. The cross appellants (respondents 1, 2) support the first option, whereas the appellants (the cross respondents) support the second option. The court of first instance held that the law of the State of Israel did not apply to the area in which 'Akab village was located, and hence its conclusion, that the respondents were "absentees", and that the plots themselves were "absentees' property". The cross appellants appeal said determination based on the following reasons:

We all agree that 'Akab village is in fact under the rule of IDF Forces. Based on this fact, the cross appellants argue that it should be regarded as an occupied area under the Area of Jurisdiction and Powers Ordinance, 5708-1948 and accordingly, the entire area should be regarded as an area in which the law of the State of Israel applies. If this construction is accepted, section 1 of the Absentees' Property Law will not apply to the two deceased persons and they may not be regarded as "absentees".

The above argument is based on the provision of section 1 of the above mentioned Area of Jurisdiction and Powers Ordinance, which states as follows:

> Any law which applies to the State of Israel in its entirety shall be deemed to apply to the entire area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Israel Defence Forces.

This argument cannot be upheld, taking into consideration the factual situation as proved to us. Indeed, it is true that the IDF commander published a proclamation dated June 7, 1967 concerning the area in which the above referenced village is located, which stipulated that the area was an occupied area by the IDF Forces (it is the proclamation under which the IDF Forces proclaimed military governance). However, the cross appellants cannot rely on this proclamation in view of the fact that the proclamation was not published by the Minister of Defence as required by section 1 quoted above.

The argument that the IDF commander, who published the above proclamation, should be regarded as the representative of the Minister of Defence and acted on his behalf, cannot be accepted either. If this was the case, we would have found some manifestation in that direction in the proclamation itself, which in fact does not exist.

9. In this context a few words should be dedicated to the Legal and Administrative Matters (Regulation) Law [Consolidated Version], 5730-1970. The purpose of this law was to exclude from the entire body of absentees' properties the properties located in the annexed territory (East Jerusalem), only if the owners of such properties were present and resided in the annexed territory on the date of the Law and Administration Order (No. 1), 5727-1967, of June 28, 1967.

Consequently, individuals who, on the relevant date (June 28, 1967) were not residents of the annexed territory or were not present in said territory on that date, will continue to be regarded as absentees for the purpose of the Absentees' Property Law, and their property will be defined as "Absentees' Property".

Under these circumstances, the fact that the plots being the subject matter of this case, are located in the annexed territory, is of no avail, in view of the fact that the legal status of the plots is determined according to the status of their owners (respondents 1, 2), who were and still are residents of the 'Akab village, to which the laws of the State of Israel were not applied. Therefore, I accept, with all due respect, the conclusion of the court of first instance on this issue, as stated in the end of page 8 of the judgment as follows:

> It should be noted that the position of plaintiffs' counsel concerning the construction of the term "the area of Israel" in the Absentees' Property Law would have had far reaching and unreasonable consequences, according to which the Absentees' Property Law would have applied to all Judea and Samaria areas provided that their owners have fully complied with all elements of the "Absentee" definition. As is remembered, one of the alternatives in this definition is that the legal owner is a resident of Jordan, and in view of the fact that the vast majority of the residents of Judea and Samaria were and still are residents of Jordan, the acceptance of the construction proposed by plaintiffs' counsel, would have turned all of them into absentees and their properties into absentees' property."

The aforesaid in the above paragraph is acceptable to me. Consequently, the basis of the cross appeal is undermined, and the cross appeal should be dismissed. My recommendation to my colleagues is therefore to dismiss the cross appeal.

10. I will now discuss the second question posed by me above, namely: what is the source for respondents' standing in this case?

In view of the conclusions I have reached thus far, it is obvious that the two plots, being the subject matter of the appeal before us, were, at all relevant times, vested property, as this term is defined in section 1(c) of the Absentees' Property Law (see also section 4 of said Law).

The term "vested" in the above referenced sense, was clarified by the court in CA 263/60 **Esther Kleiner et al. v. Estate Tax Director**, IsrSC 14 2521, in page 2527 opposite the letters D-E, as follows:

> "… when the property was vested with the custodian he held the ownership therein and when the custodian releases the vested property according to sections 27 or 28 of the Absentees' Property Law ownership does not **revert** retroactively, but rather, new ownership is created which **passes** to the previous owner or anyone on his behalf on the date of the release."

This ruling was made following the court's decision in CA 58/54 **Khabab v. The Custodian of Absentees' Property**, IsrSC 10, 912.

The court of first instance held that the previous owners (respondents 1, 2) had a standing in this case for the reasons which were specified in pages 10-12 of its judgment, which means, that despite the fact that the case concerns a vested property, the absentee owners had a certain interest, by virtue of which they were granted standing in the hearing, being the subject matter of this appeal. The court of first instance held that said interest may be realized by respondents 1,2, whose property (the two plots) was unlawfully plundered from them, in the event that, for any reason, the property would be released according to section 28 of the Law.

11. I do not disregard the difficulties in the case before us. However, before I answer the question which arose as aforesaid I will say:

If I treat the two orders which were issued within the framework of motions 664, 630/76, as interim orders only, it will be easy for me to conclude that the court may, even at its own initiative, revoke the orders which were issued as aforesaid, once it is undisputedly proved that it was deceived when it issued the orders based on fraudulent acts and a criminal offense which was committed by al-Sa'id. The above arises from the clear words of the late honorable president Sussman in his book *Civil Procedure* (Bursi – Peretz & Tovim, 4th edition, 5737) 597-598:

> "An interim order which was issued during a hearing, may be revoked not only by way of an appeal, but rather, the same instance which issued the order may revoke it according to a motion filed by a litigant or *at its own initiative*, in view of the fact that an individual never acquires a vested interest in such an order. Particularly, filing a motion with the same instance would be the appropriate way, when the litigant requests to revoke the interim order as a result of a new incident which occurred after the order was issued… (emphasis added – A.H.)

However, in view of the nature of the orders at hand, and in view of the doubt as to whether they were interim orders or orders which concluded the motions based on which the orders were issued, I will not follow this path, but will rather try to find the solution elsewhere, as follows.

12. The relevant section concerning the standing of an absentee in a judicial hearing which pertains to vested property is section 31 of the Absentees' Property Law, entitled "Plea that property is absentees' property reserved to Custodian". The section itself is drafted as follows:

> A court shall not, in any civil proceeding, entertain the plea that a certain property, being the subject of litigation, is absentees' property, unless the Custodian is a party to the proceeding. If this plea is made where the Custodian is not a party, and the court finds that there is some substance in it, the court shall invite the Custodian to join the case as a party. If the Custodian does so, the court shall consider the plea; if he does not, the court shall regard the plea as invalid.

And what happened in the case before us?

Ab initio the custodian was invited to take part, as a defendant, in the action being the subject matter of the appeal. The custodian raised the argument that the case concerned absentees' property, and has indeed succeeded to prove his said argument. However, at the same time, the plaintiff succeeded to prove the poor basis of the two orders, which were issued based on and following the commitment of criminal deeds.

The question which should be answered is therefore, should the court perpetuate an order which was issued as a result of a criminal deed, which deceived the court?

The learned counsel of the custodian referred to this issue in the statement of defense which was filed on his behalf with the court of first instance, which stated in section 3(b) thereof as follows:

> "Assuming that all arguments of plaintiff's counsel are accepted by the honorable court, and if it is held (which is reasonable in view of the evidence presented) that the power of attorney was forged, and assuming further that it is held that Edmond Levy and Zeev Golan did not acquire anything and the state of Israel does not have available to it the defense granted under section 10 of the Land Law, 5729-1969, even then the end result is that the land must be returned to the custodian. (emphasis added – A.H.)

The custodian did not refute the forgery and deceit. As far as he is concerned, the court has rightfully made its decision. The custodian's request focuses only on one point, that the property be defined as absentees' property once again.

According to the above data, one cannot escape the conclusion that the custodian has in fact adopted the position of the plaintiffs in the court of first instance on the issue of forgery and deceit, and does not wish that the results of the forgery and deceit be perpetuated. Indeed, his position on this issue was manifested within the framework of his defense, rather than as a plaintiff together with respondents 1, 2 (the plaintiffs), but this fact is of no importance and has no bearing on the end result. In other words, both respondents 1, 2 (the plaintiffs) and the custodian share the same view on the issue of forgery and deceit.

In view of the circumstances which were proved thus far, I shall examine whether the conclusion reached by the court of first instance, which did not disqualify respondents' standing in the matter before us, was correct?

13. Before I answer the above question it should be noted that the legislator did not prohibit a person, who was defined by the custodian as an absentee, from applying to the court and prove, that said definition did not apply to him. Otherwise, we may turn the custodian into the sole and conclusive authority on the issue of absenteeism, and certainly, this was not the intention of the legislator.

In HCJ 43/49 **Al-Shaker v. The Inspector of Absentees' Property, Northern District et al.,** IsrSC 2, 926, page 935 opposite the letter C, the court stated as follows:

> "… as it is not absolutely clear whether an attorney may act based on such a power of attorney in legal proceedings in which the custodian himself is a party, and particularly when the issue in question is whether or not the person who gave the power of attorney is an absentee."

In view of the above ruling, the court of first instance held, that the respondents were in Israel when they signed the power of attorney for the lawyer who represented them in this file. Accordingly, the provision of section 22(a)(s) of the Absentees' Property Law was complied with. The honorable judge was therefore correct, when he did not disqualify the mere filing of the action and the appearance of the lawyer who represented the respondents.

14. With respect to the material issue of the action which was filed as aforesaid it should be noted:

Once the custodian determined that the property was an absentees' property as this term is defined in the Absentees' Property Law, one should assume, that for as long as said determination has not been refuted, ownership in said property passed to the Custodian, and the absentees' rights in the property were expropriated (the above quoted holding in CA 260/30, page 2521). However, like the honorable judge, I am also of the opinion that the owner still has some rights or certain interests in the property itself, which enable the absentee to turn to the court for the purpose of protecting them. In the above HCJ 43/49 **Al-Shaker v. The Inspector of Absentees' Property, Northern District et al.,** this court notes, in page 933 opposite the letter C:

> "We are inclined to think that the mere fact that a person is an absentee does not mean that he is completely devoid of any interest in his property, however, the rights therein pas or are vested with the custodian…".

Now, I reach the second question which was raised above, and for this purpose I shall examine what kind of interest remained with respondents 1,2 in the two plots? The answer which was given to this question by the court of first instance (page 10 of the judgment) was as follows:

> "The answer to this is that the absentee is left with the 'possibility' or the 'expectation' that, at some stage, the custodian will release the property according to the provisions of section 28(a) of the law, and as a result of such release 'any right a person had in it immediately before it was vested in the Custodian shall revert to that person or to his successor' – as stipulated in said section."

Said determination does not arise only from the logic of things, but is also well founded in the provisions of the law, some of which were explicitly discussed by the court of first instance.

Now we shall see: when respondents 1,2 became aware of the fact that their property (which they may be able to release in the future) is about to be taken away from them forever based on forged documents which were personally attributed to them, why should such persons who were so harmed, be deprived of the right to turn to the court, to set the record straight? As is known, the court itself was deceived by these documents, and it is difficult to conceive that the court will dismiss a plea of an absentee in such a severe matter, when the custodian himself appears as a party in the hearing (although as a defendant), and (the custodian) supports the arguments of the absentees, either explicitly or impliedly, as is suggested by the general line of his defense. As we have seen, respondents' action focused on two issues:

a. The absenteeism;
b. The forgeries and the deceit.

Indeed, respondents 1, 2 have eventually failed on the issue of absenteeism, but they were fully successful on the issue of the forgeries, to the point that the custodian himself has eventually adopted their position and even supported it.

Under the above circumstances I would not nullify the proceeding as requested by the appellants. The court of first instance acted in the same manner and there is reason and basis to dismiss the appeal against its decision.

15. Furthermore: it was argued before the court of first instance, that when the state acquired the plots from Levy and Golan, it was already aware of respondents 1, 2's arguments (including the arguments concerning the forgery and fraud), which served as the basis for the transfer of the plots to the appellants, since the state acquired the plots from them during the hearing, and proper notice was given to the court in the hearing which was held on October 20, 1977. The court deprived the appellants and the state of the defense afforded by section 10 of the Land Law, 5729-1969. Hence, appellants' appeal before us (item 9 of the notice of appeal).

It should be immediately noted that the state did not appeal the decision of the court of first instance, and with respect to the state its decision became final.

As to the appellants: the court of first instance discussed their argument on this issue (page 15 of the judgment) and held that:

> "Messrs. Golan and Levy did not rely at all on the registration but only on the power of attorney and sale agreement which was presented to them by Al-Sa'id."

Said determination is generally correct and is sufficient for the purpose of depriving the appellants of the defense afforded by the above referenced section 10, in view of the fact that by assuming that the sale agreement and power of attorney were authentic, the appellants took upon themselves a calculated risk. When it became evident that this was a false assumption, they could not dispute the court's decision. Under such circumstances they cannot be entitled to the defense afforded by section 10 of the Land Law, and the argument should be dismissed.

In summary: if my opinion is heard, I would dismiss both the appeal and the cross appeal including all aspects thereof. In view of the above I would not impose costs on either one of the parties.

Deputy President M. Ben-Porat: I agree with the judgment of my honorable colleague, Justice Halima, and I would only like to add two comments:

(a) There is no basis for the argument of the cross appellants, that the 'Akab village should be regarded as an area in which the law of the state of Israel applies and which is therefore an "area of Israel", and consequently the deceased persons should not be regarded as "absentees" as this term is defined in section 1(b)(1) of the Absentees' Property Law. They basically argue that the proclamation concerning the assumption of power by the IDF (hereinafter: **proclamation No. 1**), which was published by the military commander of Judea and Samaria on June 7, 1967, should be regarded as an exercise of power by the Minister of Defence, as defined in the last part of section 1 of the Area of Jurisdiction and Powers Ordinance. This argument should be dismissed for three reasons:

(1) As specified in the judgment of my colleague, Justice Halima, the authorized party – pursuant to section 1 of the Area of Jurisdiction and Powers Ordinance to apply the laws of the state of Israel to an area, which constitutes part of Palestine but is not located within the boundaries of the state of Israel, is the **Minister of Defence**, by way of proclamation which defines the area as being held by IDF Forces, and the military commander, who was not authorized to do the above, cannot act in his stead. Hence, proclamation No. 1, which was issued by the military commander, cannot be regarded as an act under the last part of section 1 of the Area of Jurisdiction and Powers Ordinance.

(2) The military commander, who published the proclamations in Judea and Samaria including proclamation No. 1, which provides, in section 1, that the IDF "assumed the control and responsibility for the maintenance of security and public order in the area", had no intention whatsoever to act by virtue of section 1 of the Area of Jurisdiction and Powers Ordinance. The proclamations of the military commander were issued by virtue of the rules of international public law, and proclamation No. 1, on which the cross appellants wish to rely, constitutes, under these rules, a declarative act, according to which the military commander declares, after the area is seized, that the military assumed the control and responsibility for the maintenance of security and public order in the area. Things to that effect were stated by M. Shamgar in his article "Legal Concepts and Problems of the Israeli Military Government – The Initial Military Government in the Territories Administered by Israel: 1967-1980 (Jerusalem, ed. By M. Shamgar, 1982) 13, 14

> "… it is customary – although not obligatory - for the occupying military force to proclaim and make known its authority, and it is to this end that proclamation No. 1 was issued. In other words, the proclamation was not constitutive but only declaratory."

The authority of Minister of Defence pursuant to section 1 of the Area of Jurisdiction and Powers Ordinance is different and **distinct** by its source and nature. This authority originates from the Israeli law, and its purpose is to apply **Israeli law** to areas held by the IDF. Namely, whereas the purpose of the declarations of the military commander in the proclamations published by him, including the above proclamation No. 1, is to differentiate and **draw a distinction** between the legal status of the Judea and Samaria area, which is governed by the military, and the legal status within the boundaries of the State of Israel, the purpose of section 1 of the Area of Jurisdiction and Powers Ordinance is to create **equality** and unity by applying the same law to the territory of the state as

well as to the area occupied by the IDF. Thus, for instance, after the war of independence, the Minister of Defence exercised the authority established in the last part of section 1 of the Area of Jurisdiction and Powers Ordinance with respect to west Jerusalem.

A similar conclusion concerning the relation between section 1 of the Area of Jurisdiction and Powers Ordinance, and the law which applies in the Judea and Samaria areas, was reached by **Deputy President Landau** (as then titled) in HCJ 390/79 **Dweikat v. Government of Israel et al**., IsrSC 34(1) 1, page 13:

> "The fact is that the Minister of Defence did not issue an order by virtue of his authority under section 1 of the same ordinance (the Area of Jurisdiction and Powers Ordinance – M. BP) with respect to the Judea and Samaria area (and the government of Israel has not applied the laws of the state of Israel to said area, as it did with respect to East Jerusalem, by an order pursuant to section 11B of the Legal and Administrative Matters (Regulation) Law, 5708-1948). When we discuss the legal foundations of the Israeli rule in Judea and Samaria, we are concerned with actual, rather than potential, legal norms, and the basic norm actually underlying the structure of the Israeli rule in Judea and Samaria, is, as aforesaid, until this very day, a norm of military rule, rather than the application of Israeli law along with Israeli sovereignty."
>
> (See also: HCJ 61/80 **Haetzni v. State of Israel et al**., IsrSC 34(3) 595, page 599).

(3) The third, and perhaps the main reason, is that the intention of the military commander, who published the proclamations, and the legal consequence which arose there-from were that the laws of the state of Israel **were not** applied to the Judea and Samaria area. His intention was to achieve an adverse result to that which arises from section 1 of the Area of Jurisdiction and Powers Ordinance, as indicated by the Law and Administration Proclamation (Judea and Samaria) (No. 2), 5727-1967 (hereinafter: **proclamation No. 2**), which was published together with and alongside proclamation No. 1, on which the cross appellants wish to rely.

Proclamation No. 2 states as follows:

> **2. Validity of existing law**
>
> The law which was in force in the area on the 28th of Iyar 5727 (June 7, 1967), will continue and remain in force, insofar as there is nothing therein that contradicts this Proclamation or any Proclamation or Order which will be issued by me, and subject to such modifications as may result from the establishment of I.D.F. rule in the area."

Namely, the intention of the military commander was to act according to Article 43 of the Hague Convention regarding the Law and Customs of War On Land, 1907, and determine, that the law which was in force in the area will continue and remain in force, subject to the above stated qualifications (see the above HCJ 61/80 **Haetzni v. State of**

Israel et al., in page 598). Hence, it is clear that "the basic norm, underlying the structure of Israeli rule in Judea and Samaria… is the norm of military rule. In other words, the law of the state of Israel was not applied to said areas…" (Deputy President Shamgar (as then titled) in HCJ 493, 69/81 **Abu Ita et al., v. Commander of the Judea and Samaria Area et al**.; **Kanzil et al., v. Director of Customs, Headquarters of the Gaza Strip Area, et al**., IsrSC 37(2) 197, page 228), including, the 'Akab village, to which the law of the state of Israel was not applied either. Therefore, there is no basis to the argument that as a result of proclamation No. 1, the Judea and Samaria areas, including the 'Akab village, became an area of Israel in which the law of the State of Israel applies, in the sense of the Absentees' Property Law.

(b) Parenthetically I would like to note, that despite the fact that the appellants may be regarded as "absentees" in the sense of section 1(b)(1) of the Absentees' Property Law, and that consequently, the custodian of absentees' property had the authority to take possession of their lands which were located within the boundaries of the State of Israel following the order of June 1967 which applied Israeli law to Jerusalem, a question may arise as to whether the exercise of the authority under the circumstances of this case was appropriate.

The case concerns residents of the 'Akab village, which were at that time residents of Judea and Samaria under the IDF rule. There is no doubt that they would not have been defined as 'absentees' had their lands not been made part of the unified Jerusalem. The material before us does not clarify whether, under the special circumstances of this case, it was indeed necessary to seize their property following the unification of Jerusalem, despite the fact that they were present and lived in the village under Israeli rule.

The manner by which the custodian exercised his authority on the above mentioned plots of land is not one of the questions which were raised in this appeal, and therefore my comment does not affect our decision, as specified in the judgment of my colleague, **Justice Halima**.

Justice A. Barak: I agree with the judgment of my colleague, **Justice Halima**, and with the addition of my colleague, **Deputy President, Justice Ben-Porat**.

It was decided as specified in the judgment of **Justice Halima** and in the addition of the **Deputy President**.

Given on 10 Adar A 5746 (February 19, 1986), in the presence of Advocate Siton and Advocate Nachlakir and S. Frekorn.