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## Zionist settlers and the English private trust in Mandate Palestine

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### I Introduction: colonized settlers and the colonizer's law

The basic colonial encounter involved a colonizing power and colonized locals. Some colonial situations were more complex, involving a third element: settlers of non-local stock originating in an ethnos, or nation, different than that with which the colonizer was identified. Two prominent examples from the annals of the British Empire are the French inhabitants of Nouvelle France after France ceded it to the British in 1763, and the Dutch inhabitants of the Cape Colony after the British conquest of 1806. The British typically permitted such settler populations to retain at least parts of the laws to which they were accustomed, which laws were often based on the laws of the settlers' jurisdiction of origin. As regards settler use of English law, the English sometimes provided for the application of parts of it to non-British settlers, while blocking such settlers' attempts to use other parts. The part of English law most commonly applied to non-British colonial subjects, both settlers and natives, was commercial law, in order to facilitate commerce between different parts of the Empire. The parts least commonly applied to such inhabitants were family law, land law and the law of inheritance.<sup>1</sup>

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<sup>1</sup> For colonial powers' conservative bias, keeping much of pre-conquest law in place as regards both the native population and settlers unassociated with the conquering power, see L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press, 2002), p. 2; for the British colonial preference for installing English commercial law in the colonies see T. O. Elias, *British Colonial Law: A Comparative Study of the Interactions Between English and Local Laws in British Dependencies* (London: Stevens & Sons, 1962), p. 128; for the British colonial preference for keeping the pre-conquest family law, land law and law of inheritance in place, *ibid.*, pp. 50–1, 143, 199, and S. E. Merry, 'From Law and Colonialism to Law and Globalization' (2003) 28 *Law & Social Inquiry* 572. For the 'continuum with respect to the likelihood of transplantation', starting with commercial law as likeliest to be transplanted and ending with family law as the least likely, see R. Harris and M. Crystal, 'Some

Trust law, at the intersection of those four disciplines, was a special case. This essay describes the attempts of the Zionist settler population of Mandate Palestine to use the common law private trust, the Mandate government's response and the settlers' resulting preference for trust companies over individual trusteeship, while occasionally using the latter despite the government's disapproval. Other British-ruled non-British settler populations, such as the French of Lower Canada and the Dutch of the Cape Colony, had the English private trust available to them as a result of their British rulers having made it available to the British settlers in the same territories.<sup>2</sup> Native populations, too, such as those of British-controlled India and Ceylon, were eventually permitted to use the English trust, both private and charitable. Building on the Indian and Ceylonese examples, one can construct a model of the typical process by which the English trust has been received in colonial legal systems. Non-British inhabitants' use of the English trust was first legitimized and facilitated by the colonial courts' applying the English law of trusts to disputes regarding natives' trusts. Concurrently, colonial draftsmen made incidental references to the trust in colonial legislation. Eventually, comprehensive trust codes were enacted.<sup>3</sup> As regards the reception of the English private trust in Mandate Palestine, only the second element of this model – incidental legislative references to the trust – occurred. Case law-based reception was stopped in its tracks by an unsympathetic Chief Justice. While judicial hostility did not stop Zionist settlers in Palestine from actively using the English private trust, it did prevent codification of the subject for the duration of the Mandate.

Zionist settlers in Palestine had fewer reasons to abstain from using the English trust than settler populations such as the Canadian French or the South African Dutch. Unlike those populations, Zionist settlers were not attached to any pre-existing legal system or tradition to which the English trust did not belong. The Zionists had no metropole, from which they ventured to Palestine and to the law of which they were attached.

Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine' (2009) 10 *Theoretical Inquiries in Law* 561, 562–4 and sources cited therein.

<sup>2</sup> For the reception of the English trust in Lower Canada (later the province of Quebec), see D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada*, 4th edn (Toronto: Thomson- Carswell, 2012), p. 1413; for its partial reception in the Cape Colony, see T. Honoré and E. Cameron, *Honoré's South African Law of Trusts*, 4th edn (Capetown: JUTALaw, 1992), pp. 15–16; T. Honoré, 'Trust', in R. Zimmermann and D. Visser (eds.) *Southern Cross: Civil Law and Common Law in South Africa* (Oxford University Press, 1996), p. 849, pp. 851–63.

<sup>3</sup> See discussion at pp. xxx below.

Zionist immigration to Palestine came, during the Mandate era, principally from the USSR, Poland, Germany, and other Eastern and Central European countries, where Jews often suffered persecution, some of which was brought to bear by legal officers and was even directly expressed in the law.<sup>4</sup> The Jews exiting those countries generally had no attachment to their law. Neither were they attached to the late-Ottoman law which prevailed in Palestine before the British conquest. Nor were they attached to any form of Jewish law: most Mandate-era Zionist immigrants to Palestine had no intention of submitting to either the traditional Rabbinical law (*halacha*) or the Rabbis who controlled it. Attempts to fashion a Westernized, up-to-date version of Jewish law, rebranded as 'Hebrew law', failed. As Ronen Shamir put it, 'at the height of establishing, reinventing, and dreaming the resurrection of a Jewish nation in Palestine, many Zionists rejected Jewish law, even at its renewed Hebrew-national appearance, and enthusiastically embraced the law of the British-governed colonial state of Palestine'.<sup>5</sup> At least some of them wanted this embrace to include the common law private trust.

That unusually ravenous Zionist appetite for the forms of English law met, in Palestine, a circumscribed, tentative and cautious British colonial government. The British, having conquered Palestine in 1917–18, governed it from 1922–48 as an 'A' Mandate entrusted to them by the League of Nations. Under that Mandate they undertook both to 'facilitate Jewish immigration . . . and . . . encourage . . . close settlement by Jews on the land' and 'ensur[e] . . . that the rights and position of other sections of the population are not prejudiced'.<sup>6</sup> They further promised that '[r]espect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular, the control and administration of Wakfs [Islamic trusts] shall be exercised in accordance with religious law and the dispositions of the founders'.<sup>7</sup> Accordingly, the British largely left in place the existing panoply of religious community courts, each vested with exclusive jurisdiction over its community members' matters of personal

<sup>4</sup> For the history of Jewish Zionist immigration to Palestine during the Mandate era, see M. Lissak et al. (eds.), *The History of the Jewish Community in Eretz-Israel since 1882: The British Mandate Period: Part One* (Jerusalem: Mossad Bialik, 1993).

<sup>5</sup> R. Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (Cambridge University Press, 2000), p. 4.

<sup>6</sup> Mandate for Palestine and Transjordan, s. 6. The text of the Mandate is printed in N. Bentwich, *The Mandates System* (London: Longmans, 1930), pp. 137–45.

<sup>7</sup> *Ibid.*, s. 8.

status.<sup>8</sup> Private law matters were, in principle, left to be governed by the *shari'a*-based Ottoman Civil Code, the Mejlle.<sup>9</sup>

Straddling the part of the law which has been most deeply Anglicized in Palestine (commercial law) and those parts which have been least Anglicized (family law, land law and the law of inheritance), trust law provided a challenge for the territory's British rulers.<sup>10</sup> The law as it stood on the eve of the British conquest knew one key form of trust, the Islamic *waqf*; even Palestinian Jews and Christians made, during the Ottoman era, use of the *waqf*.<sup>11</sup> The British gave Palestine's Jewish (Rabbinical) and Christian religious courts exclusive jurisdiction over the 'constitution and internal administration' of Rabbinical trusts (*hekdeshim*) and Christian religious trusts, respectively.<sup>12</sup> As Palestine's Muslim majority continued, during the Mandate era, to prefer the *waqf* over other forms of trust,<sup>13</sup> it was the Zionist settlers in Palestine who, more than other parts of its population, used the English private trust and trust company. Law reports, court files, period newspapers and archival materials show those settlers using them frequently, energetically and effectively for a great variety of purposes. Much, though by no means all, of the use of the common law trust and trust company by Zionist settlers in Palestine was focused on facilitating Zionist settlement in Palestine: private initiatives and official Zionist organs

<sup>8</sup> Palestine Order in Council 1922, ss. 47, 51–7, 64–5 (hereafter: 'Palestine Order in Council'). The text of the instrument is printed in Bentwich, *The Mandates System*, above, note 6, pp. 146–65.

<sup>9</sup> A. Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press, 2006), pp. 55–8.

<sup>10</sup> The process of partial Anglicization and the development of Mandate-era Palestinian law more generally have been the subject of several essays and monographs. Three highlights are E. Malchi, *The History of Law in Eretz-Israel*, 2nd edn (Tel-Aviv: Dinim, 1953); Shamir, *Colonies of Law*, above, note 5; and Likhovski, *Law and Identity*, above, note 9.

<sup>11</sup> Ron Shaham, 'Christian and Jewish "Waqf" in Palestine during the Late Ottoman Period' (1991) 54 *Bulletin of the School of Oriental and African Studies* 460.

<sup>12</sup> The Palestine Order in Council gave non-Muslim communities' religious community courts exclusive jurisdiction over the 'constitution and internal administration' of religious trusts constituted before those courts according to the religious legal traditions they applied: §53(3) of the Palestine Order in Council, concerning Rabbinical Courts, §54(3) of the Palestine Order in Council, concerning Christian Ecclesiastical Courts. The *shari'a* courts were, similarly, granted exclusive jurisdiction in cases regarding the constitution or internal administration of a *waqf* constituted for the benefit of Moslems before a Moslem Religious Court: *ibid.*, §52.

<sup>13</sup> For the development of Palestinian *waqfs* during the Mandate era see Y. Reiter, *Islamic Endowments in Jerusalem under British Mandate* (London: Frank Cass, 1996).

competed in funnelling both Jews and Jewish funds from the Jewish Diaspora to the site of the promised 'National Home'.<sup>14</sup>

Part of the value of this study, then, is in providing a particularly sharp example of a colonial population adopting more of the colonizer's own law than that colonizer was willing to have it use. This dynamic is one reason for my exclusive focus on Zionist settlers' engagement with the common law private trust. The Arab and non-Zionist Jewish populations preferred trust forms (the *waqf* and *hekdesb* respectively) which were not derived from the Mandatory power's metropolitan legal system. It may have not been accidental that the English trust, which, as Maitland noted, 'perhaps forms the most distinctive achievement of English lawyers',<sup>15</sup> proved a major sticking point in the Anglicization of the law of Palestine: the Mandate government never intended that Anglicization to be complete, and perhaps some British colonial officials saw the trust as too peculiarly Anglo-Saxon for such a blatantly non-Anglo-Saxon population, which already had its own indigenous forms of trust. On the other hand, as we shall see, it may be that the British colonial courts of Palestine's eventual rejection of settlers' attempts to use the common law private trust was largely a result of the wrong test case having been ill-argued before the wrong judge.<sup>16</sup> One key English legal idea the British did introduce to Palestine was the doctrine of precedent. A single Supreme Court decision rejecting the use of the English private trust in Palestine could thus bring about, if cited and applied in later cases, a complete derailment of the reception process.<sup>17</sup>

Part II describes how one of the leading lawyers of Palestine's Zionist settler community, Mordechai Eliash, tried and failed to have a conveyance of land to trustees on a conventional family trust of the English type registered at the Jerusalem land registry. Eliash having taken his case to the Supreme Court of Palestine, the Court produced an oblique decision, which could be construed as saying that the English private trust had not

<sup>14</sup> The British government had, in a declaration made on 2 November 1917, and again in the text of the Mandate for Palestine and Transjordan, declared its favorable view 'of the establishment in Palestine of a national home for the Jewish people': see Bentwich, *The Mandates System*, above, note 6, p. 137 (preamble).

<sup>15</sup> F. W. Maitland, 'Uses and Trusts' in *Equity: A Course of Lectures*, revsd. by J. Brunyate (Cambridge University Press, 1936).

<sup>16</sup> See text accompanying notes 77–79 below.

<sup>17</sup> For the workings of Mandate-era Palestinian case law, and their impact on the reception of English legal ideas in the law of Palestine, see Likhovski, *Law and Identity*, above, note 9, pp. 61–83.

been received into the law of Palestine. Eliash's attempts to correct this result by legislative action failed. Some Mandate-era Palestinian legislation did, nevertheless, refer to the trust concept in private, rather than charitable, contexts, and the courts did occasionally use the concept as if it was part of the law of Palestine, thus creating an uneven and unpredictable 'partial reception'. I compare the British authorities' Palestinian approach with their greater readiness to introduce the English private trust into the law of other colonies and mandated territories. In Part III, I describe the use Zionist settlers in Palestine made of private trusts and trust companies throughout the 1930s and 1940s, for business, investment, land-purchase, and construction purposes. Trust companies were also key to the Zionist movement's 1930s effort to help Germany's Jews escape Nazi Germany with as much as possible of their property intact. During the 1940s, trusts became, as I show in Part IV, a key locus of debate among Palestine's burgeoning community of Zionist settler jurists. Leading legal academics and practitioners debated both whether English-style private trusts were part of Palestine's then-current law, and whether they should be a part of the law of the future Jewish state. Part V concludes.

## II A lawyer rebuffed: Mordechai Eliash's family trust and the Mandate authorities

Mordechai Eliash was born in the Russian Empire in 1892, attended law school in both Berlin and Oxford, and immigrated to Palestine in 1919. A prominent figure of Religious Zionism at a time when most Zionists were not observant and most observant Jews were not Zionist, he quickly became one of the leading lawyers of Mandate Palestine.<sup>18</sup> Having in 1925 purchased 5.04 *dunums* of land in Ram, a village north of Jerusalem, he sought in 1931 to transfer the land to trustees – his brother, banker Alexander Eliash, and his employee, Adv. Moshe Kehati – on trusts fairly similar to those of a conventional English

<sup>18</sup> For Eliash's professional status see, e.g., N. Brun, *Judges and Lawyers in Eretz Israel, between Constantinople and Jerusalem, 1900–1930* (Jerusalem: Magnes, 2008), p. 360, note 51. For biographical information see G. Strassman, *'Ote ha-Glima: Toldot Arikhat ha-Din be-Eretz Yisra'el* [Wearing the Robes: A History of the Legal Profession to 1962] (Tel Aviv: Israel Bar Press, 1984), pp. 26–31, pp. 303–4. For the Eliash papers see Central Zionist Archives (CZO), Mordechai Eliash Private Archive File List, available at [www.zionistarchives.org.il/ZA/showpad.aspx?PageId=25&ParamId=A417Eliash,Mordecai&-Flag=4](http://www.zionistarchives.org.il/ZA/showpad.aspx?PageId=25&ParamId=A417Eliash,Mordecai&-Flag=4). The Eliash papers make-up class A417 at the CZO.

family trust.<sup>19</sup> In February, the trustees applied to the Director of Lands, Jerusalem, asking that he register the transaction.<sup>20</sup> Five months later, the Acting Director of Lands, Moshe Doukhan, denied their application.<sup>21</sup>

Doukhan did not provide reasons for his decision. A property law textbook he published in 1935 hints at what may have been his reasoning. The land Eliash sought to dedicate was *miri* land, the full ownership of which was (according to Ottoman land law, which still applied, subject to Mandate-era amendments, in Palestine) vested in the Sultan or state. Private 'owners' of *miri*, like Eliash, were the state's tenants, though able to sell their land, mortgage it and pass it to their heirs. Ottoman statutes specifically provided that 'owners' of *miri* could neither bequeath it nor dedicate it as a *waqf*, and Doukhan extended this rule to the English trust, noting that '[i]n practice the Land Registry refuses to allow the registration of a trust of Miri, relying upon the general provisions of the Ottoman Law'.<sup>22</sup> He may have been referring to his own decision in Eliash's application. Other features of the legal background provide further likely reasons for Doukhan's decision. The trustees' petition, seeking to transfer land in Palestine to trustees of an English-style private

<sup>19</sup> The trusts were: first to Alexander Eliash, to secure his collection of debts Mordechai owed to him; next the income to be paid to Mordechai for 20 years (his then-expected lifespan); then the income to be paid, in equal shares, to Mordechai's two children for life (his widow was to have a quarter of the income for her lifetime); and finally a share of capital equivalent to the share of income allocated to each of the two children to be distributed, on the death of each child, to his or her issue, in shares as that child should in his or her will direct or, in the absence of a direction, equally. Some drafting imperfections, such as the repeated use of 'settler' for 'settlor', may be evidence for the draftsman's inexperience with such trusts. The draft trust deed is in Israel State Archives (ISA), case file for HCJ 77/31 *Eliash v. Director of Land* (hereafter: *Eliash* case file). On Alexander Eliash see Y. Rephael, 'Alexander Eliash', in *Encyclopedia of Religious Zionism*, (Jerusalem, Rav Kook Institute, 1972), vol. IV, pp. 185–6.

<sup>20</sup> Letter of 23 February 1931, in *Eliash* case file.

<sup>21</sup> Letter of 10 July 1931, in *Eliash* case file.

<sup>22</sup> F. M. Goadby and M. J. Doukhan, *The Land Law of Palestine* (Tel-Aviv: Shoshany's Printing Co., 1935), p. 94. The 'general provisions' referred to were article 121 of the Land Code of 7 Ramadan, 1274 A.H., and article 8 of the Provisional Law on Holding Real Estate of 5 Jamada Awal, 1331 A.H. Both provide that *miri* land may not be dedicated as *waqf*. An English translation of the Ottoman Land Code is available: *The Ottoman Land Code. Translated from the Turkish by Frederick Ongley* (London: Clowes and Sons, 1892). I thank one of the reviewers for the *Law and History Review* for referring me to Doukhan's book. For a discussion of the Ottoman *miri* regime see M. Bunton, *Colonial Land and Policies in Palestine, 1917–1936* (Oxford University Press, 2007), pp. 36–7.



family trust, was at least rare and possibly unprecedented.<sup>23</sup> Its legal basis was shaky, as the reception of the English private trust into the law of Mandate Palestine was, at the time, an open question. Palestinian law knew some other types of trust. Islamic *waqfs* had been commonplace for centuries.<sup>24</sup> The Mandate administration had in 1924 created, by Ordinance, a civil (non-religious) legal regime to govern charitable trusts.<sup>25</sup> This Charitable Trusts Ordinance, drafted by Doukhan's 1935 co-author, Frederic Goadby, Director of the Mandate government's law school, in consultation with Palestine's first Attorney-General, Norman Bentwich, was 'modeled on the Ceylon Trusts Ordinance of 1917', carefully stripping this source of the majority of its provisions, which dealt with private, rather than charitable, trusts.<sup>26</sup> The decision to restrict Palestine's English-inspired statutory civil trusts regime to charitable trusts was explained by Herbert Samuel, High Commissioner at the time:

It is believed that only a small number of English persons in the country will desire to create private trusts. Palestinians regularly use the institution of the wakf for the purpose of family settlements; and it does not appear expedient to encourage the introduction of a different system.<sup>27</sup>

Not anticipating the frequent use of private trusts for business and investment purposes in 1930s Palestine, this reasoning, focused exclusively on family settlements, made for the omission of the private trust from Palestine's Trusts Ordinance. That Ordinance was not the only one, however, to mention the trust: incidental use was made of the term 'trust' in several other ordinances enacted by 1931. Six of those references seem to refer to non-charitable trusts: the Companies

<sup>23</sup> I have found no trace of an earlier application of this sort; later attempts would have been stymied by the *Eliash* precedent.

<sup>24</sup> There is a rich literature on the use of *waqfs* in Palestine. The key work for the Mandate era is Reiter, *Islamic Endowments*, above, note 13.

<sup>25</sup> Ordinance to Regulate Charitable Trusts Established Otherwise than in Conformity with Religious Law 1924, 1 *Legislation Of Palestine, 1918-1925* (Norman Bentwich compiler, 1926), p. 120.

<sup>26</sup> The modelling of the Palestinian Ordinance on the Ceylonese one is mentioned in N. Bentwich, 'Memorandum on the Amendments of the Charitable Trusts Ordinance proposed by the Chief Justice', UK National Archives (hereafter: UKNA), CO 733/75, 188. Bunton, *Colonial Land*, above, note 22, at 15, mentioned the Ceylonese origins of the Palestinian ordinance, referring to page 185 of the same collection of minute sheets which contains Bentwich's Memo. Goadby's draftsmanship is established by R. H. Drayton, Assistant Attorney General, 'Memorandum Regarding the Amendments Proposed by the Chief Justice', UKNA, CO 733/73 (9 September 1924), 1.

<sup>27</sup> Letter of 27 March 1925, UKNA CO 733/91/15719, 152, pp. 1-2, paragraph 3.



Ordinance of 1929 specifically grants all companies the power to act as trustees, as well as referring to the use of trustees in the employee compensation scheme, debenture and winding-up contexts.<sup>28</sup> The Partnerships Ordinance of 1930 discusses first the consequences of ‘a partner being a trustee improperly employ[ing] trust property in the business or on the account of the partnership’, and later notes that while on the death of a partner, ‘legal interest[s] in any land which belongs to the partnership’ shall pass according to the law of succession, the heirs shall hold that interest ‘in trust’ for the surviving partners.<sup>29</sup> While the first and fifth of those six instances can be reasonably read to refer to charitable rather than private trusts, the other four, three of which use the term ‘trust’ in specific company law contexts, cannot.<sup>30</sup>

<sup>28</sup> Companies Ordinance No. 18 of 1929, *Official Gazette*, 15 May 1929, 378, gives, in subsections (o) and (w) of Schedule II, all companies the power to act as trustees unless that power is specifically excluded in a company’s memorandum of association. Section 98(1)(b) permits ‘the provision by a Company . . . of money for the purchase by trustees of fully-paid shares in the Company to be held by or for the benefit of employees of the Company’. Ss. 124 and 128 mention trustees in the debenture context, and s. 180 mentions them in the winding-up context. The term ‘trust’ is further mentioned in ss. 29(2) (‘No notice of any trust express, implied or constructive shall be entered on the register or receivable by the Registrar in respect of any Company’), 77, voiding provisions exempting officers of companies from, or indemnifying them against, liability in respect of, e.g., breaches of trust in relation to the company, 78(1) and (3), giving the Court power to exempt directors and trustees from liability for, e.g., breaches of trust, and 79(1) and (3), which create two kinds of statutory constructive trusts. For the history of the Ordinance see Harris and Crystal, ‘Some Reflections’, above, note 1.

<sup>29</sup> Partnership Ordinance, No. 19 of 1930, *Official Gazette*, Gazette Extraordinary, 8 August 1930, 646, at ss. 20 and 29(2) respectively. For discussion of s. 29(2) see Z. Tzeltner, ‘The Private Trust in Israel’ (1960) 15 *Ha’Praklit* 214, 225–7.

<sup>30</sup> The term ‘trust’ was further mentioned in legislation referring to public-owned land. The parent provision in this context was §12(1) of the Palestine Order in Council, which provided that ‘[a]ll rights in or in relation to any public lands shall vest in and may be exercised by the High Commissioner for the time being in trust for the Government of Palestine’. Another prominent Mandate-era use of the term ‘trust’ was in C. A. Hooper’s much-used translation of the *Mejelle*, the Ottoman Civil Code: C. A. Hooper, *The Civil Law of Palestine and Trans-Jordan* (London: Azriel Press, 1938). Hooper translated the title to Book VI as ‘Trusts and Trusteeship’ (ibid., p. 185), despite its subject matter being, more generally, possession of another’s effects, as of a found object by the person finding it; the Ottoman Turkish title to Book VI is ‘emanet’, Young’s French translation being ‘Des choses confiées à autrui’: G. Young, *Corps de Droit Ottoman*, vol. VI (Oxford: Clarendon Press, 1906), p. 278. The term was used in other Mandate-era English translations of Ottoman legislation applicable in Mandate Palestine: see article 236 of the Ottoman Penal Code of 1859, in both: (i) C. G. Walpole, trans. (from the French), *The Ottoman Penal Code*, 28 *Zilhijeh 1274* (London: Clowes and Sons, 1888), and (ii) J. A. S.

Only two of the six seem, however, to have been the results of a conscious decision to use the English concept of a trust in the law of Palestine, outside the charity context. Palestinian legislation on issues not unique to Palestine was largely put together by cutting and pasting provisions from existing English and colonial enactments. This method of legislation was prone to inadvertent reception: the incorporation of English and colonial legal concepts, formulations and rules into Palestinian statute absent an explicit, considered decision to do so. While Government of Palestine and Colonial Office personnel seem to have generally been quite careful in composing Palestinian Ordinances, some details seem to have slipped in inadvertently. This may have been most likely to happen with the longest and most technical of Ordinances, such as the Companies Ordinance.<sup>31</sup> Though much documentation having to do with the drafting of this Ordinance has been lost,<sup>32</sup> we know it was drafted by Henry Nathan, of the London law office of Oppenheimer and Nathan, based, principally, on the UK Companies (Consolidation) Act 1908, and the 1926 Report of the UK Company Law Amendment Committee of 1925–26.<sup>33</sup> Nearly all the Ordinance's provisions where trusts are mentioned can in fact be traced, either to equivalent provisions in the 1908 Act, or to recommendations in the Report.<sup>34</sup> Nathan, who repeatedly expressed an agenda of conforming the commercial law of Palestine as nearly as may be to that of England,<sup>35</sup> seems to have

Bucknill and H. Apisoghom, trans. (from the Turkish), *The Imperial Ottoman Penal Code* (London: Humphrey Milford, 1913). Both translators used the term 'trust'.

<sup>31</sup> The post-1931 case of the elaborate Income Tax Ordinance of 1941 seems to have been similar: see discussion at text to notes 61–62.

<sup>32</sup> '[T]he Government of Palestine files on the drafting of that Ordinance have been lost . . . [t]he first in a series of four files created at the Colonial Office in London is also lost. The second covers . . . a stage at which the third draft of the ordinance was already distributed and a fourth was being drafted': Harris and Crystal, 'Some Reflections', above, note 1, 571.

<sup>33</sup> Cmd. 2657. For the drafting of the Palestinian Ordinance and its sources see Harris and Crystal, 'Some Reflections', above, note 1, 571–3.

<sup>34</sup> S. 29 of the Palestine Ordinance is derived from s. 27 of the Companies (Consolidation) Act 1908, 8 Edw. 7, c. 69; s. 78(1) of the former is derived from s. 279 of the latter; s. 124 (2) from s. 102(2); and s. 180 from s. 164. S. 98(1)(b) of the Palestine Ordinance originated in para. 31 of the Report; s. 77 originated in para. 47, and s. 128 in para. 66.

<sup>35</sup> He professed himself 'certainly inclined to the opinion that it is desirable that the English and the Palestinian Law should, so far as possible, be formulated in the same phrases': his letter to Lloyd of the Colonial Office, Middle East Department, 20 October 1927, in UKNA, CO 733/133. He took for granted that the law of the metropole and the law of the Mandated territory should be substantially identical. As Nathan sent his fifth and final draft to Sir John Shuckburgh of the Colonial Office, he wrote, '[Y]ou will observe that I have revised [the draft Ordinance] so as to bring

regarded the uses of the trust in the commercial sphere as of a piece with the rest of English commercial law. Though the Ordinance went through five elaborate drafts, with Bentwich and a 'committee of local [Palestinian] advocates' criticizing various details as too complex for the circumstances of Palestine, or otherwise inappropriate, there seems to have been no discussion regarding the references to the trust.<sup>36</sup>

There was, contrastingly, some such discussion à-propos the two references to the trust in the Partnerships Ordinance, which was also drafted by Nathan, 'based on the English Partnership Act 1890, and certain provisions of the English common law'.<sup>37</sup> As to one of those two references, Bentwich noted that 'it would be better to omit this section because the notion of trust property, save in regard to charitable trusts, is scarcely developed in Palestine'. Colonial Office staff replied that '[t]rust may arise from many other circumstances than [sic] from express creation and is certain to be evolved in Palestine. Though the idea may be [better?] explained, it is recommended that the section be retained'. As to the other draft section that mentioned the trust, Bentwich noted that the '[s]ection . . . should be omitted because the terms used are not current in the law of Palestine and may lead to confusion; while the courts should apply the general principle which is embodied in the subsection without express direction'. Colonial Office staff replied that '[t]he terms may not now be in use in Palestine but they are convenient terms and represent circumstances which certainly may exist in Palestine. The section might be retained'.<sup>38</sup> Both sections were retained in the Ordinance as promulgated. A 'London' approach, adopted by Nathan and the Colonial Office, favouring the transplantation of the whole of English commercial law, including the commercial uses of the trust, into Palestine, thus prevailed over Samuel's and Bentwich's 'Palestinian' approach, which saw no need in burdening the already-complicated Palestinian legal system with the English law of private trusts. Colonial office staff, replying to Bentwich,

it as far as possible into accord with the English law as it now stands amended by the recent Companies Act 1928': letter dated 28 November 1928, entitled 'Your Ref. 57037/28', UKNA, CO 733/145.

<sup>36</sup> The correspondence is in UKNA, CO 733/145.

<sup>37</sup> N. Bentwich, 'Explanatory Note on the Partnership Ordinance', ISA, file M – 283/26.

<sup>38</sup> Bentwich's comments are in his 'Note on the Draft Partnership Ordinance', in UKNA, CO 733/145/18, at 23–24; the first refers to s. 19 of Nathan's draft (the later s. 20), and the second to s. 28(2) (the later s. 29(2)). The comments in reply are in a document in the same file entitled 'Memorandum by the Legal Advisor to the Colonial Office upon Mr. Bentwich's Note on the Draft Partnership Ordinance', at 6–7.

predicted that the judicially imposed, remedial forms of trust, resulting and constructive, shall be the most useful in Palestine.

While some commercial uses of the English private trust were thus legislatively transplanted into Palestine, the private family trust, such as Eliash attempted to create, was quite consciously left out of the Palestinian (Charitable) Trusts Ordinance. This lack of legislative transplantation did not necessarily mean, however, that the private family trust could not be used in Palestine; there were other means of transplantation. In legal systems, like Mandate Palestine's, which recognize judicial decisions as a source of law, legal institutions can also be received into the local system by way of judicial decisions recognizing and legitimating their use. On explaining the decision to omit the private trust from the Palestinian Trusts Ordinance, Samuel noted that

[a]ny person is free to constitute a trust in the English form, and should a question arise in the Courts about such a trust, the English law would doubtless be applied in accordance with the provisions of Article 46 of the Palestine Order in Council.<sup>39</sup>

Article 46 provided that subject to Ottoman law and to legislation enacted by the Mandate Government, the civil courts of Palestine were to apply 'the substance of the common law, and the doctrines of equity in force in England'.<sup>40</sup> Until 1931, the civil courts seem not to have met with an attempt to 'constitute' a private family trust 'in the English form'. They did, in at least two cases, employ the English private variety of trust; but one, a District Court decision later decisively reversed by the Supreme Court of Palestine, was a partnership case, and the other, a decision of the Supreme Court itself, dealt with a bankruptcy.<sup>41</sup> Neither

<sup>39</sup> Samuel, letter, above, note 27.

<sup>40</sup> The Palestine Order in Council, article 46. For a careful study of this provision and its construction by Mandate-era courts, see Likhovski, *Law and Identity*, above, note 9, pp. 61–83; *Id.*, 'In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine' (1995) 29 *Israel L Rev* 291.

<sup>41</sup> Both decisions are unreported. The district court decision is quoted in the report of the Supreme Court decision which reversed it: CA 35/31 *Israel Lieber v. Jacob and Sheftel Mirenberg* 5 COJ 1811 [1931]. The following description is based on materials in the case files (now in the ISA) for that case and CA 131/30 *Israel Lieber v. Jacob and Sheftel Mirenberg*. The parties had entered into partnership 'for the manufacture of chocolate' and the partnership agreement set up a 'Board of Managers' of which Lieber and Sheftel Mirenberg were members, but Lieber acted without his partners' consent in managing the firm, having physically expelled them from the factory. They filed suit, asking that the Tel-Aviv district court either order Lieber to manage the firm subject to Sheftel Mirenberg's consent, or 'restrain [Lieber] from the management of the undertaking and ... appoint

dealt with a private family trust. Against this background, and considering that the Mandate regime had by 1931 legislated many other institutions, rules and principles of English law into the law of Palestine, 'receiving' them in no uncertain terms,<sup>42</sup> the reception of the English private trust was, at best, halting, and was confined to the commercial context. Doukhan's dismissal of the would-be trustees' application fits this trend.

Why, then, did Eliash attempt what he must have known was an extremely unusual step? His private correspondence provides a clue. Nine days after Doukhan sent his response, Eliash responded to an enquiry by a relative, Yosef Eliash of Hadera, who asked Mordechai to find a way to have Yosef's land pass, after his death, other than to his heirs-at-law. Mordechai's response, in which he refers to his attempt to transfer his own land to trustees and have the transfer registered, makes clear that the grounds for that attempt were, precisely, that like Yosef's

a receiver in order to manage [the factory]'. The Court held that '[i]n view of the security [Lieber gave] and of the nature of the business we are of opinion that to appoint a receiver would not be a proper remedy . . . [n]either do we think it proper to restrain [Lieber] from the management', and chose instead to constitute Lieber 'trustee for all parties'. The Supreme Court reversed, holding that '[w]e know of no power either under English or Ottoman Law whereby such an appointment can be made, nor indeed, do we understand the effect of such an appointment' (all quotations from the Supreme Court decision in CA 35/31, p. 1812). The Supreme Court decision referred to in the text is CA 50/31 *Ibrahim Eff. Kamal (Syndic in the Bankruptcy of Abdel Mou'ti Ghneim) v. Adib Eff. Daudi*, unreported, delivered 14 October 1931. As this decision was described in CA 92/29 (Jaffa) *Arieh Gurevitz v. Anglo-Palestine Co. Ltd*, 1 COJ 228, 230–1[1932]: '[i]n that case . . . Respondent . . . received and collected the proceeds of bills drawn in his favour by one Taher el Masri . . . Appellant, who was the Syndic in the bankruptcy of Abdel Mu'ti Chnesim, alleged that the Respondent [was] acting under instructions from Taher, who owed money to the bankrupt [and] was applying the proceeds of the bills for the benefit of the bankrupt, in fraud of his creditors . . . It was held in so far as it might be proved that the Respondent held such proceeds in trust, he did so as trustee not for the bankrupt but for Taher . . .'. The final sentence, from 'in so far', appears verbatim in the original decision, which I have located in the case file, available in the ISA. The Courts used the term 'trust' in at least two more cases, but not in ways clearly implying their reception and use of the English concept of a private trust. In CA 42/29 *Olaf Erickson Lind v. Vester & Co., the American Colony Stores* 5 COJ 1808 [1930], the parties having agreed that defendants held property on trust for appellants, both the District and Supreme Courts held the trust not to be charitable, but did not specify what type of trust it was. Trusteeship was also mentioned in LJa 191/21 *Arthur Henry Finn v. Government of Palestine* 5 COJ 1802 [1929] but in the context of the law of deeds of arrangement rather than in that of private trusts.

<sup>42</sup> For a general description of the reception process, see Malchi, *History of Law*, above, note 10, pp. 77–180.

land, Mordechai's land was *miri*. Since *miri* land could not be bequeathed, Mordechai attempted to structure the provision he wanted to make for his children out of his land by creating a private trust of that land.<sup>43</sup> He must have hoped that the Director of Lands, or, if need be, the Courts, would not extend the prohibition on bequeathing *miri* and dedicating it as *waqf* to constituting a private trust of it.

In late December 1931 Mordechai applied, as he wrote to Yosef he would, to the Supreme Court of Palestine, sitting as a High Court of Justice, asking that the Court order the Director of Lands to show cause for not registering the trustees' rights in the land. He supported his application with two arguments. One was technical. The other was:

Nor can it be maintained that a private trust is an institution foreign or repugnant to the law in force in Palestine. The Companies Ordinance 1929 contains many clauses mentioning trusts in respect of property.<sup>44</sup>

Arguing that the English private trust had already been introduced into the law of Palestine by way of the incidental references to it in the Companies Ordinance, Eliash asked the Supreme Court to reinforce that introduction and make it explicit. But the Court and its officials were less than obliging. The rule nisi boded ill: it directed the respondent to show cause why 'the disposition of Waqf lands of Special category, should not be registered in the Land Registry Office'.<sup>45</sup> From Eliash's point of view, this was the wrong question: the land in question was *miri*, not *waqf*, and Eliash wanted to declare an English-style private trust of it and have the trustees' title registered, not to register a disposition in any sort of *waqf*.

<sup>43</sup> Yosef Eliash's letter dated 16 Tammuz 5691 (according to the Hebrew calendar) and Mordechai's response dated 19.7.1931 are in CZO, A 417, file 749. In his response, Mordechai pretended that he was pursuing the matter for a client rather than on his own behalf. The rule that *miri* land could not be bequeathed appeared both in the Provisional Law on Holding Real Estate, article 8, referred to in note 22 above, and in the Succession Ordinance, No. 4 of 1923, *Official Gazette*, no. 88, 1 April 1923, s. 19, which lent renewed force to the Provisional Law Regulating the Right to Dispose of Immovable Property of 1329/1913. Article 8 of the latter provided (in R.C. Tute's translation: *Ottoman Land Laws* (Jerusalem: Greek Convent Press, 1927)), that 'Miri land owned by virtue of a formal title deed cannot be constituted *waqf* or left by legacy unless the State confers the absolute ownership by Imperial mulknama according to Sharia law'. The final section of the Charitable Trusts Ordinance emphasized that *miri* land could not be devised for charitable purposes: Ordinance to Regulate Charitable Trusts, note 25 above, s 43.

<sup>44</sup> The application is in the *Eliash* case file. Eliash referred to s. 29(2), for which see note 28 above, as a particularly striking example.

<sup>45</sup> The rule is in the *Eliash* case file.



That whoever phrased the rule rephrased Eliash's application, originally put in the language of English trust law, in the language of *waqf*, boded ill regarding the court's willingness to permit Palestinians to declare and register English-type private trusts.

At the subsequent hearing, held on May 18, 1932, the Government Advocate, Elliott, appearing for the Director of Lands, addressed not the question whether the English private trust has been received into the law of Palestine, but whether such a trust could be constituted out of *miri* land. He argued that it could not, since *miri* was, under Ottoman land law, still in force in Mandate Palestine, publicly-owned land. Private holders of *miri* land – even those registered as its 'owners', like Eliash – were thus, in effect, lessees, and though they could, in principle, alienate their rights in the land, they could not transfer them to trustees, rather as they could not dedicate the land as *waqf*. Eliash countered with an attempt to drive a wedge between Palestine's Ottoman land law and its Mandate-era law of land registration, arguing that registering *miri* land as subject to a trust did not change its nature as *miri*. Such land was, he said, being registered as subject to (civil) charitable trusts, so why not private ones?<sup>46</sup>

Judgment was handed down on 15 June, and thoroughly disappointed Eliash. Sir Michael McDonnell, the Chief Justice, wrote:

[T]here is a presumption that the legislator does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or . . . beyond the immediate scope and object of the statute . . . I do not think one can seriously hold, knowing the nature of the Legislation with which we are dealing [the Companies Ordinance], that the Legislature intended by a mere side-wind to introduce a new principle of law, such as the doctrine of private trusts, into Palestine.<sup>47</sup>

This clear rejection of the applicability of the English private trust in Palestine – contradicting High Commissioner Samuel's confidence that should a case like Eliash's come before the Courts, the English law of private trusts would 'doubtless be applied' – was unnecessary to decide the case. Eliash's application for an order that the Director of Lands

<sup>46</sup> My analysis of the oral arguments is based on the handwritten notes of Chief Justice McDonnell and Justice Khayat, in English and Arabic respectively; they are found in the Eliash case file. Doukhan's note in his property law textbook of 1935 (note 22 above), 94fn, that the question whether charitable trusts could be dedicated out of *miri* land was not argued in this case, is thus not quite accurate.

<sup>47</sup> HCJ 77/31 *Eliash v. Director of Land* 1 PLR 735 [1932] (hereafter: Eliash case report).



register his trustees' rights in the land could have been rejected by holding, more restrictedly, that *miri* land could not be made a trust. McDonnell held this, too,<sup>48</sup> and Justice Khayat added that the proposed trust was not a *waqf*, as it was not charitable. This last statement seems puzzling, as *shari'a* recognizes dedications of property as *waqf* to benefit the founder's descendants, known in Palestine as the *waqf dhurry*, to be no less charitable than dedications intended to benefit the wider public.<sup>49</sup> The dedication of such private family *waqfs* was common in Mandate Palestine; most *waqfs* dedicated in Mandate-era Jerusalem were of this type.<sup>50</sup> Khayat is unlikely to have been ignorant of the basic *shari'a* notion that family *waqfs*, too, were charitable in nature. Further, one wonders why Khayat raised the question whether Eliash's proposed trust was a *waqf*. Neither Eliash nor Elliot claimed that it was. Khayat may have relied on the rule nisi, which did, erroneously, refer to Eliash's trust as a *waqf*. Khayat further noted that 'there is no provision that allows the registration of immovable property in the name of a person by way of trust except, as stated by petitioner, in the Companies Ordinance', and that the proposed trust was 'equal' to a bequest of *miri* land and so should be encompassed by the prohibition on the latter.<sup>51</sup>

It appears there was, for more than a decade after the *Eliash* case was decided, considerable confusion regarding the actual holding in the case. To go by reported decisions, Palestine's courts do not seem to have applied *Eliash* until 1945.<sup>52</sup> Three reported decisions, and at least one unreported decision, all of 1945–46, applied it, citing as the rule in *Eliash* McDonnell's general refusal to admit the English private trust into the law of Palestine rather than the more restricted point of whether such a trust could be dedicated out of *miri* land.<sup>53</sup> Doukhan, in his 1935

<sup>48</sup> *Eliash* case report, 736.

<sup>49</sup> Reiter, *Islamic Endowments*, above, note 13, p. 13.

<sup>50</sup> Reiter, *ibid.*, lists in his Table 3.1, on pp. 50–1, all 61 *waqfs* established by Muslims in Jerusalem during the Mandate period for which data was found in the records (*sijill*) of the Jerusalem *shari'a* Court. 52 of them were 'family' *waqfs*, dedicated to benefitting the founder's relatives.

<sup>51</sup> *Eliash* case report, 736–7; See also his pencilled draft judgment, in Arabic, in the *Eliash* case file.

<sup>52</sup> Israel State Archives policy currently makes a general search of unreported Mandate-era decisions very difficult.

<sup>53</sup> The three were: CC 125/43 *Malatzky v. Bawly*, Selected Cases of the District Courts (SCDC) 265 [1945]; LC 20/45 *Albert Missri v. Itzhaq Raphael Eliashar*, SCDC 180, 182 [1946]; and CA 16-24/45 *Bracha Ben-Ya'acov & ors. v. Joseph Forer*, 2 ALR 628 [1945] (reversed, on points irrelevant to present concerns, in Privy Council Appeals 30–32/47

textbook, took a similar view of the case, but noted that '[t]he case only decided that a disposition creating a [private] trust could not be registered at the Land Registry', not that such a disposition was wholly ineffective and void.<sup>54</sup> Eliash himself, when arguing a different case in 1942, representing an orphanage beneficiary of a charitable trust of *miri* land, argued that the decision in *Eliash* should be read as limited to the rejection of private trusts, and that McDonnell's statement that *miri* land could not be dedicated as *any* kind of trust was made *obiter*. The Supreme Court, however, rejected the latter part of Eliash's argument, holding that the *miri* point 'appears . . . to be one of the main grounds for the judgment'.<sup>55</sup>

His application to the Supreme Court having been rejected, Eliash wrote on 5 October 1932 to Harry Trusted, the Attorney-General, urging that '[t]here can be no doubt that the creation of private trust [s] is envisaged by other legislation as well as by such general principles as are laid down in article 46 of the Palestine Order in Council'. Noting that '[t]he judgment in question points . . . to the necessity of special legislation in this regard', Eliash asked 'that such legislative steps as may be necessary . . . be taken without delay'.<sup>56</sup> Trusted passed Eliash's letter to Elliott, who appeared for the government in the case, for comments. Elliott's response showed a very different understanding of the holding in *Eliash* from that evident in the 1940s decisions applying it. He wrote:

*Bracha Ben-Ya'acov & ors. v. Joseph Forer*, 2 Psakim 498 [1948]). None of the three was concerned with a family trust. The unreported decision was Estate Case 472/46 (Tel-Aviv) *In Re Estate of Ya'acov Blum* (unreported). Robert Eisenman cited *Eliash* and *Ben-Ya'acov* in his *Islamic Law in Palestine and Israel: a History of the Survival of Tanzimat and Sharia in the British Mandate and the Jewish State* (Leiden: E. J. Brill, 1978), pp. 95–6, note 41 and text, attributing the courts' rejection of the English private trust to their '[c]onscious[ness] of the great evil family *waqf* had become in the Middle East and the endless controversy surrounding them'. There is no trace of such consciousness, or indeed any mention of the family (*dhurry* or *ahli*) *waqf*, in the decisions discussed; but the judges concerned may have been conscious of the issue nevertheless.

<sup>54</sup> Goadby and Doukhan, *Land Law*, above, note 22, p. 90 (footnote and accompanying text). It was certainly Doukhan's own view – as distinct from his view of the holding in *Eliash* – that '[a] trust of *Miri* is, therefore, merely void': *ibid.*, p. 94. The phrase appears in a discussion of charitable trusts, but Doukhan's view of private trusts of *miri* seems, from context, to have been similar.

<sup>55</sup> CA 117/40 *Agudath Batey Yetomim Veyetomoth v. A-G*, 9 PLR 291, 297 [1942]. The Court (Gordon-Smith CJ) noted that according to both legislation and case law, *miri* land could not be dedicated for charitable purposes, either by will or *inter vivos*.

<sup>56</sup> ISA, file M-269/10.

The Supreme Court in discharging the order decided that a private trust could not be created of *Miri* Land. So far as the judgment refers to Trusts, other than Trusts of *Miri* Land, it should be read with caution.

‘The Court was never called upon’, noted Elliott, ‘to discuss the effect the introduction of Equitable principles might have upon the law affecting’ several areas of law which were in English law impacted by such principles, from the administration of decedents’ estates and the wardship of infants to the rectification of deeds and the specific performance of contracts. The rest of Elliott’s comments are of great interest:

Had the Court had to decide under the Companies or Partnerships Ordinances whether the principles governing Private Trusts as we understand them were applicable in Palestine it might very well have held such principles applicable on the ground that the Ordinances referred to adumbrated such principles apart altogether from any consideration of what was meant by article 46 of the Order in Council, 1922.

If I were asked whether in the view of the Supreme Court the principles governing Private Trusts were applicable in Palestine my answer would be ‘Yes, but their application differs with the law applicable to the particular case under review’.

In other words, the principles may be directly applicable where an Ottoman Law, Order in Council, Ordinance or Regulation so provide and indirectly in cases falling under article 46 of the Order in Council where there is no such provision.<sup>57</sup>

Here was a 1932 view joining Samuel’s 1925 recognition that Palestinian attempts to establish private family trusts on the English model could be accommodated, by way of article 46 of the Palestine Order in Council, to the implications of the references to the trust in commercial legislation enacted since 1925. On this reading of the decision in *Eliash*, its impact on the emergent Palestinian law of private trusts was minimal: it merely held that ‘owners’ of *miri* land could not dedicate it as a private trust, extending the Ottoman-era statutory prohibition on dedicating such land from the Islamic form of trust to the English one. Doukhan’s very different reading of the case, which, unlike Elliot’s, was made public (in a published book), was not unduly restrictive of the Palestinian law of private trusts, either: the case merely decided, he wrote, that private trusts of land could not be registered in the Land Registry.<sup>58</sup> This did not rule out private trusts of personalty, even beyond the companies and partnerships contexts.

<sup>57</sup> ISA, file M-269/10.

<sup>58</sup> See text to note 54 above.

Eliash's attempt to have the English law of private trusts introduced into Palestine by legislation, reversing the earlier decision not to do so, was, however, unsuccessful. The failure was due to the government's limited manpower being employed on more pressing issues, rather than to a governmental decision rejecting his attempt. The government file containing his request travelled to and fro for several years to little avail. The final substantive minute on the subject, dated August 1936, during the severe disturbances of that year, noted that '[t]here seems no hope of dealing with this at present'.<sup>59</sup>

While Mandate draftsmen continued to incidentally refer to trusts in legislation enacted after 1932, those references all appear to have entered the law of Palestine as an inadvertent result of the copying of the provisions which contain them from UK, colonial and model legislation. Though Mandate-era materials preserved in UK and Israeli archives reveal, in most cases, the source of each provision of the numerous Palestinian Ordinances enacted, I have found no explicit discussion of the appropriateness of the references to the private trust contained in several provisions. And so the Bankruptcy Ordinance of 1936 provided that '[t]he property of the bankrupt divisible amongst his creditors . . . shall not comprise . . . property held by the bankrupt on trust for any other person', language taken from the UK Bankruptcy Act 1914.<sup>60</sup> The Income Tax Ordinance of 1941 contained the largest number of references to the trust since the Companies Ordinance of 1929. It referred to a married woman's trustee (a reference to the English practice, prevalent among the upper classes before married women were granted the right to own property at law, of granting property to trustees on trust for such women for their separate use notwithstanding coverture), to a trustee 'having the direction, control or management of any property or concern on behalf of any incapacitated person', to the local trustee for a 'person not resident in Palestine', to 'two or more persons acting in the capacity of trustees of a trust', and defined 'disposition' to include 'trust'.<sup>61</sup> All but

<sup>59</sup> ISA, file M-269/10.

<sup>60</sup> Bankruptcy Ordinance, No. 3 of 1936, *Palestine Gazette*, Gazette Extraordinary, No. 566, 24 January 1936, Supplement No. 1, s. 37(1). The origin of this section – the fact that it 'follows s. 38 of the English Act' – is made clear in a 'Note on the Bankruptcy Bill, 1935', in the UKNA, CO 733/284, 4. The 'English Act' referred to is identified as the Bankruptcy Act 1914 in a letter by Hall, Officer Administering the Government, from 12 October 1935, in the same file. The English s. 38 is identical in relevant detail to the Palestinian s. 37.

<sup>61</sup> Income Tax Ordinance, No. 23 of 1941, *Palestine Gazette*, No. 1126, 22 August 1941, ss. 21 (married woman's trustee), 27 (trustee for an incapacitated person), 28(1) (trustee for

two of the sections containing those references were copied from the Model Income Tax Ordinance drafted by the 1922 Inter-Departmental Committee on Income Tax in the Colonies not Possessing Responsible Government, while the remaining two sections were taken from the Kenya Income Tax Ordinance of 1940.<sup>62</sup> Moving further away from commercial law, the expression ‘breach of trust’ appears in the Civil Wrongs Ordinance, enacted in 1944 and brought into force in 1947, the provision containing it having been copied from the UK Law Reform (Miscellaneous Provisions) Act 1934. While thought was given to this provision – it was one of a minority of the Palestinian Ordinance’s provisions which were not based on the Cypriot Civil Wrongs Law of 1932 – the reference to the trust is not a central element thereof, and seems to have slipped in without discussion.<sup>63</sup>

Considering this plethora of legislative references to the English private trust, one is struck by Robert Drayton, the Mandate Government’s

a ‘person not resident in Palestine’), 29 (refers again to the two latter types of trustee), 34 (two or more joint trustees of one trust), and 22(1) (defines ‘disposition’). Gabriel Eichelgrün, a noted Palestine ‘tax consultant’ of the 1940s, noted in his *Palestine Income Tax Guide* (Haifa: Paltax, 1945) that the definition of ‘disposition’ in s. 22(1) ‘is one of the standard-phrases of the Palestine Legislator “swallowed virtually holus bolus” (HC 77/31, *Eliash v. Director of Lands*) from English statutes (cf. 1920 Finance Act, sect. 20(5))’ (p. 143). The best study of married women’s separate property under English law remains S. Staves, *Married Women’s Separate Property in England 1660–1833* (Cambridge, MA: Harvard University Press, 1990); see also R. J. Morris, ‘Men, Women, and Property: the Reform of the Married Women’s Property Act 1870’ in F. M. L. Thompson (ed.), *Landowners, Capitalists, and Entrepreneurs: Essays for Sir John Habakkuk* (Oxford University Press, 1994), pp. 171–91.

<sup>62</sup> Ss. 21, 27, 28(1) and 29 of the Palestine Ordinance are identical to ss. 20, 26, 27(1) and 28 of the Model Income Tax Ordinance, for which see Report of the Inter-Departmental Committee on Income Tax in the Colonies not Possessing Responsible Government, Cmnd. 1788 (Dec. 1922), 19ff. Ss. 22(1) and 34 of the Palestine Ordinance are identical to ss. 23 and 41, respectively, of the Kenya Income Tax Ordinance, No. II of 1940, and were taken therefrom: ‘Income Tax Ordinance, 1941. Comparative Table’, in UKNA, CO 733/444, Part II. For the origins and Mandate-era history of the Palestine Income Tax Ordinance see A. Likhovski, ‘Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandate Palestine’ (2010) 11 *Theoretical Inquiries in Law* 725, 738, 747, 748, 751.

<sup>63</sup> Civil Wrongs Ordinance, No. 36 of 1944, *Palestine Gazette*, No. 1380, 28 December 1944, Supplement No. 1, s. 14(6). That this clause, numbered 15(6) in the bill version of the Ordinance, published in 1942, was based on s. 1(6) of the English Law Reform (Miscellaneous Provisions) Act 1934, 24 & 25 Geo. 5, c. 41, is noted in a ‘Memorandum on Draft Civil Wrongs Ordinance’, ISA, file M-279/29. That most of the Ordinance was based on the Cyprus Civil Wrongs Law 1932 is noted in ‘Civil Wrongs Ordinance, 1942. Objects and Reasons’, dated 20 December 1941, signed by W.J. FitzGerald, Attorney General, in the ISA, same file.

Legal Draftsman since 1931, having commented in 1933, while explaining a clause he redrafted according to which 'rights to land which are not established by any claimant shall be registered in the name of the High Commissioner in trust for the government of Palestine', that '[i]n Palestine . . . trusts in the English sense do not exist'.<sup>64</sup> It seems that legislative references to trusts in the land settlement and registration context were not intended to refer to the technical English concept, but to a vaguer notion of holding *ex officio* for public purposes. Legislative use of the term in many other contexts, such as in the Income Tax, Bankruptcy and Civil Wrongs Ordinances, does, contrastingly, seem to refer to the English technical concept of a trust. While some of the references to trusts in those three Ordinances can be construed so as to cohere with the theory that the only variety of the English trust available under the law of Mandate Palestine was the charitable one, others, such as the reference in the Income Tax Ordinance to a married woman's trustee, cannot be so construed; and in all cases, such a construction appears, from context, to be distinctly artificial.

The Mandate-era Supreme Court itself delivered, post-*Eliash*, at least two decisions which cohere with Elliott's permissive reading of that case, permitting the creation of private trusts other than of *miri* land. In one case, the Court saw no difficulty in a contract 'for the transfer of certain shares' which provided that 'until the cheque and promissory note are paid, the shares remain in trust with the Belgo-Palestine Bank Ltd, Tel-Aviv' and laid certain obligations on that bank, as 'trustee'.<sup>65</sup> In another case, an Income Tax Appeal, the Court held, applying the section of the Income Tax Ordinance that referred to the local trustee for a 'person not resident in Palestine', that United Artists (Export) Ltd, an

<sup>64</sup> The clause in question is s. 29 of the Land (Settlement of Title) Ordinance 1928, *Official Gazette*, 1 June 1928, 201–75, as amended by the Land (Settlement of Title) (Amendment) Ordinance, No. 48 of 1939, published in Supplement No. 1 to the *Palestine Gazette*, 23 November 1939. Similarly, s. 29A, inserted in the amending Ordinance, provided that land used for, or assigned for, public purposes, shall be registered 'in the name of the High Commissioner in trust for the government of Palestine'. For Drayton's explanation, see 'Memorandum by the Legal Draftsman, R. H. Drayton, on the first drafts of the [1933 versions of] the Land (Partition) Ordinance, Land (Settlement of Title) Ordinance and Land (Registration of Title) Ordinance, dated 29 September 1933', para. 23, in the ISA, file M-711/15. For Drayton's appointment in October 1931, see Report by His Majesty's Government [. . .] to the Council of the League of Nations on the Administration of Palestine and Trans-Jordan for the year 1931, available here: <http://domino.un.org/UNISPAL.NSF/a47250072a3dd7950525672400783bde/c2567d9c6f6ce5d8052565d9006efc72>.

<sup>65</sup> CA 93/41 *Hausdorf v. Metzger* 1 SCJ 260, 261 [1941].



American film exporter, 'are . . . assessable in the name of appellants [a Palestinian film distributor] as trustees'.<sup>66</sup> The position taken in these cases, recognizing the use of private trusts in Palestine, seems to have been formulated as a direct inference from the references to the trust in the Companies and Income Tax Ordinances, respectively. Judge Tzeltner of the Tel-Aviv District Court went further, realizing Samuel's and Elliott's expectation that in contexts where no Palestinian Ordinance referred to the use of trusts, the courts would apply English trust law by way of article 46 of the Palestine Order in Council: he had no qualms about applying section 61 of the (English) Trustee Act 1925, which empowers the court to relieve trustees from liability for breaches of trust where they had 'acted honestly and reasonably, and ought fairly to be excused', to custodians of an absentee's property who made a mistaken payment to the Tel-Aviv municipality.<sup>67</sup>

Thus, the Mandate Government and courts' position regarding the reception of the English private trust, other than of *miri* land, into the law of Palestine remained unclear after the *Eliash* decision. The pertinent sources fall into a pattern: English private trusts were suffered to exist in commercial contexts, while their applicability in the context of non-commercial landholding was repeatedly denied – by McDonnell in the *Eliash* decision, by Doukhan in his textbook and by Drayton in a memorandum. As we shall see in Part III, the continuing indeterminacy regarding the positive standing of the common law private trust did not prevent use of such trusts in practice by Palestine's growing Jewish settler population, although they responded to the emergent pattern by preferring trust companies, which could point to the many references to the trust in the Companies Ordinance, over individual trusteeship. The Supreme Court's cold-shouldering of *Eliash* may have been enough to prevent any further attempts to have *family* trusts of land on the English model approved by state authorities. Jewish Palestinian use of trusts and

<sup>66</sup> Income Tax Appeal 8/42 *Ideal Motion Pictures v. Assessing Office of Income Tax, Tel-Aviv* 9 PLR 481, 487 [1942].

<sup>67</sup> CC 673/46 *In Re Esther Baum, of Siberia, Russia, Absentee v. Rachel Avivi*, 2 District Court Decisions 418 [1950]. The decision in this case was given after the establishment of the state of Israel, which fact had no impact on the jurisdiction's law of private trusts: s. 11 of the Law and Government Ordinance, 2 *Official Gazette*, 19 May 1948, Appendix A, 1, issued by the provisional government of Israel four days after the state was established, provided that the law of Mandate Palestine, as it stood on the termination of the Mandate, was to continue in force, subject to express changes introduced by the new regime. No changes regarding private trusts had been introduced by 1950.



trust companies was, as we shall see, focused on business, investment, the purchase, sale and development of land and the facilitation of Jewish immigration to Palestine.

Such use may have developed even had the Mandate authorities been more clear-cut in their rejection of the common law private trust; as is the case with contracts, where the parties to a private trust effectively cooperate, resolving their differences (if any) by negotiation, arbitration or before non-state judicial fora, such a trust can, in many contexts, be effectively used without ever alerting a court, or any other arm of the state, to its existence. The use of the English trust started in medieval England as a non-state phenomenon, directed at bypassing and evading the state's rules (such as the feudal dues due on a tenant's death and tenants' inability to bequeath their land), long before the Chancery, or any ecclesiastical court, ever enforced a trust.<sup>68</sup>

Despite the various views which developed regarding the actual holding in *Eliash*, and the use of private trusts and trust companies in practice, the British were undeniably less facilitative of Zionist settlers' attempts to use English private trusts than they were of similar attempts by the non-British population of other colonies. In India, Ceylon, and (applying Indian cases) the mandated territory of Zanzibar, Anglo-colonial courts facilitated native use of English private trusts, including in family contexts. According to those courts, such facilitation did not contradict the application of natives' personal (often religious) laws to their family affairs: trusts were, at least in India and Ceylon, seen as a non-personal-law subject.<sup>69</sup> Natives certainly had non-Western trust forms at their disposal: Indians of all creeds, for example, used and use *benami* transactions, a form of bare trusteeship under which one person is a merely formal, or ostensible, owner of property in which another is beneficially interested.<sup>70</sup> Muslims in both India and Ceylon made use of

<sup>68</sup> J. Biancalana, 'Medieval Uses', in R. H. Helmholz and R. Zimmermann (eds.), *Itinera Fiducia: Trust and Treuhand in Comparative Perspective* (Berlin: Duncker & Humblot, 1998), p. 111.

<sup>69</sup> I thank Mitra Sharafi for her advice on this point.

<sup>70</sup> For an exhaustive treatment of the law of *benami*, see the Law Commission of India, 57th Report, *Benami Transactions* (1973); id., 130th Report, *Benami Transactions – a Continuum* (1988). The Indian courts of the Raj enforced *benami* transactions, noting their similarity to English resulting or bare trusts, which were also enforced in India. However, the Indian legislator, both under the Raj and since India's independence, has repeatedly acted to repress, first, fraudulent *benami* transactions, and, eventually, any such transaction: the Benami Transactions (Prohibition) Act, No. 45 of 1988, made entering into a *benami* transaction an offence punishable with imprisonment of up to three years. See

the *waqf*,<sup>71</sup> and Hindus of charitable trusts under Hindu law.<sup>72</sup> The availability of non-Western forms of trust did not stop the Indian and Ceylonese courts from applying English trust law to natives' trusts. In both India and Ceylon, Anglo-colonial facilitation of native use of English private trusts started in the courts, along with incidental references to the trust in colonial legislation; eventually comprehensive trust codes were enacted for both colonies, conceiving of the trust as an obligatory relationship rather than as a double ownership structure, but otherwise loyal to the English model.<sup>73</sup> Non-British European settler populations in British colonies, such as the Dutch of the Cape and the French of Lower Canada, were similarly allowed by their British rulers to use the English trust.<sup>74</sup> This despite the fact that they, too, had at their disposal non-English trust forms: the tutors, curators, administrators, usufructs, fiduciary substitutions, *modus* and foundations of the pre-Napoleonic civil law, and, in the South African case, the Dutch *bewind*.<sup>75</sup> The reception

ibid. Interestingly, some courts have held the *benamidar* – the ostensible owner – not to have legal title, and thus rejected the English trust analogy: see cases quoted in Law Commission of India, 57th Report, above, p. 10–11.

<sup>71</sup> For India, see G. C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge University Press, 1985); for Ceylon see A. Cooray, 'Oriental and Occidental Laws in Harmonious Co-existence: The Case of Trusts in Sri Lanka' (2008) 12 *Electronic Journal of Comparative Law*: [www.ejcl.org/121/art121-5.pdf](http://www.ejcl.org/121/art121-5.pdf), 15.

<sup>72</sup> For which, see A. C. Sen, B. K. Mukherjea's *Hindu Law of Religious and Charitable Trusts*, 5th edn. (Calcutta: Eastern Law House Private Ltd., 2003)., For their use in Ceylon, see Cooray, 'Oriental and Occidental Laws', above, note 71, 13.

<sup>73</sup> W. F. Agnew, *The Law of Trusts in British India*, 2nd edn (Calcutta: Thacker, Spink & Co., 1920), pp. 14–29; B. M. Gandhi, *Equity, Trusts and Specific Relief* (Lucknow: Eastern Book Company, 1983), pp. 33, 236–40; and see cases like *Umes Chunder Sircar v. Mussumat Zahor Fatima* 17 L.R., I.A. 201 [1890]; *Moosabhai Mohamed Sajan v. Jaccobhai Mohamed Sajan* 29 I.L.R. 267 (Bom.) [1904]; and *Mumtaz-Un-Nissa v. Tufail Ahmed* 28 I.L.R. 264 [1905]. The Indian law of (non-religious, English-type, private) trusts was eventually codified in the Indian Trusts Act, Act II of 1882. For Ceylon, see discussion in L. J. M. Cooray, *The Reception in Ceylon of the English Trust* (Colombo: Lake House Printers and Publishers, 1971), pp. 3–9, 21; the Ceylonese law of trusts was eventually codified in the Trusts Ordinance of 1917, adding significantly to the Indian model. For Zanzibar, see Case 28/30 *Public Trustee v. H. H. the Sultana* 4 Zanzibar LR 14 [1930]; and see discussion in Elias, *British Colonial Law*, above, note 1, p. 117. Interestingly, an obligational understanding of the trust relationship reminiscent of that of the Indian and Ceylonese codes has recently come into vogue among scholars of the common law: L. D. Smith, 'Trust and Patrimony' (2008) 38 *Revue générale de droit* 379, 25–29 and *passim*; B. McFarlane and R. Stevens, 'The Nature of Equitable Property' (2010) 4 *Journal of Equity* 1.

<sup>74</sup> See sources in note 2 above.

<sup>75</sup> For the non-English trust forms available in British-governed Quebec, see Waters, *Law of Trusts*, above, note 2, pp. 1424–7. For South Africa, see F. W. D. Fischer, 'Trust, *Fiducia*,

process of the English private trust in South Africa and Quebec followed a roughly similar pattern to that found in India and Ceylon, though the presence of significant English settler populations in the former means the processes are not easily comparable: much of the greater legislative activity noticeable in Quebec and South Africa was consequent on the use of the trust by English settlers.<sup>76</sup> Palestine, too, experienced one element of the standard three-stage reception process: it had its incidental legislative references to the trust. But the reception process was derailed by *Eliash*, which, at least on one reading, decisively rejected the use of English private trusts by Palestinians. The process never got back on track until the end of the Mandate.

Why did the British display, intermittently as least, such a discouraging attitude towards attempts to use English private trusts in Palestine, while permitting them elsewhere? Several reasons come to mind. *First*, the derailment produced by *Eliash* may have been, at least partly, a product of Mordechai Eliash's insistence that his *miri* land be registered as held by persons who were trustees of an (English) trust; *miri* land was subject, as we have seen, to special complications. Had the test case on Palestinian use of English private trusts been concerned with assets of a less problematic type, such as *mulk* (fully-owned) land, shares or money, the result may well have been different. *Second*, a comparative colonial perspective hints that not only the substance of Eliash's application, but also the arguments he chose to support it, may have been less than felicitous: he, in effect, requested – one could say challenged – the Supreme Court to directly declare that Palestinians could, as a matter of colonial law, use English private trusts. That a less direct approach may have led to a different result is illustrated by a near-contemporary case, decided in 1930 by the Sultan's Court for Zanzibar, another Muslim-majority territory under

*Bewind* (administration), *Stichting* (foundation)' (1957) 20 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 25.

<sup>76</sup> The general codification of trust law, which came relatively early (Act relating to Trusts, S. Q. 1879, c. 29) in Quebec and late (Trust Property Control Act, Act 57 of 1988) in South Africa, was preceded, in both jurisdictions, by a great number of special Acts making use of the trust for particular purposes. A key context of this early legislative activity in the private trusts field was the use of trustees for holding assets securing loans to companies; see the Cape Ordinance no. 13 of 1846 and, in Quebec, hundreds of private Acts enacted from the mid-nineteenth century until the eventual enactment of a general Act on the subject in 1914. See, for South Africa, Honoré, 'Trust', above, note 2, pp. 851–9; for Quebec, J. B. Claxton, *Studies on the Quebec Law of Trust* (Toronto, Thomson, 2005), pp. 10–12.

a British Mandate. The late Sultan having in 1899 attempted to create an English-style life-interest family trust, the question brought to court was whether the trust was effective as a matter of Sunni Islamic law; there was no question that the Court was bound to apply Muslim law to non-European Zanzibaris' private law affairs. The question having been put this way, Pickering CJ simply applied the long line of Indian cases which held that Muslims could, under Anglo-Muhammadan law, use English private trusts.<sup>77</sup> It may be that had Eliash asked the Supreme Court of Palestine not whether the colonial law of Palestine permitted Palestinians to use English private trusts, but whether Jewish law permitted Palestinian Jews to use them, the Court's answer would have been different.<sup>78</sup> *Third*, Chief Justice McDonnell's aversion to the quick Anglicization of the law of Palestine has been extensively documented. Sympathetic to the Arab anti-Zionist cause, and rueful of the British promise, underlying the Mandate, to facilitate the establishment of a Jewish 'national home', McDonnell saw the Anglicization of the law as a step in derogation of the Arab interest. His lack of sympathy with the fast-paced Westernization of Palestine and its law was palpable in *Eliash* itself, where he described the Companies and Partnerships Ordinances as 'very lengthy enactments based upon English Statutes which have been, if one may use the expression, swallowed virtually holus-bolus by the legislator of Palestine with

<sup>77</sup> *Public Trustee v. H. H., the Sultana*, above, note 73. Despite the trust being a non-personal-law subject in colonial India, Muslims challenged other Muslims' use of the English trust as void because inconsistent with Mohammadan law. It is, thus, not surprising that the colonial judges hearing those cases tended to be permissive in their interpretation of Mohammadan law on this point; see the cases cited in note 73. I thank Mitra Sharafi for reminding me that in discussing the application of Muslim law in Anglo-Colonial India, terms like 'Anglo-Muhammadan Law', rather than *shari'a*, should be used.

<sup>78</sup> That might have been the right question to ask: the Palestine Order in Council, while giving the various religious community courts of Palestine 'exclusive jurisdiction' over the 'constitution or internal administration' of religious endowments constituted before those courts according to the religious law they apply (articles 52, 53(3), 54(3)), was silent regarding the allocation of jurisdiction over questions concerning English private trusts, and the law to be applied in such cases. A family trust such as the one Eliash attempted to create could be seen as a matter of 'successions, wills and legacies', which under article 51 were seen as matters of 'personal status', but were not (per article 53(1)) under the exclusive jurisdiction of the Rabbinical Courts. According to article 47, the civil courts were to exercise their jurisdiction over such matters 'in conformity with any law, Ordinances or regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable'. The question of Eliash's ability, under Jewish law, to create an English family trust could thus be seen as the right one to ask.

comparatively small alterations'.<sup>79</sup> The reception of the private trust, that most peculiarly English of the institutions of the common law, may have seemed particularly inappropriate to a person of such views. *Fourth*, it may be that private trusts of land, which make possible, even under a land registration regime, the enjoyment of land by unregistered beneficiaries, were seen – by Director of Lands Doukhan, for example – as undesirable in the context of the Mandate government's extensive efforts, since the late 1920s, to have all rights in land in Palestine publicly ascertained ('settled') and registered.<sup>80</sup> *Fifth*, McDonnell's reluctance to absorb a major institution of English private law into the law of Palestine by way of judicial decision may have been strengthened by what Martin Bunton called the Mandate's 'post-First World War Wilsonian' context, which, he wrote, drove 'the imperial enterprise' into 'a search for legitimacy'.<sup>81</sup> The Mandate government's commitment to furthering the creation of a Jewish national home, against the wishes of the Arab majority, as well as the failure to materialize of the legislative council envisioned in the Palestine Order in Council, which was to include elected members, compounded the Mandate government's democratic deficit. Judges such as McDonnell, aware of this deficit, may have felt that refraining from introducing English legal institutions into the law of Palestine other than by express legislation was one way of stalling the autocratic regime's uninvited transformation of Palestinians' environment.<sup>82</sup> *Sixth*, an anti-mortmain policy was rather more evident in the law of Mandate Palestine than in the English law of the time: unlike English companies, which since 1862 had been generally permitted to hold land as one result of incorporation, Palestinian companies needed 'a

<sup>79</sup> *Eliash* case report, 735. For McDonnell's general approach see Likhovski, *Law and Identity*, above, note 9, p. 66, and his 'In Our Image', above, note 40, 320–321; N. Brun, 'Palestine, Duel at the Summit: High Commissioner Wauchope and Chief Justice McDonnell's Quarrel over the "Jaffa Demolition Case" – 1936' (2009) 25 *Bar-Ilan Law Studies* 285, 288, 292–4.

<sup>80</sup> For the Mandate government's 'land settlement' efforts, see H. Sandberg, *Land Title Settlement in Eretz-Israel and the State of Israel* (Jerusalem: Sacher Institute, 2000) pp. 167–202 and *passim*; K. Stein, *The Land Question in Palestine, 1917–1939* (Chapel Hill: University of North Carolina Press, 1984); Bunton, *Colonial Land*, above, note 22, *passim*.

<sup>81</sup> Bunton, *ibid.*, p. 187.

<sup>82</sup> For the planned Legislative Council, its failure and the Advisory Council that replaced it, see Mogannam E. Mogannam, 'Palestine Legislation under the British' (1995) 164 *Annals of the American Academy of Political and Social Science* 47, 48–9. See further Likhovski, *Law and Identity*, above, note 9, pp. 24–5.

certificate under the hand of the High Commissioner' to do so.<sup>83</sup> While the continuing practice of establishing both charitable and private *waqfs*, which the British were obliged to continue according to the terms of their Mandate, meant that a considerable amount of Palestinian land was controlled by 'dead hands', the British may have felt that introducing another legal form which tends to perpetuity – the private trust – was unwise.<sup>84</sup> And *finally*, once *Eliash* was decided, it was, at least potentially, a precedent, which later courts could ill ignore, and which, on one reading, negated Palestinian use of English private trusts.

### III Trusts in action: private trusts in Zionist settler practice

On 14 February 1946, Dr Aharon Barth, a lawyer and Vice-Chair of the Board of the Anglo-Palestine Bank, then owned indirectly by the Zionist movement, wrote to the directors of 'Himnuta', a Jewish National Fund subsidiary established in 1938, which, as we shall see, functioned as a trustee:

I wish to draw your attention to [one of the three decisions of 1945–46 applying *Eliash*] . . . Applying an antiquated decision of 1931, and absent any *de novo* argument, this decision provides that a 'trust' is illegal in Palestine. This necessitates, I believe, a fundamental review of your company's legal status . . . I should add that [in 1938, when Barth took care of the paperwork establishing and registering Himnuta] I consulted with [leading Palestinian lawyer Solomon] Horowitz, who believed, much

<sup>83</sup> English company law started providing, with the Companies Act 1862, 25 & 26 Vict., c. 89, s. 18, that every company incorporated under the Companies Acts, except charities, could hold land. This exception to the Mortmain Acts was repeated in later recodifications of English company law, down to and including the Companies Act 1948, 11 & 12 Geo. VI, c. 40, s. 14(1). The abolition of the law of mortmain in the Charities Act 1960, 8 & 9 Eliz. II, c. 58, ended the need for such an exception. For more detail on the decline and end of the English law of mortmain see A. H. Oosterhoff, 'The Law of Mortmain: An Historical and Comparative Review' (1977) 27 *University of Toronto Law Journal* 257, esp. 288–95; I. Dawson, 'The Rule against Inalienability – a Rule without a Purpose?' (2006) 26 *Legal Studies* 414, esp. 426–9. For the more restrictive Palestinian regime see Companies Ordinance, above, note 28, s. 15, which provided that 'the Registrar shall not register any Company which has as its object or one of its objects the acquisition and development of land generally in Palestine unless such Company produces a certificate under the hand of the High Commissioner empowering it to hold lands generally'.

<sup>84</sup> For the use of *waqfs* in Mandate Palestine see Reiter, *Islamic Endowments*, above, note 13, pp. 49–50. Arguments five and six build on comments by a reviewer for the *Law and History Review*, for which I am thankful.



like myself, that this decision of 1931, which was the only one of its kind, cannot be seen as a binding precedent. As Palestinian practice, including the establishment of trust companies being approved by the government's legal apparatus, has long since established, contradicting that decision, that the trust does indeed exist in Palestine, we did not see that decision as preventing the establishment in Palestine of trust companies.<sup>85</sup>

As Barth observed, the Zionist settler population in Palestine had during the 1930s and 40s, notwithstanding the Mandate legal system's unclear position regarding the reception of the English private trust, made frequent, varied use of trusts and (especially) trust companies. As observed above, I have found no trace of family trusts on the English model;<sup>86</sup> but trust companies were frequently used in various business, land-purchase, banking, investment and immigration contexts. Plain, unincorporated trusts were also occasionally used. Here follows a description of the uses to which trusts and trust companies were put, starting with pure 'private sector' uses and ending with uses of private, non-charitable trust structures by Zionist organizations for purposes related to building the Zionist state-in-waiting.

The unclear positive legal standing of individual trustees on the classical English model, and the contrasting express grant of power to act as trustees, in a Schedule to the Companies Ordinance, to companies incorporated according to the Ordinance,<sup>87</sup> channelled most Zionist settler use of private trusts into trust companies. Zionist settlers' trust companies acted as trust companies were then acting in England, the United States, Australia, South Africa and other jurisdictions: they performed the functions of an individual, unincorporated twentieth century trustee, acquiring, holding, investing, managing and distributing money

<sup>85</sup> CZA, file KKL5/14060 (original in Hebrew; my translation). Barth's letter was mentioned by G. Alexander, 'The Foundation of Himnuta Ltd. and Its Earliest Uses (1938–1940)' (1992) 68 *Kathedra* 80, 87. The history of the Anglo-Palestine Bank was described in N. Gross et al., *Banker to an Emerging Nation: the History of Bank Leumi Le-Israel* (Jerusalem: Masada, 1977); for Barth and his career at the bank, see *ibid.*, pp. 173–4. For Himnuta see text to notes 123–132 below.

<sup>86</sup> Evidence of such family trusts, which could easily be created without having been brought to the attention of any public authority, may certainly elude researchers working in public, rather than private, archives. My searches, however, included the dozens of private archives, including those of leading Mandate-era lawyers, which have been deposited in the Israel State Archives and the Central Zionist Archives. Still I found no evidence of family trusts on the English model.

<sup>87</sup> Note 28, above. In England, the same power was only legislatively recognized in 1906: Public Trustee Act 1906, 6 Edw. VII, c. 55, s. 4(3).



and other assets. While the aforementioned local reasons may have been key to the Palestinian preference for trust companies over individual trustees, the move to corporate trusteeship was a key twentieth century trend in the principal common law jurisdictions: as trustees' responsibilities and liabilities became increasingly burdensome, the corporate trustee, often a trusteeship arm of a larger financial service provider such as a bank or insurance company, came increasingly into use. Many settlors and beneficiaries were eager for the accumulated expertise often found at corporate trustees and the easy solution of the replacement trustee issue they provide.<sup>88</sup> As Palestinian trusteeship was modelled on foreign, principally Anglo-American, models, the local popularity of the trust company may have reflected this larger trend. As in the nineteenth century United States and turn-of-the-century Japan, not every company with the term 'trust' in its name in fact provided trusteeship services; structured as companies rather than as trusts, and producing profit (or loss) for their shareholders rather than distributing income and capital to beneficiaries, some Palestinian 'trust companies' were trusts in name only.<sup>89</sup> So, for example, when the Jaffa riots of 1936 drove the establishment of a utility corporation for the purpose of building port facilities at Tel-Aviv, the company was named 'Marine Trust Company', but the only feature differentiating it from a plain public (i.e. traded) corporation was a Board of Trustees tasked with easing the company into existence, safe-keeping monies subscribed until the company was ready to receive them.<sup>90</sup>

<sup>88</sup> On the rise of corporate trusteeship in the United States see L. M. Friedman, 'The Dynastic Trust' (1964) 73 *Yale L. J.* 547, 563–72; on the equivalent process in the United Kingdom see D. R. Marshall, *Corporate Trustees* (London: Europa Publications, 1952); G. Moffat et al., *Trusts Law*, 5th edn, (Cambridge University Press, 2009), pp. 429–30. Trust companies first appeared in Massachusetts 'in 1818 or 1822', and then, a decade or two later, in South Africa, where '[t]he management of private trusts was often [since the mid-nineteenth century] undertaken by trust companies': Honoré, 'Trust', above, note 2, p. 855.

<sup>89</sup> For the free nineteenth-century American use of the term 'trust', see A. W. Scott, 'Fifty Years of Trusts' (1936) 50 *Harvard Law Review* 60, 73–5. For the 'trust [*shintaku*] companies' of early twentieth century Japan, which were, in substance, lending institutions rather than trusts, see Hiroto Dogauchi, 'Trusts in the Law of Japan', in M. Cantin Cumyn (ed.), *La Fiducie face au trust dans les rapports d'affaires* (Bruxelles: Bruylant, 1998), pp. 105, 106; see further Makoto Arai, 'Japan', in A. Kaplan (ed.), *Trusts in Prime Jurisdictions*, 3rd edn. (London, Globe Business Publishing, 2010), p. 233, 234–6.

<sup>90</sup> *Palestine Post*, 'Trust Company for Tel Aviv Port Development: Utility Corporation opens Subscription Lists', 28 May 1936, 1. Similarly, the Builders' Trust Limited was a

The Mandate era did see use of non-incorporated private trusts. One such was the Palestine Orchestra Trust, established by trust deed as the body administering the orchestra's affairs. The trust deed, setting up a ten-member Board of Trustees, was authored in December 1935 by Bronislaw Huberman, the orchestra's founder, and lawyer Solomon Horowitz, who three years later advised Barth that *Eliash* 'cannot be seen as a binding precedent'.<sup>91</sup> Another instance of the use of individual trusteeship was the practice of registering all the flats in a condominium as owned by a 'committee' made up of the owners of certain of them, the non-registered flat-owners having previously agreed by contract that the committee-members 'hold [all the flats] in favor of all the purchasers of the flats' [that is, hold each flat for its respective purchaser]. This practice was contrived to bypass the inability, from 1937–1953, of Palestinian flat-owners to register their rights in their flats; only owners of plots, in whole or in part, could register their rights. While the practice was in 1945 held illegal and void by the Supreme Court, *because* it amounted to registering land in the name of trustees, which was, under *Eliash*, impossible (it was this decision that alerted Barth to the potential destructive force of *Eliash*), it seems to have been quite popular in practice.<sup>92</sup> Individual

bank, not a trust: *Palestine Post*, 'Help for the House-owner: Builders' Trust Limited formed in Tel-Aviv', 26 January 1938, 3. Other trust companies with few, if any, traits distinguishing them from non-trust companies were the Ramelana Trust Co., Carmel Investment Trust and Joseph Loewy & Co., for records of which see ISA, files P-7/919, P-8/919 and P-9/919. Joseph Loewy or Löwy, a Jewish engineer and entrepreneur of German birth, active in the Palestinian land market since before World War I, was instrumental in the 1930s extension of Jewish Haifa and the establishment of settlements to the north, such as the town of Nahariya: Y. Gelber, *New Homeland: Immigration and Absorption of Central European Jews, 1933–1948* (Jerusalem: Ben Tzvi Institute, 1990), pp. 358–9, 364; the Carmel Investment Trust purchased and developed land on the central Carmel plateau: *Palestine Post*, 'Central Carmel Plateau between Athlit and Nesher', 12 November 1948, 14. The archival materials the three companies left make possible a characterization of their activities. No activities particularly characteristic of a trust – rather than of a company or corporation – were found.

<sup>91</sup> For the Palestine Orchestra Trust, see U. Teplitz, *The Story of the Philharmonic Orchestra* (Tel-Aviv: Keter, 1992) pp. 15–16; *Palestine Post*, 'Reply to Musicians' Complaints', 28 June 1946, 3. The orchestra's musicians rebelled in 1946, deciding not to renew their contracts with the trust, but rather to form a self-governing cooperative to replace the trust as the orchestra's managing body: *Palestine Post*, 'Palestine Orchestra to turn into Cooperative', 28 May 1946, 3.

<sup>92</sup> Several construction projects where this practice was used provided the factual background to *Ben-Ya'acov* (above, note 53), where Shaw J declared it to be ineffective (the quoted phrase is drawn from the Court's quotations from contracts signed by individual purchasers; *ibid.*, at 631). *Eliash*, appearing for the purchasers, argued that the

trusteeship was also used as an interim solution for registering, for the duration of construction, rights to land purchased by co-owners, none of whom were able to take care of obtaining permits necessary for construction. The trustee, the wife of one co-owner, seems to have actively taken care of construction.<sup>93</sup> The purchase, development and registration of land and flats appear to have been the primary contexts in which individual, unincorporated trusteeship was used.

Trust companies were, from the mid-1930s, used with an impressive frequency for investment and other business purposes, some specializing in real estate.<sup>94</sup> The 'certificates under the hand of the High Commissioner' which were, under the Companies Ordinance, necessary for

committee-members could be seen as trustees for every purpose except registration, but the court, unsurprisingly, rejected this contention. The registration of rights in flats, separately from the rights in the land they stood on, first became possible during the Ottoman era, by way of analogy from s. 25 of the Ottoman Land Code of 1858 (which referred to rights in gardens, orchards and vineyards rather than in flats). The possibility of such registration was abolished by the British in the Land Law (Amendment) Ordinance, 1937, s. 1, though existing registered rights in 'trees', 'buildings' and 'rights to build or add to existing buildings' were preserved. Flat-owners were thus left in need of devices such as the scheme described in the text, until the enactment of the Condominium Act 1952. See a brief review of the history of the subject in S. Ben-Shemesh, 'On the Abolition of the Separate Registration of Buildings and Plants' (1970) 26 *HaPraklit* 403.

<sup>93</sup> This trust, created in 1935, provided the factual scenario behind CA 87/50 *Liebman v. Lifshitz* 6 PD 57 [1952].

<sup>94</sup> See, e.g., the Palonath Trust and Agency Ltd, incorporated in order to 'manage a trust investment company business': *Palestine Gazette*, Hebrew Version, No. 517, 6 June 1935. The English version of that same issue of the Gazette included, e.g., a notice of the incorporation of OTIC, the Oriental Trust & Investment Company Ltd, incorporated in order 'to account lands and any estate or interest therein and to develop and turn to account same'. These were not the only trust companies whose incorporation was noticed in this issue of the Gazette, which I have picked as a sample. The *Palestine Post* published a weekly report on the 'weekly list of new enterprises' published in the Gazette; many of those reports feature trust companies. See, e.g., the following reports: 'Incorporation of 13 Private Companies', 14 January 1937, 10 [one trust company]; 'New Companies and New Investments', 23 July 1937, 12 [two trust companies]; 'LP.64,000 Invested in Local Industry and Trade', 16 March 1939, 9 [4 trust companies]; 'Investments of LP.200,000 in August: 10 New Firms Commence Business', 27 September 1939, 6 [4 trust companies]; 'Investments', 18 May 1941, 4 [one trust company]; and the apparent record holder, 'New Financing in Palestine: 23 Investment Trusts Formed at One Time', 13 June 1935, 1. The archives yield many further examples, e.g. the following trust companies, all of which specialized in purchasing, holding and selling real estate: the Union Holding and Trust Co., Ltd: ISA, files M-24/319, M-21/856, M-11/857, M-52/4355; Ramelana Trust Co., Ltd, Carmel Investment Trust Ltd, and Joseph Loewy & Co., Ltd (for which see note 90 above); Fidelity Emun Investment and Trust Co. Ltd: CZA, file KH4 7626; and the Palestine Trust Corporation: ISA, file M-20/309.

companies to hold land, were generously issued by Registrar of Companies Henry Kantorovich, to whom this power of the High Commissioner had been delegated. Kantorovich later recalled that he used to 'issu[e] certificates to companies to hold land where on the scanty evidence before him he was satisfied that the company was a genuine land development company'.<sup>95</sup> The Anglo-Palestine Bank incorporated its trust subsidiary, A.P.B. Trust Company Limited, in 1939; Barth was a member of its Board of Directors. The company 'was established for the purpose of engaging in every description of trustee business . . . act[ing] as trustees for persons residing abroad who invest their capital here, as trustees for debenture holders, and undertak[ing] executorships under wills, etc'.<sup>96</sup> Where 'capitalists who still reside abroad' invested money in 'property or land' in Palestine, the company promised to establish a 'separate private limited compan[y] . . . in respect of each property in order to facilitate its transfer to its rightful owner after his arrival in Palestine'.<sup>97</sup> A few years later the company 'reported good progress' in its business of acting 'for people living in Great Britain, the Empire and America, who entrust it with management of their Palestine investments and business', as well as acting 'for debtors' and 'administer[ing] the trusteeship in the name of groups of banks which participate in joint loans'.<sup>98</sup> The Eretz Yisrael Discount Bank, a prominent Palestinian privately owned bank, established its trust subsidiary in 1944.<sup>99</sup> Banks also provided trust and escrow services directly.<sup>100</sup>

<sup>95</sup> For the requirements of the Companies Ordinance, s. 15, see note 83 above and accompanying text. Kantorovich's description of his pre-war practice is in the ISA, file M 714/19: Minutes of meeting held in office of Administrator General on Monday, 29th April, 1946. Participating were Administrator General Kantorovich, H. E. Baker, Acting Solicitor General, and J. F. Spry, Assistant Director of Land Registration.

<sup>96</sup> *Palestine Post*, 'A.P.B. Trust Company Established: £P.50,000 Fully Paid Share Capital', 13 August 1939, 7; a Hebrew version of the same story was published in *Davar*, 14 August 1939, 3.

<sup>97</sup> *Palestine Post*, 'Foreigners' Local Property: Activity of A.P.B. Trust Company', 8 September 1939, 4.

<sup>98</sup> *Palestine Post*, 'Local Deposits for Financing War: Anglo-Palestine Bank's 1943 Report', 11 May 1944, 2.

<sup>99</sup> Gross, *Banker*, above, note 85, p. 269.

<sup>100</sup> As illustrated by the facts of *Hausdorf v. Metzger*, above, note 65. Banks also served as debenture trustees: see, e.g., notice of a general meeting of the debenture holders of Teltsch House Ltd, *Palestine Post*, 10 August 1939, 4, mentioning the Kupat Am Bank Ltd. serving as trustee.

Insurance companies, too, formed trust company subsidiaries,<sup>101</sup> while some trust companies functioned as insurers.<sup>102</sup>

Private Palestinian demand for professional investment services appeared in the early 1930s with the immigration to Palestine of Jews from the Balkans and from Germany, who were accustomed to investing in securities. This demand led to the 1935 establishment of the 'Securities Exchange Bureau' (later the 'Tel Aviv Securities Clearing House'), the future Tel-Aviv stock exchange.<sup>103</sup> It also led to the establishment of numerous investment trust companies, at least some of which operated as unit trusts: a well-known example was the Palestine Investment Association (PIA), a unit trust established in 1936 by Ernst Kahn, an immigrant from Germany.<sup>104</sup> The Yefet family's private bank also established a closed unit trust at about this time.<sup>105</sup> Palestinian investment practice was thus distinctly advanced for the time, at least compared to English practice: unit trusts were only 'introduced into England from America in 1932'.<sup>106</sup> The Anglo-Palestine Bank established what it called 'Palestine's second investment trust', the A.P.B. Investment Company Ltd, in 1945; Barth was again a Director, along with the Bank's other top managers. Having introduced its preference shares and debentures at the Tel Aviv Securities Clearing House, the company has already, on its registration, 'invested or loaned a total of around LP.400,000' in

<sup>101</sup> Insurance company 'Tzion' participated in the forming of the 'Mortgage Trust Company, Ltd.', to which some mortgages 'Tzion' held were transferred: *Davar*, "'Tzion' Rising: Incomes Doubled in 1941', 26 April 1942, 4.

<sup>102</sup> E.g. the 'Zorfan' Trust Company, established to offer 'prompt mutual assistance for war-time damage from a special Compensation Fund formed through the cash subscriptions of members': *Palestine Post*, 'War Risk Fund', 20 September 1940, 6 (properties in Palestine were damaged during World War II by Italian air bombings, which also claimed numerous Palestinian lives). At the end of the 'first accounts period', 'allocation of compensation will be made or, if the property registered with the Fund is not damaged, money will be repaid': *ibid.* The directors included Shmuel Tolkowsky, M.B. E., Ernst Kahn, the founder of PIA (see text to note 104), and Menachem Dunkelblum, a leading lawyer and future Justice of the Supreme Court of Israel.

<sup>103</sup> For its history see S. Doron, 'From Exchange Bureau to Stock Exchange (1933-1962)' (1997) 137 *Riv'on Le'Banka'ut* 43.

<sup>104</sup> For the appearance of demand for investment opportunities and services, and the establishment of the Tel-Aviv stock exchange, see Gross, *Banker*, above, note 85, pp. 178-9; Gelber, *New Homeland*, above, note 90, pp. 419-23. For the establishment of PIA see Gelber, *ibid.*, p. 422; A. P. Michaelis, 'A Hundred Years of Banking and Money in Eretz-Yisrael' (1984) 91 *Riv'on Le'Banka'ut* 87.

<sup>105</sup> Gelber, *New Homeland*, above, note 90, pp. 419-20; Michaelis, 'Hundred years of Banking', above, note 104, 88.

<sup>106</sup> L. C. B. G., 'Fixed and Flexible Trusts' (1937) 1 *Modern Law Review* 68, 69.

preference shares of local undertakings, in debentures and in loans to Jewish municipalities and local councils.<sup>107</sup> Its claim to being 'Palestine's second investment trust', after PIA, is only plausible if only investment trusts traded on the Securities Clearing House are counted.<sup>108</sup>

Attempts at establishing trust companies offering a wide repertoire of trust services were not limited to banks: the Palestine Trust Company Ltd held itself out as 'afford[ing] guidance on all financial and business problems', 'procur[ing] sound and profitable investment possibilities', 'perform[ing] all necessary operations towards execution of clients' undertakings', 'secur[ing] favorable investments in mortgages and other securities', 'assist[ing] in the purchase and development of land, plantations, farms, and urban property', 'undertaking the formation and establishment of companies and participat[ing] in their management', 'provid[ing] openings for capital in new or established business', 'creat[ing] strong economic units through the union of individual efforts having limited resources', 'assist[ing] in the prompt transfer of funds from Central Europe', and 'manag[ing] estates as executor, trustee, administrator or guardian'.<sup>109</sup> Activities promised were not always carried out, however; while the company did lend money,<sup>110</sup> function as a real estate agent,<sup>111</sup> serve as middleman in the sale of distributing houses of electrical appliances<sup>112</sup> and organize other companies,<sup>113</sup> many other aspects of its apparent multifaceted aptitude seem to have remained unexercised.

<sup>107</sup> *Palestine Post*, 'Half-Million Pound A.P.B. Trust', 30 September 1945, 2; see also Gross, *Banker*, above, note 85, p. 209.

<sup>108</sup> Many earlier investment trusts, such as those mentioned in note 94 above, were evidently disregarded, perhaps for marketing purposes, by A.P.B. top brass. S. Hoofien, General Manager from 1925–1947, seems to have thought of establishing A.P.B.-controlled trust companies for several years before the first such company was eventually formed in 1939. In 1935 he proposed that the bank sell its Palestine Electric Company stock to a trust company formed for that purpose. The scheme was supposed to enable the bank to realize its profits on its P.E.C. holdings without relinquishing its voting rights. It was dropped on the advice of London solicitors, Cazenove, Akroyds & Greenwood & Company, and Linklaters and Paines. See correspondence in CZA, file L51\404.

<sup>109</sup> *Palestine Post*, Advertisement, 18 May 1934, 20.

<sup>110</sup> It advertised in February 1936 that it had 'Funds Available for conservative mortgage loans to responsible building owners': *Palestine Post*, 16 February 1936, 2.

<sup>111</sup> It advertised an 'exquisite family home in Rehovoth': *Palestine Post*, 30 May 1935, 12.

<sup>112</sup> 'Business Offer', *Palestine Post*, 24 December 1936, 11.

<sup>113</sup> Such as the Palestine Plate Glass and Paint Works (Shepherd, Tobias and Co.) Ltd of Haifa: *Palestine Post*, 'Glass and Paint Factory: New £15,000 Company for Haifa', 4 November 1935, 5.



Similarly ambitious was the General Trust Corporation Ltd (GTC), founded in April 1939 by Siegfried Moses, a leader of German Zionism and recent immigrant from Nazi Germany. It held itself out as offering investment advice, property administration services ('especially on behalf of persons residing abroad'), expertise in setting up, reconstituting and winding-up enterprises, accounting services, advice on business restructuring, estate administration services, 'as well as assuming the trusteeship in those cases provided for in the Companies Law' (e.g. debentures and employee compensation schemes).<sup>114</sup> Data on the GTC's actual activities include its serving, from 1940, as trustee for PIA, registered that year as the Palestine Independent Trust Association Ltd; PITA itself focused on managing its portfolio.<sup>115</sup> The GTC also lent money.<sup>116</sup>

Mandate-era use of trust structures also extended to various Zionist organizations, which used the trust for both charitable and mixed, public-private purposes. Some uses of the trust form by Zionist organizations were plainly non-charitable – in effect, private trusts, set up and administratively supported by 'Zionist public sector' institutions, components of the Zionist state-in-waiting of the Mandate era. Use of trust structures by Zionist Organizations started before the Mandate, during the Ottoman era. The Jewish National Fund (JNF), for example – Zionism's most prominent land-purchasing arm – was in effect a Zionist *waqf*, intended to purchase land in Palestine, hold it for the Jewish people, and never let it go: Jewish users of JNF land, such as *kibbutzim*, received leases or tenancies at will, the title to the land staying with the JNF. The JNF was registered in England in 1907 as an Association Limited by Guarantee. The English trust form, suggested by Herbert Bentwich (Norman's father and a prominent English solicitor and Zionist), was rejected, because as the Fund was to have, inter alia, powers to cultivate the land it purchased, lease it, and develop industry, it could not,

<sup>114</sup> See a letter by Moses to potential clients, marketing his services, in CZA, file S7\2108. Moses, chairman of the Organization of German Zionists (Zionistische Vereinigung für Deutschland) from 1933–37, later became the first Comptroller of the State of Israel, serving from 1949–1961.

<sup>115</sup> Gelber, *New Homeland*, above, note 90, p. 422; and see the 'company history' page on the PIA website: <http://www.pia.co.il/pia/Front/Document.asp?ID=520505>. PIA paid a dividend of 8.4% p.a. for 1940: *Palestine Post*, 'Progress of Palestine Unit Trust', 30 December 1941, 2.

<sup>116</sup> As to Kibbutz Beit-Alpha, see contract of May 1941 between the Kibbutz and Palinvest, the Palestine Investment Service Ltd., and Deed of Charge granting the GTC a charge over the Kibbutz's crop of wheat and barley: both in CZA, file A376\288.

had it been established as a trust, be seen as purely charitable, and would thus have been subject to the rule against perpetuities, while its founders wanted it to be, precisely, a perpetuity.<sup>117</sup>

I will describe three particularly interesting examples of the use of trust forms by Zionist organizations, starting with the notorious and ending with the secret.

#### A. *Ha'avara*

Germany's Jews came under threat on the establishment of the Nazi government in early 1933. Many German Jews were relatively wealthy, and Nazi government policy, until the War years, supported their emigration. Wealthier Jews could immigrate to Mandate Palestine more easily than the less fortunate, as the Mandate government was, until 1937, prepared to issue an unlimited number of 'A-1' Visas, granted to immigrants who could demonstrate their ownership of property worth at least £1,000. Before the Nazis' rise to power, the number of such relatively wealthy Jewish immigrants to Palestine was limited: the prosperous Jews of Central and Western Europe – not to mention those of the Americas – were generally intent on staying in their host societies. The Nazis' rise to power brought a relatively prosperous Jewish population under direct threat for the first time since the late nineteenth century rise of Zionism; and as other options for emigration were increasingly closed off, the Palestinian option became more attractive.

Prosperous immigrants, however, generally wanted to take their wealth along with them. German legislation enacted in 1931–1932, before the Nazi takeover, in an effort to stem capital flight from Germany, limited the amount of funds those leaving German territory could take with them, absent special permission, to 200 Reichsmarks (then about £13). Such a sum did not suffice in order to obtain an 'A-1' visa, far less to settle in Palestine. Various commercial enterprises took advantage of German Jewry's plight by offering, for example, insurance policies

<sup>117</sup> For the debate regarding the legal form to be given to the JNF, see H. Bentwich, 'Zur Legalisierung des jüdischen Nationalfonds' *Die Welt*, 28 September 1906, 27–32; M. Bodenheimer, 'Zur Legalisierung des jüdischen Nationalfonds' *Die Welt*, 3 October 1906, 13–14; 12 October 1906, 12–14. See further L. Doukhan-Landau [Moses Doukhan's daughter], *The Zionist Companies for Land Purchase in Palestine* (Jerusalem: Yad Izhak Ben-Zvi, 1979), pp. 63–85; T. Shiloni, *The Jewish National Fund and Settlement in Eretz-Israel, 1903–1914* (Jerusalem, Ben Zvi Institute, 1990), pp. 26–9; M. and N. Bentwich, *Herbert Bentwich: The Pilgrim Father* (Jerusalem, Hozaah Ivrit, 1940), pp. 139–40.

which could be purchased in Germany, then cashed abroad after emigration, at a significant discount. Under those circumstances, the leaders of the small German-Jewish community of pre-Nazi-era Mandate Palestine, principally Felix Rosenblüth and Werner Senator, along with the then-head of the Jewish Agency's political department, Chaim Arlosoroff, conceived of a trust operation for the extraction of Jews, along with their property, from Germany to Palestine. Negotiations between private Jewish businessmen, German-Jewish banks, representatives of the German Zionist movement, and the Nazi Wirtschaftsministerium proved successful, and in late 1933 two self-described trust companies were set up and registered, in Germany and Palestine respectively. The German trust company, PALTREU – Palästina Treuhandstelle zur Beratung Deutscher Juden, or the Palestine Trust Office for Advising German Jews, was a partnership of the Anglo-Palestine Bank and two major German-Jewish banks, owned by the Warburg and Wassermann families. The Palestinian trust company, the Trust and Transfer Office 'Ha'avara' (transfer), was, at first, a Tel-Aviv subsidiary of the Anglo-Palestine Bank; the bank later transferred its holding to the Jewish Agency for Palestine, the local arm of the World Zionist Organization. The scheme worked as follows. German Jews deposited Reichsmarks in excess of the Reichsmark equivalent of £1,000 in one of two specially earmarked accounts at the Reichsbank. Having received a certificate for doing so, they were able to prove their ownership of funds in the sum deposited to the Mandate immigration authorities and receive an 'A-1' visa for Palestine. Palestinian merchants and industrialists, meanwhile, placed orders for German products – typically products German manufacturers had trouble selling on the free market – with the Ha'avara office in Tel-Aviv. Monies taken from the PALTREU Reichsbank accounts were channelled to the German manufacturers as payment. As the Palestinian purchasers repaid Ha'avara, through Palestinian banks, for the credit extended, Ha'avara paid the counter-value to the newly-arrived immigrants from Germany. In this way the German need for export markets for German products was exploited to permit German Jews to escape Hitler's noose with at least some of their property intact: 25% of the Ha'avara monies were deducted from payments made to depositors, and used to cover the travel costs of poor immigrants from Germany and support immigrants during their absorption in Palestine. Depositors lost the applicable exchange commission for purchasing sterling; another fraction of the sums deposited was deducted to reimburse Palestinian purchasers of German goods for the extortionate prices demanded by

German manufacturers. On top of those losses, Ha'avara-PALTREU charged a 10% commission to cover their administrative costs. The terms worsened as Nazi repression deepened and Germany's Jews became more desperate to leave.<sup>118</sup>

Ha'avara served general Jewish and Zionist purposes.<sup>119</sup> It increased the Jewish population of Palestine, swelled the Jewish-Palestinian middle class and Palestine's industrial infrastructure, and saved some 50,000 to 60,000 German, Austrian and Czechoslovak<sup>120</sup> Jews from likely murder

<sup>118</sup> The archive of Ha'avara now forms Class L57 at the CZA. For the history of the Ha'avara transfer operation see: W. Feilchenfeld, *Five Years of Jewish Immigration from Germany and the Haavara-transfer* (Tel-Aviv: Haaretz Press, 1938); W. Feilchenfeld et al., *Haavara-transfer nach Palästina und Einwanderung Deutscher Juden 1933-1939* (Tübingen: Mohr, 1972); L. Pinner, 'Vermögenstransfer nach Palästina, 1933-1939', in H. Tramer (ed.), *In Zwei Welten: Siegfried Moses Zum Funfundsiebzigsten Geburtstag* (Tel-Aviv: Bitan, 1962), p. 133; Gelber, *New Homeland*, above, note 90, pp. 26-35, 154-175; R. Bondi, *Felix: Pinchas Rosen and his Time* (Tel-Aviv: Zmora Bitan, 1990), pp. 120, 247, 290; R. N. Rosenzweig, *The Economic Consequences of Zionism* (Leiden, E.J. Brill, 1989), pp. 81-9; H. A. Strauss, 'Jewish Emigration from Germany, Nazi Policies and Jewish Responses (II)' (1981) 26 *Leo Baeck Institute Yearbook* 343; Gross, *Banker*, above, note 85, pp. 176-8; E. Black, *The Transfer Agreement: the Dramatic Story of the Pact Between the Third Reich and Jewish Palestine* (New York: Carroll & Graf, 2001). For the subsidy Ha'avara paid Palestinian purchasers of German goods to reimburse them for the prices demanded by German vendors, see the documents in CZA file A417/422, including statements of claim and judicial decisions in lawsuits depositors filed against Ha'avara for deducting a larger fraction of sums deposited than was agreed; Ha'avara had to pay larger subsidies as the Germans demanded higher and higher prices.

<sup>119</sup> In furthering those purposes it established other trust companies, such as the Near East Trust Co., established in 1934 as an Ha'avara affiliate. In 1937 the Near East Trust Co. proposed 'to grant second-transfer mortgages . . . from money placed at its disposal by . . . Ha'avara', and 'issue LP.30,000 of 6% certificates which will be offered to transfer immigrants'. 'Preference [was to] be given to prospective immigrants who can thereby obtain an [immigration] certificate': *Palestine Post*, 'Second-Transfer-Mortgages managed by the Near East Trust Co.', 14 April 1937, 10. Once immigration from Germany was cut short by the war, the Near East Trust Co. shifted its activities to supporting the 'middle class' farming settlements founded in Palestine by Jewish emigrants from Germany (being 'middle class' principally meant, among late Mandate-era Palestinian Jews, not being a member of the powerful Jewish Labourers' Federation, the *histadrut*). It became 'a purchasing organization for a number of grocery stores', 'a subsidiary enterprise of the Rural and Suburban Settlement Company (RASSCO)', itself an Ha'avara affiliate: *Palestine Post*, 'LP.50,000 Debenture Issue of "Rassco"', 25 June 1945, 2. It collectively marketed the produce of 'middle class' communities to both grocery stores and industrialists, who contracted with the trust to buy this produce exclusively from the trust: see overview, dated 16.12.1943, of the trust's first year of renewed operations, and other pertinent documents, in CZA, file 415\422.

<sup>120</sup> After the *Anschluss* of March 1938, operations similar, though not identical, to Ha'avara were put in place for Austrian and (later) Czechoslovak Jews. These operations, like

at the hands of the Nazis. It provided a sizable chunk – slightly more than 9 Million Palestinian Pounds – of the influx of private funds, running to 54.2 Million P.P., which was imported into Palestine between 1933 and 1939, driving its economic growth and facilitating the establishment of a modern infrastructure and economy.<sup>121</sup> Ha'avara resembles charitable trusts in that its beneficiaries were distressed persons, and in that it was administered through a mechanism set up by public-sector Zionist organizations; private trusts are usually the creation of their settlor and his legal and tax advisors, and are administered by them. Still, the essence of Ha'avara was a series of special-purpose private family trusts. Its purpose was to let German-Jewish immigrants *keep* as much as possible of their money; charitable trusts are a means of giving one's assets away. The unique nature of Ha'avara reflected the unique characteristics of its user population: still relatively wealthy, and yet distressed by a menacing regime and the restrictions it put on the exportation of money.

Strikingly, while the transfer mechanism functioned as a hybrid, public-private trust, neither of its two arms was, in point of form, a pure trust. Though 1930s German law knew a form of trust in the *Treuhand*,<sup>122</sup> it was seen as more appropriate to establish PALTREU as a partnership. The Tel-Aviv arm of the operation, the Trust and Transfer Office Ha'avara, was a trust company, though one which did in fact function as a trustee. A further peculiarity of the transfer operation was that the monies distributed to its beneficiaries in Palestine did not derive directly from monies its settlors deposited in Germany, despite the settlors and beneficiaries being the same persons. Monies deposited in Germany were paid to German manufacturers. Monies distributed in Palestine came from credit extended by Palestinian banks to Palestinian purchasers of German goods. Of the familiar types of trust, the Ha'avara operation most resembles, perhaps, the pension fund: a standardized,

Ha'avara itself, only lasted until the opening of World War II: see sources in note 118 above.

<sup>121</sup> For data on the sums transferred through Ha'avara and on capital imports to 1930s Palestine generally, see Gelber, *New Homeland*, above, note 90, pp. 152, 172; M. Michaely, *Foreign Trade and Capital Imports in Israel* (Tel-Aviv: Am Oved, 1963), p. 1, 3; M. Beenstock et al., 'Immigration and the Jewish Economy in Mandatory Palestine' (1995) 15 *Research in Economic History* 149–213; T. Gozansky, *Formation of Capitalism in Palestine* (Haifa: University Projects Press, 1986), pp. 99–107.

<sup>122</sup> On the *Treuhand* see, e.g., S. Grundmann, *Der Treuhandvertrag: insbesondere die werbende Treuhand* (München: C. H. Beck, 1997); M. Löhnig, *Treuhand: Interessenwahrnehmung und Interessenkonflikte* (Tübingen: Mohr Siebeck, 2006); H. Kötz, 'Trusts in Germany', in *La Fiducie*, above, note 89, p. 175.

collective trust fund intended for a specific, pre-defined class of beneficiaries, where employee and employer contributions to the fund are made at time X (during employment) and disbursed at time Y (retirement). The Ha'avara-transfer substituted the physical distance between Germany and Palestine for the distance in time in the pension fund model, and the difficulties of Nazi repression, German exchange controls and Mandate immigration controls for the hardships of old age.

### B. *Mheiman and Himnuta*

The extraction of Jewish monies from Nazi Germany was also the principal motive for the establishment of two more 'Zionist public sector' trust companies: Mheiman and Himnuta, both JNF subsidiaries. The two companies' unique names – Aramaic forms of 'trustee' – were chosen by Dr Barth, who took care of their registration: Barth was an observant Jew, conversant in Judaism's Aramaic sources.<sup>123</sup> The JNF established them as one element of a complex plan formed to facilitate the transfer to Palestine of monies the JNF itself accumulated in German banks, the fruits of donations by German Jews. Money owned by an organization, rather than an individual, could not be transferred to Palestine by way of Ha'avara. A solution was found once the Berlin offices of the JNF were indirectly contacted in April 1936 by Hermann Ferdinand Keller, a former inhabitant of the (non-Jewish) 'German Colony' of Haifa, newly arrived in Germany; some of the Templer inhabitants of Palestine's 'German Colonies' were, as a result of the deterioration of German-Jewish relations, keen to return to Germany and liquidate their property in Palestine.<sup>124</sup> Despite his emigration, Keller still owned a significant amount of land in Haifa, and was interested in selling it to the JNF. As both the German branch of the JNF and Keller were domiciled in Germany, the sale was not subject to German exchange controls: it was to be a sale between two Germans. The JNF did not, however, wish to hold Keller's land, on the periphery of Haifa, as part of its ever-growing fund of land, which its statutes barred it from selling: during this period, the Fund focused on acquiring rural land for agricultural development, and did not wish to hold urban land. The solution was found in the

<sup>123</sup> Alexander, 'Himnuta', above, note 85, 86.

<sup>124</sup> For the non-Jewish German community of late-Ottoman and Mandate-era Palestine, and its 'German Colonies', see Y. Ben-Artzi, *From Germany to the Holy Land* (Jerusalem: Ben Tzvi Institute, 1996).



establishment, in the Fall of 1936, of Mheiman, a trust company, so that it could hold Keller's land on trust for the JNF. Unlike the JNF itself, Mheiman was not barred by its statutes from selling its land. The consideration for the eventual sale of land held by Mheiman would then continue to be held on trust for the JNF, which could, as beneficiary, call for the monies when it saw fit. Registration of the land as owned by an unknown company rather than the JNF was also useful in preventing the anti-Zionist clerks of the Haifa land registry from derailing the plan.<sup>125</sup>

Mheiman was, however, limited, according to both its memorandum of association and statutes, to purchasing and acquiring Keller's Haifa land. It was made use of in three more purchases of land in Haifa from H. F. Keller and other German owners of Haifa land.<sup>126</sup> Still, when a sale of German-owned land in the Bet-Shean valley, by the Jordan River, was proposed, another company, on the Mheiman model but not limited to purchases in Haifa, was established in the Summer of 1938: Himnuta. While the last significant transaction in which Mheiman was involved was completed in 1938, and the company was eventually wound up in 1950, Himnuta has since its establishment served the JNF for a large variety of transactions: it was (and is) used whenever the JNF purchases land with a view to reselling it.<sup>127</sup>

Interestingly, the memoranda and statutes of both companies do not mention their trusteeship role. They define the companies' objects as purchasing, administering and holding real estate, and expressly give them extended powers to deal with the property they purchase, including, significantly, powers of sale. The establishment of each company was, however, accompanied by the conclusion of a contract between the newly established company and the JNF, according to which the company was to hold its assets in trust for the JNF. The contract concluded

<sup>125</sup> For Mheiman, see G. A. Alexander, 'Land Transactions in Haifa between Germans and the Jewish National Fund, 1936–1937' (1988) 48 *Kathedra* 164; Y. Katz, *The Battle for the Land: the Jewish National Fund before the Establishment of Israel* (Jerusalem: Magnes, 2002), pp. 56–9. My description omits several additional complexities which characterized the transactions to which Mheiman was a party, but are unnecessary for present purposes.

<sup>126</sup> Alexander, 'Land Transactions', above, note 125, 178–81.

<sup>127</sup> On Himnuta, see generally Alexander, 'Himnuta', above, note 85, *passim*. For the winding-up of Mheiman, see Alexander, 'Land Transactions', above, note 125, 175 note 43. For the many 1940s uses of Himnuta, see Alexander, 'Himnuta', above, note 85, 93–95; Katz, *Battle*, above, note 125, pp. 196–8, 242–55. For later (post-1967) uses of Himnuta, see A. Ehrlich, 'West Bank Land Fraud' (1986) 15 *Journal of Palestine Studies* 161.

between Himnuta and the JNF make clear Himnuta's role as a passive trustee. It undertook to receive, release and transfer any asset upon receipt of instructions from the JNF. The JNF undertook to defray any transaction costs. Himnuta was not to undertake any obligation to a third party absent JNF consent in writing.<sup>128</sup>

The care Barth took to disguise the two companies' function as trustees in their memoranda and statutes is striking, especially if he believed in the late 1930s, as he described his belief of that time in his 1946 letter, that Chief Justice McDonnell's seeming rejection of the applicability of the English private trust in Palestine could not 'be seen as a binding precedent'. Barth's further 1946 statement, that *Eliash* did not prevent 'the establishment in Palestine of trust companies' and their approval by 'the government's legal apparatus', meaning the registrar of companies, was correct, since as we have seen, companies expressly called 'trust company', and even a 'General Trust Corporation', were successfully registered in Palestine both before and after the registration of the two JNF subsidiaries. Some of those 'trust companies' specialized, like Mheiman and Himnuta, in the purchase and resale of land in Palestine.<sup>129</sup> It was probably the identity of the beneficiary – the JNF – that made Barth disguise the subsidiaries' role as trustees for that organization. Both companies were registered during the disturbances known as the 'Arab Revolt' (1936–39); the JNF's controversial land purchases were a central cause of Arab alarm. In response to Arab pressure, British support for Zionism was weakening.<sup>130</sup> Strikingly, the two companies' very nature as JNF *subsidiaries* was also disguised: each company issued, on its establishment, 20 shares, held in equal parts by Barth and Dr Sally Hirsch. Both were then working as private lawyers, rather than for the JNF or any other public Zionist institution (16 of the 20 Himnuta shares were in 1939–1940 transferred to the JNF).<sup>131</sup> The two companies' identity as JNF subsidiaries was thus kept from the Registry's staff. While Barth admitted, in his letter of 25 April 1938 to the Registrar of Companies,

<sup>128</sup> The memoranda and statutes of Mheiman have been lost, but not the contract it concluded with the JNF; I follow Alexander, 'Land Transactions', above, note 125, 175–6. For the memoranda and statutes of Himnuta, see Alexander, 'Himnuta', above, note 85, 86. The contract Himnuta concluded with the JNF is quoted by Katz, *Battle*, above, note 125, p. 59; the original is at the CZA, file L1/597.

<sup>129</sup> See examples in notes 90 and 94 above.

<sup>130</sup> T. Segev, *Palestine under the British* (Jerusalem: Keter, 1999), pp. 353–359.

<sup>131</sup> For the share allocation, see Alexander, 'Land Transactions', above, note 125, 176; Alexander, 'Himnuta', above, note 85, 91–3.

applying for the registration of 'Hinmuta', that the company was being established as a trustee for German Jews who were having difficulties transferring their property out of the Third Reich, he remained silent regarding Himnuta's being a trustee for the JNF.<sup>132</sup> Barth may have estimated that Mandate government officials would be less likely to obstruct what was presented as a humane effort to help Germany's oppressed Jews than JNF purchasing activity, presented as such.

### C. *Use of nominee landowners*

My final example of the use of private trust forms by Zionist organizations involves JNF use of what were, in effect, individual passive trustees of land, in the increasingly adverse, from the JNF's perspective, circumstances of the 1940s. The Land Transfers Regulations of 1940 having forbidden, as regards 95% of the land in Palestine, the transfer of land owned by Palestinian Arabs other than to Palestinian Arabs,<sup>133</sup> the JNF resorted to legal subterfuge, between 1940 and 1948, in order to continue extending its landholdings. Key to several of the stratagems adopted was a loophole in the regulations which facilitated Jewish purchases of Arab land if the latter were made in satisfaction of a mortgage. To take advantage of this loophole, the JNF arranged for land it purchased from Arab sellers – many continued to sell, despite the regulations and Arab agitation against such sales<sup>134</sup> – to be purchased and held by its Arab nominees. Such nominees, referred to in at least one JNF document as 'trusted persons', gave the JNF a mortgage on the land, a durable power of attorney and a notarized bill in recognition of a (fictional) debt owed by the nominee. The nominee would then fail to repay his purported debt, and the land would be subjected to a judicial sale by public auction, in which JNF representatives would appear and win. This trusteeship practice was fully concealed from the Mandate government, including its land registry and courts. It operated, at great risk of default on the nominees' part, absent the involvement of any government body. It continued to the end of the

<sup>132</sup> For Barth's letter, see Alexander, 'Hinmuta', above, note 85, 88.

<sup>133</sup> Land Transfers Regulations, 1940, *Palestine Gazette*, Gazette Extraordinary, No. 988, 28 February 1940, Supplement No. 2.

<sup>134</sup> For Palestinian Arabs' sales of land to Zionist settlers, both individuals and organizations, throughout the Mandate period, and for Arab agitation against such sales, see H. Cohen, *An Army of Shadows: Palestinian Collaborators in the Service of Zionism* (Jerusalem: Ivrit, 2004).

Mandate, despite the applicability, in Palestine, of the English private trust having, in 1945–46, been explicitly rejected by the courts.<sup>135</sup>

The above three examples of the use of private trust forms by Zionist organizations demonstrate both the trust's eminent utility for effecting complex transactions and moving funds between territories, and its characteristic walking of the line between legality and the lack thereof. Zionist organizations made use both of trust types which were plainly legal – as trust companies were according to the Companies Ordinance – and, when driven to extremes by the government's limitations on Jewish land-purchase activities, of trust types which were wholly subterfuge, echoing the beginnings of the trust in late medieval England as a strictly private, passive nominee, played out outside the State's purview.<sup>136</sup>

If some British colonial judges, then, tended to deny the natives of Palestine and Zionist settlers there the use of the English private trust form, some of those settlers used it nonetheless, though trust companies, serving as trustees, were more popular than individual trusteeship. The Zionist settler population thus appropriated more of the colonizer's law than the latter was willing to have it use (at least on the more restrictive reading of *Eliash*). As is often the case with the uses to which trusts are put, Zionist settler use of private trusts and trust companies was often directed at evading inconvenient elements of positive law, such as the impossibility of registering title to a flat (rather than to a plot of land), Germany's limitations on the exportation of money, the quotas the Mandate authorities applied on Jewish immigration to Palestine, and the restrictions put on Jewish purchases of Arab-owned land. Much of the use of trusts and trust companies, both private initiatives such as Kahn's Palestine Investment Association and Moses' General Trust Corporation or initiatives of the Zionist establishment, such as Ha'avara and the JNF-controlled trust companies, was dedicated to the funnelling of Jews and Jewish money to Palestine. Other trusts were dedicated to using that money in purchasing land in Palestine. Jewish immigrants from Germany, as were Barth, Moses, Kahn, Rosenblüth and Senator, were as key to the burgeoning supply of trusteeship services in 1930s

<sup>135</sup> For the practice described, see CZO, file KKL5/15927, minutes of a meeting between Y. Stroumza, T. Wolf and A. Danin (all JNF operatives), held 5 November 1947 (the phrase 'trusted persons' appears in this document); *ibid.*, file KKL5/15929, letter dated 4 January 1948, by JNF land dept. to Adv. Yoav Sugarman. See also Katz, *Battle*, note 125, above, pp. 129, 232, note 87 and text; Y. Katz, *Jewish Settlement in the Hebron Mountains and the Etzion Bloc* (Ramat Gan: Bar-Ilan University Press, 1992), p. 31.

<sup>136</sup> See note 68 above and accompanying text.

Palestine as to the simultaneously growing demand for them.<sup>137</sup> A 1936 listing, by trade or profession, of the Jewish immigrants from Germany then living in the town of Haifa, a major concentration of such immigrants, shows thirteen 'transferberater [transfer advisors], trustees usw.'<sup>138</sup> Downtown Haifa's financial district, now largely derelict, still features a 'Trustees St.'<sup>139</sup> The trust was not only important in practice, however; it was also, as we shall see in the next Part, an important focus of debate among Mandate Palestine's Zionist jurists.

#### IV Zionist settler jurists debate the trust

The common law trust, seen, despite its functional equivalents in other legal traditions, as unique to the common law, often seems foreign to jurists of other traditions. Civil law jurists in Quebec and South Africa, faced with the undeniable presence of the trust in their jurisdictions, repeatedly struggled with the technical difficulties of fitting the common law trust into civil law-based systems of private law.<sup>140</sup> The very advisability of such a reception was also debated. Some accepted that their systems have received something very similar to the English trust;<sup>141</sup> others insisted that though the terms 'trust', 'trustee' and other terms originating in English trust law were in common use in their systems, those terms were to be interpreted according to the principles of the receiving system, rather than as importing the English law of trusts.<sup>142</sup>

<sup>137</sup> This prominence of lawyers and bankers principally familiar with German law and finance made for curious Anglo-German hybrids, such as the Fidelitas Investment & Trust Co. Ltd. advertising its Treuhand services in the *Palestine Post*, 9 March 1934, 7.

<sup>138</sup> Statistics of the German immigrants in Haifa, 1936, found in CZA, file S7\377. The data quoted is from Table 8.

<sup>139</sup> Banks St., Deposit St. and Account St. are nearby.

<sup>140</sup> See, for Quebec, Claxton, *Studies*, above, note 76, pp. 12–25.

<sup>141</sup> See, e.g. Quebecois jurist P.-B. Mignault's essay 'A propos de fiducie' (1933) 12 *Revue du droit* 78, and the opinions by Chief Justice De Villiers of the Cape Colony discussed by Honoré, 'Trust', above, note 2, at p. 860 (incorporating into the law of the Cape 'the English conception of a trustee *de son tort*') and p. 862 (incorporating into the law of the Cape the English rule that on the insolvency of a registered owner of land, who held it as a trustee although the register did not reflect this fact, the beneficiaries have priority over the trustee's private creditors as regards the trust land). De Villiers clothed his reception of English ideas in civilian terminology; there was no explicit reception.

<sup>142</sup> See, e.g., decisions by James Rose Innes, Chief Justice of South Africa, cited in Honoré, 'Trust', above, note 2, at pp. 862 and 868 ('the English law of trusts forms, of course, no portion of our jurisprudence . . . but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect in our own law').

1940s Palestine knew a similar debate, focused on both the advisability of receiving the English trust into the law of Palestine and the technical means for doing so. The trust was at the centre of a controversy which raged, throughout the decade, in the pages of the *Journal of the Palestinian Association of Jewish Lawyers*, *HaPraklit* [the lawyer]. The debate, caused by the co-existence of prevalent use of trusts and trust companies and incidental legislative references to private trusteeship with judicial decisions denying the applicability of the common law private trust in Palestine, was ignited by a lecture given at the 1942 conference of the Association, and later published in the inaugural issue of its organ, by Guido Tedeschi, a Jewish-Italian Professor of law. Tedeschi was then lately arrived from Italy after having been fired from his post at Siena University following Mussolini's anti-semitic legislation of 1938. Tedeschi's piece did not directly address the reception of the private trust in Palestine: in reviewing the common law trust and civilian *fiducia*, he noted early instances of the adoption of the trust in largely civilian systems: Quebec, South Africa and Japan.<sup>143</sup>

Tedeschi's brief piece attracted several ripostes, focusing, unlike Tedeschi's piece, on the applicability and use of the private common law trust in Mandate Palestine. One was by Alfred Witkowski, then a leading Jewish-Palestinian lawyer of German birth, who received his legal education in both Germany and England. Witkowski, who was to be appointed in 1954, as Alfred Witkon, to the Supreme Court of Israel, served as its undisputed tax expert until his 1980 retirement.<sup>144</sup> His article pointed out how trust law was developing in Palestine under conditions similar to those which drove its development in late-medieval England. Since most land in both the agricultural and urban areas of Palestine was (state-owned) *miri*, its possessors could not bequeath it or dedicate it as *waqf*. Much as in England before the Statute of Wills of 1540, the impossibility of making wills of land proved a fertile ground for the adoption and popularization, in practice, of the common law trust. As is well known, a further reason for the medieval employment of the

<sup>143</sup> G. Tedeschi, 'Contemporary Trust Business' (1943) 78 *HaPraklit* 1. He could also have cited Ceylon, which adopted the English trust on top of a Roman-Dutch legal stratum: Cooray, *Reception*, above, note 73. For biographical information on Tedeschi see Y. Sagy, 'Interview with Gad Tedeschi' in Aharon Barak et al. (eds.), *Essays in Private Law, in Memory of Gad Tedeschi* (Jerusalem: Sacher Institute, 1995), p. 23.

<sup>144</sup> For biographical information see M. Landau, 'In Memory of Alfred Witkon', in Aharon Barak et al. (eds.), *Justice and the Judiciary* (Tel-Aviv: Schocken, 1988), p. 11 (a collection of Witkon's articles); H. Cohn, 'On Alfred Witkon', *ibid.*, p. 15.



English trust were the feudal burdens accompanying intestate succession, which were, in effect, a medieval form of taxation.<sup>145</sup> Witkowski was understandably vague, in print, in his treatment of this aspect of the parallelism between late-medieval and Mandate Palestinian circumstances, noting that ‘though feudal burdens are not now imposed on property owners in Palestine, it is certainly possible that under modern conditions, too, a need will occasionally arise for the legal owner to be other than the beneficiary’.<sup>146</sup> Witkowski concluded, echoing Herbert Samuel’s expectations of 1925, that article 46 of the Palestine Order in Council, which permitted the application of English law, excepting (probably) statute but including ‘the doctrines of equity’, so far as Ottoman and specifically Mandate law did not ‘extend or apply’, did permit the reception of the common law private trust into the law of Palestine. In particular, since most land in Palestine was state-owned, out of which *waqfs* – the only form of trust Ottoman law knew – could not be declared, there was an evident need, not satisfied by existing Ottoman law or Mandate legislation, for an alternative form of private trust.<sup>147</sup>

Reinforcing Witkowski’s arguments, Tedeschi noted in a second piece on the subject, now addressing the applicability of the common law private trust in Palestine, that in light of the promulgation of the Charitable Trusts Ordinance and the references to the trust in other Ordinances, the common law trust could not be seen as contradicting any pre-existing principles of Palestinian law, and thus did not fall foul of the restrictive clauses of article 46.<sup>148</sup> Tedeschi further argued that instead of seeing the common law private trust as received into the law of Palestine by way of article 46, the trust should be seen as permitted as one result of the freedom of contract, which had been a basic principle of Palestinian law since late Ottoman times.<sup>149</sup> Arguing for the reception of the English private trust by way of article 46 had the disadvantage that a common reading of that article understood it to permit, subject to its several restrictive clauses, the importation of English case law while blocking that of English statutes (it permitted the importation of ‘the substance of

<sup>145</sup> See a listing of ‘the chief custodial purposes of [medieval] uses’ in J. Getzler, ‘Duty of Care’, in P. Birks and A. Pretto (eds.), *Breach of Trust* (Oxford: Hart, 2002), p. 43. Wielding power to dispose of land, including testamentary disposition, and escaping the Crown’s fiscal claims are the last two.

<sup>146</sup> A. Witkowski, ‘Private Trusts in Palestine’ (1947–48) 3 *HaPraklit* 99, 102.

<sup>147</sup> The quotations are from the Palestine Order in Council, article 46. <sup>148</sup> *Ibid.*

<sup>149</sup> For the introduction of this principle into Ottoman law, see Malchi, *History of Law*, above, note 10, pp. 62–3.

the common law, and the doctrines of equity'). Contracting parties, however, could agree to adopt, as between themselves, not only that part of the English law of trusts which was contained in the cases, but also its statutory part.<sup>150</sup>

Once the Italian-born Tedeschi, who studied law in Rome, and the German-born Witkowski, who received a PhD from Freiburg University, advocated the reception of the common law private trust into the law of Palestine, it was left to Professor Paltiel Dickstein of the Tel-Aviv School of Law and Economics, a generation older than both and a product of Russian Zionism, to oppose that reception.<sup>151</sup> Echoing Chief Justice McDonnell, Dickstein argued that ill-drafted legislation does not prove that a foreign legal form has been received into local law. Difficulties, such as most of the land in Palestine being impossible to bequeath should be corrected by direct amendment rather than by the importation of means for circumventing them. The chief reason for Dickstein's negative attitude towards the reception of the common law private trust into the law of Palestine was his ideological support for the fundamental refashioning of the law of the fast-increasing Jewish population of Palestine along lines drawn from ancient Jewish law, refashioned for the twentieth century. In such a worldview there was no place for the importation of the English private trust, and Dickstein emphasized the trust's deep roots in English culture and history. In the 1940s, when the adoption of the Anglo-American trust by non-Anglophone jurisdictions was less advanced than it is today, describing the trust as somehow peculiar to the English national character and history could, perhaps, have seemed plausible.<sup>152</sup>

<sup>150</sup> G. Tedeschi, 'On English-Style Private Trusts in Eretz-Yisrael' (1947–1948) 3 *HaPraklit* 306.

<sup>151</sup> For Dickstein, see Likhovski, *Law and Identity*, above, note 9, p. 127–53.

<sup>152</sup> P. Dickstein, 'On Ways for Completing Our Law and on the Private Trust' (1948) 4 *HaPraklit* 4. Another group of 1940s publications which discuss the applicability of the common law private trust in Palestine were textbooks and practitioners' manuals on income tax law. The juxtaposition of the references to private trusteeship in the Income Tax Ordinance with *Eliash* and the mid-1940s cases applying it made for great uncertainty, which is reflected in the income tax literature. Some treatises, looking squarely at the provisions of the 1941 Ordinance, simply assumed, without argument, that private trusteeship was part of the law of Palestine: S. Moses, *The Income Tax Ordinance of Palestine* (Jerusalem: Tarshish, 1942), p. 96; A. Fellman, *The Palestine Income Tax Law and Practice* (Tel-Aviv: Lapid, 1946), pp. 82, 128–9, 232, 254, 288, 292, 378. Other works, being aware of the conflicting line of case law, were driven to ambiguous statements on the subject. G. Eichelgrün opined in 1945 that 'One can say that the applicability of the English law of trusts is not yet explored at all in Palestine . . . It is . . . not impossible that the Palestine courts might today be more inclined to accept the substance of the English

## V Conclusion: the law of trusts as a liminal site of legal transplantation

The career of the common law private trust in Mandate Palestine provides examples of several types of legal transplantation under colonial conditions. Jonathan Miller's typology of legal transplants was created with transplants between sovereign states in mind,<sup>153</sup> and requires adaptation before it is used to classify transplants under colonial conditions, where the recipient territory is not independent. A typology of legal transplants under colonialism, focused on transplantation to colonized territories, could classify two groups, according to the transplanting agents' identity: (i) transplant initiated by persons representing the colonizer or applying the colonizer's power and (ii) transplant initiated by others, such as the inhabitants of the colonized territory concerned who are not employed by, or otherwise serve, the colonizing power. A finer classification emerges once we take into account the motives of and reasons for transplantation. Colonizer-initiated transplantation can take place because its agents are convinced that the legal ideas they are transplanting are superior, and their transplantation will benefit the recipient population. Or it can take place as a cost-saving measure: colonial rule according to principles with which colonizing personnel are already familiar is cheaper (or 'more efficient') than requiring that personnel to familiarize itself with unfamiliar legal rules, ideas, principles and practices. Colonizer-initiated transplantation can also, as this chapter demonstrates, take place absent a full consideration of its appropriateness: colonizing personnel sometimes transplant large masses of legal ideas wholesale (as in copying lengthy, codifying enactments), without separate consideration of the appropriateness of transplanting each and every idea transplanted. Or they can act under an unverified assumption

law of trusts in Palestine' (*Palestine Income Tax Guide* (Haifa: Paltax, 1945), p. 136). Moses reflected in the second edition of his treatise that '[t]he legal possibility of validly creating in Palestine a trusteeship in cases other than those provided for in statutes . . . has been in the past somewhat doubtful, but in general assumed as existing. This view has been confirmed by section 21A, introduced by [the Income Tax (Amendment) Ordinance, 1945], which pre-supposes the possibility of creating a trusteeship for the purpose of a "settlement" in favour of minors' (S. Moses and W. Schwarz, *The Income Tax Ordinance of Palestine*, 2nd edn (Tel-Aviv: Bitaan, 1946), p. 78).

<sup>153</sup> J. M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 *American Journal of Comparative Law* 839.

that local law on a certain point must be similar or identical to the law they know, ignoring the very possibility of legal diversity.

Transplantation initiated by persons unconnected to the colonizing power can also take place as a result of myriad motives and causes. Transplantation other than by the colonizer is a matter of private persons and nongovernmental groups and associations choosing to use legal forms and practices which have hitherto been foreign to them. While such choices were not always respected by colonizing personnel, this sort of transplantation could continue despite the absence of consent on the part of the colonizer, especially if respected by all the relevant (nongovernmental) parties. As to the motives for and causes of this sort of transplantation, transplanting agents unconnected with the colonizer may seek to import legal ideas they see as superior, whether originating in the metropolitan legal system of the colonizing power in question or elsewhere. Cost-saving could play a role in this type of transplantation too, some colonized persons being anxious to take the shortest and cheapest route available to forming a social order independent of the colonizer. Such transplantation could even take place as a form of anti-colonial protest or struggle, its agents choosing legal imports from sources unconnected with, or seen as rivals of, the power colonizing them, as in British-controlled Egypt's use of French legal ideas.<sup>154</sup>

The Mandate-era Palestinian career of the common law private trust also included several decisions, which proved influential in varying degrees, to block its transplantation. The motives for such decisions were various: a belief that locals would have no use for the institution; that as the local pre-Mandate legal system included comparable institutions, transplanting the English private trust would unnecessarily clutter the legal landscape; that transplantation would impede Government policies, such as land settlement; and finally, a general abhorrence of transplanting English legal ideas into Palestine, stemming from a perception of the injustice wrought by British rule and a consequent desire to minimize its footprint. My study thus provides a vivid example of a struggle of two British colonial juristic mentalities: one supported the dissemination of English law in the Empire for native and non-British settler use, while the other believed in the preservation of the ante-colonial legal status quo.

The complexity of the transplantation story I have told reflects the trust's nature as a particularly complex and conflicted legal site. Its

<sup>154</sup> For which see G. Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Leiden: E. J. Brill, 2007).

situation at a crossroads of family law, the law of succession, and the law of commerce, business and investment placed it, in the British Empire, on the margins of the Empire's various personal law reserves. In India and Ceylon trusts were generally seen as outside that reserve, though the Ceylon Ordinance recognized Buddhist and Muslim 'religious trusts', exempting them from its charitable trusts regime.<sup>155</sup> The trust's situation in Palestine was yet more complex, as religious trusts – Moslem, Jewish and Christian – were explicitly included in the personal law reserve.<sup>156</sup> The fact that Muslim and Jewish religious trusts could be both charitable, in the sense of being dedicated to purposes of public benefit, and private family trusts, may have contributed to Chief Justice McDonnell's choice to block the transplantation of the English family trust into Palestine. That Jewish, Christian and Muslim religious trust law does not include commercial trusts may have, under those circumstances, contributed to this part of English trust law being successfully transplanted into Palestine.

The end result of the transplantation processes I have described was a partial reception of the English trust, on top of the existing religious trust regimes: while the English law of charitable trusts was received in a special Ordinance, and that of commercial trusts was received through a combination of an official zeal for uniformity in commercial law, official oversight and settler enthusiasm. However, reception of the English family trust was blocked by the status-quo-minded Chief Justice. This result, while not reflecting any consciously settled and coherent government policy regarding transplant of the English private trust into Palestine, does cohere with general British policy on the Anglicization of the law of Palestine: commercial law was Anglicized, land law was not. Zionist settlers' trust practice was discouraged where trusts were sought to be employed to create purportedly long-standing landholding arrangements: thus the discountenancing of the Eliash family trust and of the flat-owners' trust arrangement. Trust companies, on the other hand, were formed as commercial entities, often for investment purposes. The British, who scrutinized each one of them as their registration was sought, approved them, even when the subject of their commercial

<sup>155</sup> The Ordinance exempts 'religious trusts regulated by the Buddhist Temporalities Ordinance' and 'religious trusts regulated by the Muslim Intestate Succession and Wakfs Ordinance': An Ordinance to Define and Amend the Law Relating to Trusts, No. 9 of 1917, 4 of 1918, s. 109.

<sup>156</sup> Palestine Order in Council, articles 52, 53(3), 54(3)

activities was land. Landholding for commercial purposes was treated differently from the long-term holding of estates.

The trust's liminal character was reflected in the disagreement and confusion evident, on this subject, among British colonial personnel concerned with Palestine throughout the period of British rule. The private trust provisions of the Ceylon Trusts Ordinance were dropped from its early 1920s Palestinian descendant based on an expectation that should a private family trust on the English model come before the Courts of Palestine, they would apply the English law of private trusts, receiving it by way of the Palestine Order in Council, article 46. When, less than a decade later, such a trust did come before the Supreme Court of Palestine in the *Eliash* case, the Court acted contrary to this expectation. In the interim, English commercial law, including some commercial practices involving private trusts, was legislatively transplanted into Palestine as part of a Colonial Office drive to homogenize the commercial law of the Empire. Attorney-General Bentwich, often a champion of Anglicization, wrote to London that at least some of those practices were unknown in Palestine and legislative references to them were thus superfluous, but his advice was left unheeded. Come the 1930s, the *Eliash* decision amplified the accumulating confusion, as different official readers formed different views regarding the decision's import and consequences. Some Mandate officials were convinced that the English law of private trusts was no part of the law of Palestine. Others thought otherwise; so did, for example, the Registrar of Companies, who was registering trust companies by the dozen. Later in the decade, new Ordinances multiplied the legislative references to private trusts, a tendency which culminated in the 1941 Income Tax Ordinance. Though every word of this Ordinance was repeatedly scrutinized prior to enactment, those involved appear not to have been aware that private trusts were not necessarily a part of the law of Palestine. No thought appears to have been given to the issue. A few years later, contrastingly, the Courts of Palestine decided at least four cases based on the view that *Eliash* firmly excluded the English private trust from the law of Palestine.

Much of this confusion seems to have been a product of two tendencies. One was a tendency to treat each specific question separately as it arose, deciding it on the basis of its immediate doctrinal context. This tendency, which may have been a fruit of many colonial officials never having fully mastered the admittedly complex and multi-layered law of Palestine, seems to have prevented the formation, by any one official, of a full view of the common law private trust's evolving status under the law



of Palestine: the Registrar of Companies seems to have taken his bearings from the Companies Ordinance, the legislative draftsmen of the 1930s and 40s – from the legislative experience accumulated both in Palestine and elsewhere in the Empire, and the courts – from the law reports. Thus were formed, regarding the transplant of the English law of private trusts into Palestine, a restrictive camp, made largely of judges (though Legal Draftsman Drayton appears to have been a member) and a permissive camp made largely of executive personnel. Another habit tending to induce confusion was the tendency to discuss ‘private trusts’ as a whole, not distinguishing between family trusts and commercial uses of the trust. Officials generalized from either family trusts or commercial trusts to the positive status of English private trusts as a whole, leading to contradictory, and indeed mistaken and confusing, assessments.

A key feature of the reception process I’ve described was that some of the initiative behind it came from Zionist settlers in Palestine rather than British colonial officialdom. Most jurists among Mandate-era Zionist settlers in Palestine, being attached to no particular legal tradition or customs (at least other than in personal status affairs), were highly receptive to the law their British rulers could offer. The history of private trusts and trust companies in Mandate Palestine thus provides an example of a colonial population making use, for its own purposes, of legal institutions made available by the colonizer,<sup>157</sup> and even trying to use elements of that colonizer’s metropolitan legal system which the colonizer was not necessarily ready to make available to it. The evident interest non-British native and settler populations throughout the British Empire had in the English trust speaks to the trust’s multi-faceted utility. Other British colonial administrations, such as those of India, Ceylon, Canada and the Cape Colony, seem to have been more generous than that of Palestine in permitting the native and non-British settler populations under their sway to make use of the English private trust in its original form of individual, rather than corporate, trusteeship, including trusts of land. The legal and political restrictions and difficult circumstances of the uncomfortable Mandate of Palestine made for a different result.

<sup>157</sup> Another example would be some Africans’ enthusiastic use, during the early twentieth century, of the newly-established British colonial courts, for which see M. Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia*, (Portsmouth, NH: Heinemann, 1998), pp. 103–4, cited in Merry, ‘Law and Colonialism’, above, note 1, 574.