

Hanna Eissa Kawas - - - - - *Appellant*

v.

Bishara Elias Kawas and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 24TH JUNE, 1943

Present at the Hearing:

LORD MACMILLAN

LORD PORTER

LORD CLAUSEN

SIR GEORGE RANKIN

SIR MADHAVAN NAIR

[*Delivered by LORD MACMILLAN*]

This is an appeal by the defendant in an action against him by the widow and two sons of his deceased brother in which they claim from the defendant an account of the transactions of a business carried on in Honduras by the defendant in partnership with the deceased and another brother, whose share was acquired by the defendant. Payment is also claimed of the deceased's share in the partnership assets as the same may be ascertained from the accounts.

The case was contested by the defendant on various grounds but the only defence with which their Lordships are concerned is founded on an agreement dated 10th March, 1925, made between the appellant on the first part and one Shaheen and the deceased's widow of the second part, in which the second parties are described as the legal guardians of the deceased's two sons then in minority "by virtue of a legal certificate of guardianship emanating from the Ecclesiastical Orthodox Court of Jerusalem." By this document it was agreed that the share of the widow in the partnership assets amounted to £250 and that of the two minor children to £1,750. The agreement contained provisions relating to the manner of payment of these sums and the widow appears to have received certain sums in pursuance of it.

If this agreement is valid and binding it affords a complete answer to the respondents' claim for it quantifies and provides for the payment to them of the deceased's share in the partnership assets. But the Courts in Palestine have held that the appointment of Shaheen and the deceased's widow as guardians of his two sons was invalid and consequently that the agreement which they made as such guardians with the appellant is of no avail to him as a defence except in so far as it concerns sums received by the widow on her own account. Having thus disposed of the obstacle interposed by the existence of the agreement of 1925 the Courts below fixed the share of the deceased in the partnership on his death in 1922 at \$24,500, on which sum they allowed interest at 6 per cent. to the date in 1927 when the partnership was due to expire, and gave judgment for payment accordingly subject in the case of the widow to deduction of the sums admittedly received by her. The respondents accept the judgment of the Courts below and have not cross-appealed.

The only question argued before their Lordships and the only question which it is necessary for them to decide is whether the appointment of Shaheen and the deceased's widow as guardians of the two minor sons of the deceased was competently effected; if it was not, the agreement of 1925 is invalid and the judgment below must stand.

The certificate whereby the deceased's widow was appointed guardian to the minor sons and Shaheen was appointed to assist her in performing her duties as guardian was granted in 1925 on her application by the Ecclesiastical Court of the Greek Orthodox Patriarchate, Jerusalem. The jurisdiction of this Ecclesiastical Court to make the appointment is challenged and the question has to be determined by examination and interpretation of the Palestine Order in Council of 1922.

Section 54 of the Order in Council provides as follows:—

“ 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 as defined in Article 59.

(ii) Jurisdiction in any other matters of personal status of such persons, where all the parties to the action consent to their jurisdiction.

(iii)”

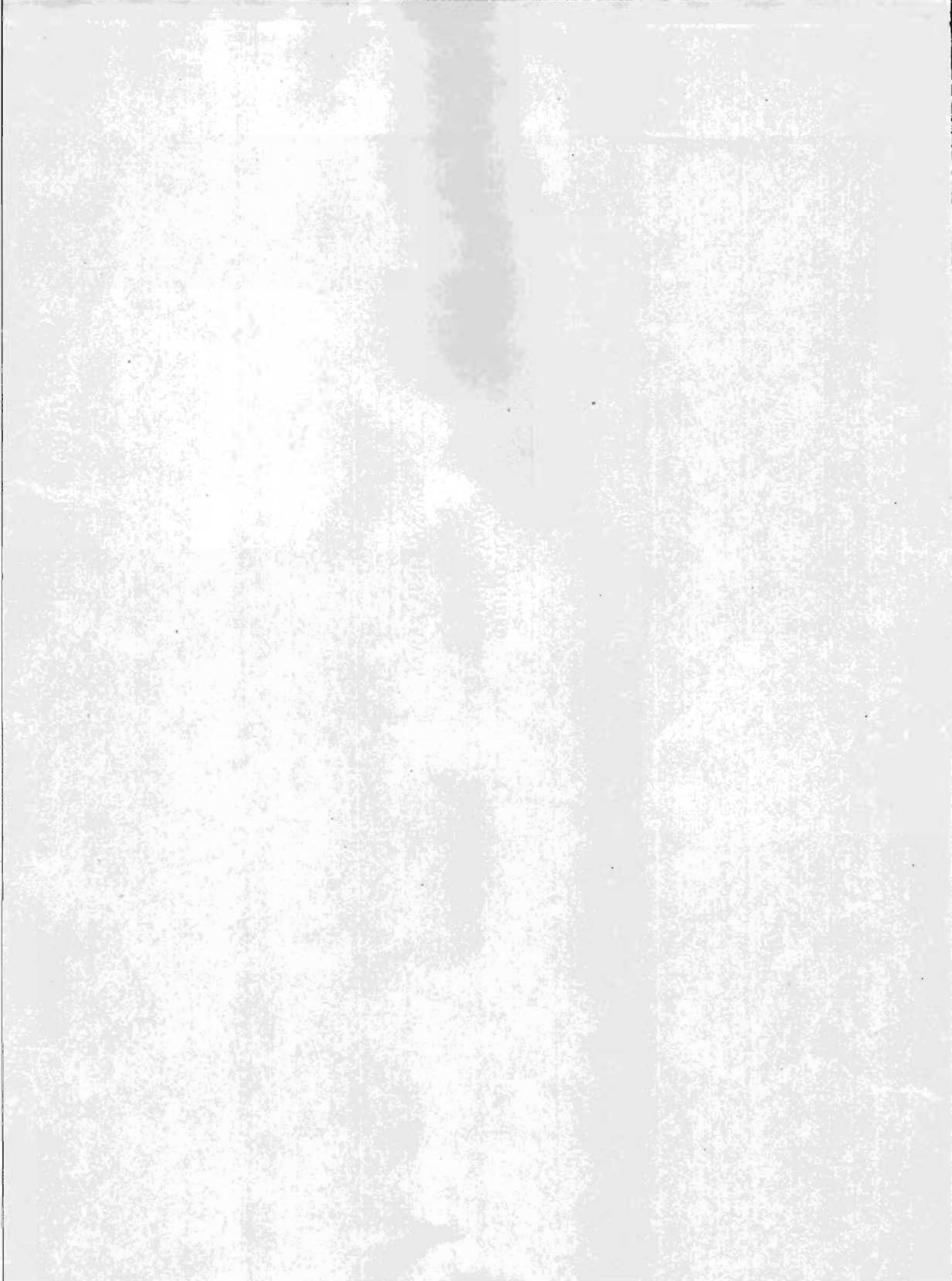
“ Matters of personal status ” are defined in section 51 of the Order to mean “ suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.”

Now it will be observed that in conferring jurisdiction in matters of personal status on the Courts of the several Christian communities (of which the Court of the Greek Orthodox Patriarchate is one), the Order in section 54 discriminates between certain selected matters, enumerated in paragraph (i), with regard to which it confers exclusive jurisdiction on these Courts and any other matters of personal status with regard to which in paragraph (ii) it confers jurisdiction only where all the parties to the “ action ” consent to their jurisdiction. Here the word “ action ” is used, presumably as a synonym for the word “ suit ” used in section 51. Neither word is strictly appropriate to denote non-litigious proceedings. Their Lordships, however, are inclined to infer from the context that these terms are used in a wide and general sense as meaning any proceedings of a judicial character in which the powers of a Court are invoked. Assuming without deciding this to be so, their Lordships are of opinion that all the proper parties to the application for the appointment of guardians to the two minors did not consent to the jurisdiction of the Ecclesiastical Court, for the minors themselves did not and could not consent. Where a consensual jurisdiction requires for its constitution the consent of all parties, this must mean the consent of all whose interests are concerned in the proceedings. If it be said that minors cannot give an effective consent, this does not justify proceedings without their consent. In the case of a consensual jurisdiction absence of consent, whether due to unwillingness to consent or inability to consent, is equally fatal.

On the other hand, if an application for the appointment of guardians does not fall within section 54 (ii), as not being a suit or action, then there is no provision in the Order conferring jurisdiction on this Ecclesiastical Court to entertain such an application. In that case, the application would require to be made to the Supreme Court sitting as a High Court of Justice which by section 43 has “ jurisdiction to hear and determine such matters as are not causes or trials but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice.”

Thus either way the appointment of guardians was invalid. It was made either by the wrong Court or by a Court for whose jurisdiction consent was essential but was wanting. Consequently the agreement of 1925 to which the invalidly appointed guardians were parties is of no binding force, except to the limited extent indicated in the judgment under appeal.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed and the judgment of the Supreme Court of 31st July, 1940, be affirmed. The appellant will pay the respondents' costs of the appeal.



In the Privy Council

HANNA EISSA KAWAS

v.

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AND OTHERS

DELIVERED BY LORD MACMILLAN

Printed by His Majesty's Stationery Office Press,
DRURY LANE, W.C.2

1943