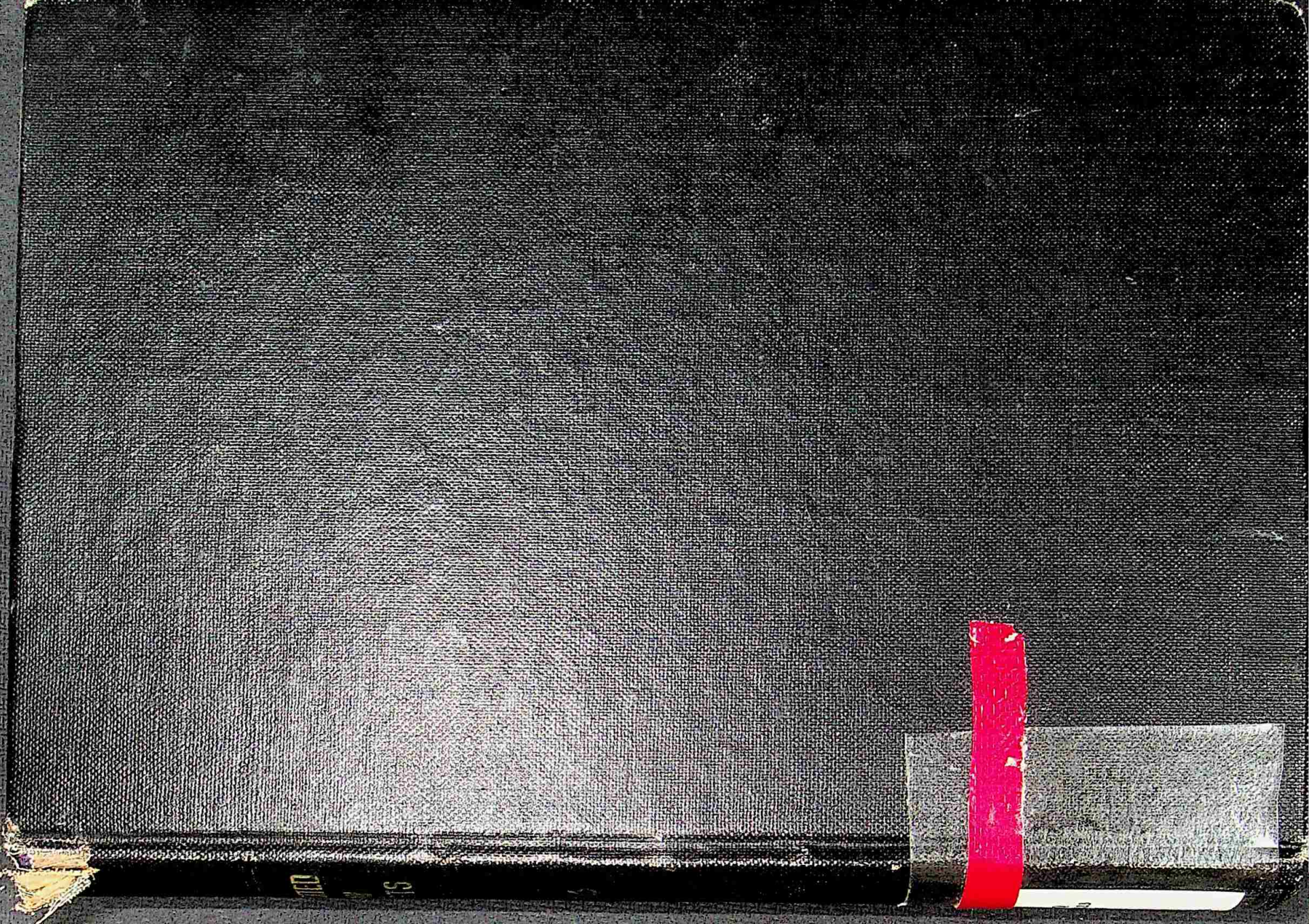

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Edited by:

M. LEVANON
Advocate
Approved Law Reporter

A. M. APELBOM, LL. B.
Barrister at Law, Advocate
Approved Law Reporter

Dr. H. KITZINGER & Dr. A. GORALI Advocates

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HIGH COURT No. 24/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Curry, A/J. and Frumkin, J.

IN THE APPLICATION OF :—

Mrs. Blana Sakai. PETITIONER.

v.

The District Commissioner, Galilee District, Nazareth. RESPONDENT.

Requisition order by District Commissioner — Scope of Defence Regulations in matter of requisition — Exercise of discretion.

Return to an order *nisi* given on the 25th day of February, 1946, directed to the Respondent calling upon him to show cause why his requisition order issued on the 2nd of February, 1946, should not be set aside, and/or revoked and why he shou'd not release the house, property of Petitioner, situated in Afula Block No. 16660 Parcel No. 74 and why he should not return possession thereof to Petitioner, order discharged:—

1. Regulation 114(1), Defence Emergency Regulations not *ultra vires* sec. 6, Palestine (Defence) Order-in-Council, 1937.

2. Notice of requisition of premises need not give reasons for requisition.

3. High Court will not interfere with requisition order if not satisfied that District Commissioner acted *mala fide*.

4. (*Obiter*): Before making a requisition order not only the convenience of the person to be accommodated but also that of the landlord must be taken into consideration.

(*M. L.*)

FOLLOWED: H. C. 30/45 (1945, A. L. R. 360); H. C. 58/44 (1944, A. L. R. 522; 11, P. L. R. 428); Carltona Ltd. *v.* Commissioner of Works & ors. A. E. L. R., 1943, Vol. 2, p. 560.

ANNOTATIONS:

1. On point 1 see H. C. 47/46 (*post*, p. 468).

2. On point 2 see H. C. 142/44 (1945, A. L. R. 247; 12, P. L. R. 39) see also H. C. 68/42 (12, Ct. L. R. 104; 9, P. L. R. 450; 1942, S. C. J. 629).

3. On point 3 see cases followed and annotations on H. C. 58/44 & 30/45 in A. L. R. see also H. C. 18/45 (1945, A. L. R. 563; 12, P. L. R. 248) and H. C. 61/45 (1945, A. L. R. 547; 12, P. L. R. 450) and annotations in A. L. R.

4. On point 4 see H. C. 138/44 (1945, A. L. R. 257) and H. C. 47/46 (*supra*).

(*A. G.*)

FOR PETITIONER: Geiger.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

This is a return to an order *nisi* calling upon the Respondent — the District Commissioner of the Galilee District — to show cause why his Requisition Order of the 2nd February, 1946, should not be set aside.

The facts in this case appear as follows. The Petitioner is the owner of a house in Affule which was occupied by Mr. Bergman a District Officer. This District Officer was transferred to another District and the Petitioner wished to move into his own house. Petitioner informed the Respondent that the landlord of the flat in which he was living was prepared to offer the flat to the incoming District Officer and Petitioner asked that his house should not be further requisitioned.

The District Commissioner after consideration refused to grant the application of the Petitioner and requisitioned the house for Mr. Salinger, the new District Officer.

It is clear from the evidence that Mr. Salinger's family consists of two persons only, whilst that of the Petitioner consists of five persons. The flat offered by Petitioner consists of three rooms and two balconies and the requisitioned house consists of the same number of rooms. The District Commissioner admitted that a three-room flat was sufficient for two persons but it is clear that he considers a flat does not befit the standing of a District Officer who in view of his social obligations should reside in a house in a locality such as Affule. In the view of the District Commissioner a District Officer requires rather better accommodation than any other Government official and although he did not consider the flat entirely unsuitable he did not consider it really satisfactory. In other words on balance he thought the house the better proposition.

Mr. Geiger on behalf of the Petitioner first raised the objection that Regulation 114(1) of the Defence Emergency Regulations were *ultra vires* the power given under section 6 of the Palestine (Defence) Order-in-Council, 1937.

I do not think there is any merit in this objection. The Order-in-Council gives the High Commissioner power to make regulations for securing the essentials of life to the Community and Regulation 114(1) gives power to the District Commissioner to requisition for the purpose of maintaining supplies and services essential to the life of the community. Clearly, therefore, the Regulation is within the power granted by the Order-in-Council.

Mr. Geiger's second objection was that the notice of requisition was invalid as it did not give the reasons for the requisition. There is,

however, nothing in the Regulation requiring the District Commissioner to give notice so that I do not think there is any ground in this objection. It is to be noted moreover that Petitioner was well aware at the time of the reason for the requisitioning.

The only remaining objection to consider is whether the Order of the District Commissioner can be set aside on the ground of unreasonableness or the like. There are a long line of authorities which have laid down that this Court can only interfere where the District Commissioner has acted in bad faith. In High Court No. 30/45 it was held that the High Court could only interfere if satisfied that the competent authority had exercised its discretion *mala fide* or without regard to rules of reason or justice. Again in High Court No. 58/44 this Court held it could not investigate the adequacy of the reasons and could only see that the powers given were exercised in good faith. These decisions follow the decisions in England where similar Regulations are in force. In Carltona Ltd. *v.* Commissioner of Works & ors. A. E. L. R. 1943, Vol. 2, p. 560, it was held that Parliament has committed to the Executive the discretion of deciding when an Order for the requisition of premises should be made under the regulation and with that discretion, if *bona fide* exercised, no Court can interfere.

There is and can be no suggestion in this case that the District Commissioner has acted *mala fide* and it therefore follows that this Court cannot interfere with his discretion. I cannot help feeling, however, that when the legislature enacted these regulations, it did so with a view to ensuring that accommodation could be obtained for a necessary official and not with a view to enabling an official to pick and choose between available premises which were not unsuitable for his accommodation and the requisitioning of other premises which were more to his taste. The ordinary citizen's rights have been very seriously curtailed as a result of the Defence Regulations and his lot is by no means a happy one. He must often wonder what freedoms remain to him after this war which one understood was fought to establish the freedom of the subject. Because he is not a Government official it does not follow that he belongs to a lower class of humanity who has no social obligations and whose convenience need not be considered. It does not appear to me that the question of the convenience of the Petitioner was really ever taken into consideration. I cannot help feeling that requisitions of this nature increase the bitterness of feeling which undoubtedly exists amongst the ordinary citizens against the Government and I do not think that feeling is entirely unjustified. I would express the hope that perhaps the Legal Department would

carefully consider the advisability of defending such a use of the power in future.

In the circumstances we have no option but to dismiss the petition and discharge the order *nisi*.

Mr. Geiger stated that the Petitioner was prepared now to pay for the removal of the District Officer to the flat offered should the District Commissioner reconsider his Order. In the circumstances we can only hope he will be prepared to reconsider the matter.

Given this 18th day of April, 1946, no appearance for Petitioner, and in the presence of Mr. E. Salant for Respondent.

A/British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

HIGH COURT No. 47/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPLICATION OF —

Salah Eddin Amin Salah & 2 ors. PETITIONERS.

v.

The Acting District Commissioner, Samaria District, District Commissioner's Offices, Nablus. RESPONDENT.

Requisition of house and plot of land required as a hostel for students of Agricultural School — Scope of Defence (Emergency) Regulations, 1945 — Question whether or not the Regulations are ultra vires Palestine (Defence) Order-in-Council, 1937.

Return to an order *nisi* issued on the 16th April, 1946, directed to the Respondent calling upon him to show cause why his Notice of Requisition dated the 11th of April, 1946, in respect of Petitioner's property situate at Tulkarm and recorded in their names in the Revenue Office of the District Administration, Tulkarm, under Block 8198, Parcel 19, comprising a house and a plot of land of an area of 7 *dunums*, approximately, should not be set aside; order *nisi* discharged:—

1. Decision for purposes of requisition what services were substantial to life of community is left to District Commissioner.
2. High Court will not interfere with requisition order made by District

Commissioner unless his exercise of the discretion given to him was manifestly unreasonable.

3. Defence (Emergency) Regulations, 1945, made under Palestine (Defence) Order-in-Council, 1937 — not *ultra vires* merely because they provide for matters not specifically referred to in preamble of said Palestine Order-in-Council.

(*M. L.*)

REFERRED TO: H. C. 4/45 (1945, A. L. R. 509) Maxwell on Interpretation of Statutes 5th Ed. p. 73; Craies on Statute Law 3rd Ed. p. 184, 185.

ANNOTATIONS:

1. On point 1 see case referred to and annotations in A. L. R.
2. On points 2 & 3 see H. C. 24/46 (*ante*, p. 465) and annotations.

(*A. G.*)

FOR PETITIONERS: Mogannam.

FOR RESPONDENT: A/Solicitor General — (Baker).

ORDER.

Shaw, J.: This is a return to an order *nisi* dated 16.4.46 calling upon the Respondent to show cause why his notice of requisition dated 11.4.46 in respect of the Petitioner's property situate at Tulkarm, comprising a house and plot of land of an area of approximately 7 *dunums*, should not be set aside.

The Respondent when he issued the notice of requisition purported to do so in the exercise of his powers under Article 114 of the Defence (Emergency) Regulations, 1945, which are to be found at p. 1055 Suppl No. 2 of the Palestine *Gazette* for 1945. The requisition was made because it appeared to the Respondent to be necessary or expedient to make it in the interests of the maintenance of a service essential to the life of the community.

The Respondent, Mr. W. V. Fuller who is the Acting District Commissioner of Samaria District, stated in para. 7 of his affidavit dated 29.4.46:—

> "7. It appeared to me to be necessary or expedient in the interests of the maintenance of supplies and services essential to the life of the community to take possession of the House and Plot as they were urgently required as a boarding school or hostel and appurtenant grounds for students of the Kadoorie Agricultural School, Tulkarm, the grounds of which adjoin the plot. The said school is the only school in Palestine where Arab male rural teachers can be trained and the need for such teachers is urgent and great. The school is a boarding school to which students come from all parts of Palestine and in which they are educated and maintained almost entirely at Government expense. The boarding accommodation in the school itself is insufficient for the proper supply of rural teachers,

> and it is necessary to add immediately boarding accommodation for an additional thirty students in order to maintain the numbers and efficiency of the teaching service."

Mr. Fuller was cross-examined by Mr. Mogannam, advocate, who appeared for the Petitioner. Mr. Fuller has told us that the Kadoorie Agricultural School is operated by Government and is paid for out of Government funds. It was originally established by Sir Elias Kadoorie. Mr. Fuller was cross-examined at some length with a view to showing that accommodation other than that which is the subject of these proceedings might have been requisitioned, and it was even suggested that the Petitioners were discriminated against because they held certain political views. Mr. Fuller stated categorically that he was not moved by any political considerations when he made the requisition, and he has affirmed that the house in question is the most suitable having regard to the needs of the school.

Having heard the various submissions which Mr. Mogannam made, Mr. Fuller stated that he still considered this house to be necessary for the purpose for which he requisitioned it. He could not, however, give a final answer to the question whether it was necessary to requisition all of the land (some 7 *dunums*) attached to the building, without first communicating with the Director of Education. One reason why a portion, at least, of the land should be required is that the main part of it lies between the requisitioned building and the Kadoorie school building itself, and the students if they reside in the requisitioned building would require a road of access to the School across the land.

It may be observed here that this building and the land had been in the occupation of the military authorities up to the date when the Respondent issued his order of requisition, and it had been so occupied since 1938. So it was not a question of turning the owner out of premises which he had been occupying for a long time.

Having considered the evidence I have no hesitation in finding that the Respondent acted in good faith and without caprice, and that the building was in fact the most suitable for the purposes of the requisition.

In H. C. 4/45 (1945, A. L. R.) the Court in its judgment observed:—

> "It is a condition precedent to the exercise of the powers vested in him that the District Commissioner must be satisfied that the requisition is expedient in the interest of public safety, defence, or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community. If he is not so satisfied then he would not have acted within the four walls of the Regulations. The question therefore arises who is to decide whether, in fact, the necessary conditions precedent do exist. As to this there is the overwhelming authority of numerous cases.

> The District Commissioner is for all practical purposes the sole deciding authority. The Court will not interfere with his decision unless it is satisfied that it was arrived at on grounds which are untenable. It will limit itself to an enquiry as to whether he has directed his mind to the issue and having so directed his mind come to a conclusion. It is not sufficient, as Mr. Geiger has argued, to submit an affidavit of another person, in this instance the Petitioner, to the effect that in his opinion the requisition was not necessary for these purposes."

The position as I see it is this: — The Defence (Emergency) Regulations, 1945, were made by H. E. the High Commissioner under the provisions of Article 6 of the Palestine (Defence) Order-in-Council, 1937; Article 6(1) reads as follows:—

> "6. (1) The High Commissioner may make such regulations (in this Order referred to as "Defence Regulations") as appear to him in his unfettered discretion to be necessary or expedient for securing the public safety, the defence of Palestine, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community."

The High Commissioner could in the exercise of his "unfettered discretion" have made a regulation declaring that the provision of trained teachers for the purpose of spreading agricultural education was a service essential to the life of the community. The High Commissioner, however, did not do that, but he left it to a District Commissioner to decide what services were essential to the life of the community. So this Court can interfere, but only in the circumstances set out in the judgment in High Court 4/45 to which I have referred.

It may be that if I had had to exercise my discretion I might have decided that this service was not essential to the life of the community. But it is not for me to substitute my discretion for that of the District Commissioner unless his exercise of the discretion given to him is manifestly unreasonable. I am unable to say that the District Commissioner could not reasonably hold that the training of persons for the purpose of spreading the knowledge of agriculture in the Arab villages of Palestine was a service essential to the life of the community. Mr. Baker has drawn attention to the fact that the Anglo-American Committee of Enquiry in its recent report commented upon the inadequacy of the facilities which exist for training such teachers. He referred to para. 12 of Cap. 18 of the Report where the Committee says:—

> "There are only some fifteen Arab secondary schools in the whole of Palestine and one fully developed agricultural school, the Kadoorie School at Tulkarm which specialises in the training of teachers for

> agriculture for Arab schools. With only 65 places, however, it too is totally inadequate."

Our attention has been drawn to the fact that the preamble to the Palestine (Defence) Order-in-Council, 1937, (Suppl. No. 2, Palestine *Gazette*, 1937, p. 268) contains the following passages:—

> "AND WHEREAS by the Palestine (Defence) Orders in Council, 1931 and 1936, provision was made for securing *the public safety* and *the defence* of Palestine;
> "AND WHEREAS it is expedient to make other provision *for that purpose;*"

and it has been submitted that the Regulations are limited to securing the "safety" and "defence" of Palestine. I am, however, unable to hold that the Regulations themselves are *ultra* vires if they provide for matters not specifically referred to in the preamble. It is the Regulations and not the preamble that we have to interpret. Maxwell on the Interpretation of Statutes, at p. 73 of the 5th Ed., says:—

> "But the preamble cannot either restrict or extend the enacting part when language and object and scope of the Act are not open to doubt. It is not unusual to find that the enacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is prescribed, the legislative provisions extend beyond it. The preamble is often no more than a recital of some of the inconveniences and does not exclude any others for which a remedy is given by statute."

and at pp. 184 and 185 of Craies on Statute Law (3rd Edition) the following passages appear:—

> "If the enacting words can take it in (the mischief which the statute was intended to remedy), they shall be extended for that purpose though the preamble does not warrant it.
> But it must always be a question of some nicety for the Court to determine whether an Act is sufficiently explicit by itself or whether the preamble should be looked to for aid in explanation of it."

I feel no difficulty in holding that the words "supplies" and "services" are to be read disjunctively. It is, to my mind, obviously not necessary that the thing to be maintained should be at the same time a supply and a service. And I would observe that Article 6 of the Palestine (Defence) Order in Council, 1937, does not say "essential to the lives of the individual members of the community". It says "essential to the life of the community". I take that to mean the corporate life of the community as a whole. It does not, in my judgment, mean that the service must be immediately essential for the purpose of preserving the lives of the members of the community.

The exercise of the wide powers which the Regulations give to District Commissioners clearly calls for the highest degree of good

judgment and discretion on their part, in order that the least possible hardship may be imposed upon the individual who is called upon to suffer for the good of the community as a whole, but the power exists and where it is properly exercised this Court will not interfere with the discretion.

The petition fails and must be dismissed, but I would direct the Respondent to enquire into the question whether it is essential to requisition all of the land, and to release such portion of it as he may find to be not essential provided that the Petitioner wants that portion to be released. If the Petitioner continues to feel aggrieved after the release of such of the land as is considered by the Respondent to be not essential he will be at liberty to come again to this Court but he will, if he is to succeed, have to show that the Respondent has not exercised his discretion in a proper manner.

Given this 27th day of May, 1946, in the presence of Mr. Mogannam for Petitioner and Mr. Baker A/Solicitor General for Respondent.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 309/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPEAL OF:—

Beikah Shaker el Mohammad. APPELLANT.

v.

Mahmoud Deeb el Safadi. RESPONDENT.

Res judicata — M. C. P. R. 139, *C. P. R.* 21A, *C. A.* 460/44, *C. A.* 94/43 — *Test to determine when the defence is available.*

Appeal from the judgment of the Magistrate's Court of Acre, dated 7.8.45, in Land Case No. 5/45, allowed:—

1. *Quaere* whether a plea of *res judicata* may, in the Magistrate's Court be decided separately *in limine*.

2. The present case is not sufficiently similar to the proceedings resulting in C. A. 231/44, to justify a finding of *res judicata*.

(*A. M. A.*)

REFERRED TO: C. A. 94/43 (1944, A. L. R. 152); C. A. 231/44 (not reported); C. A. 460/44 (12, P. L. R. 138; 1945, A. L. R. 136).

ANNOTATIONS:

1. *Cf.* C. A. 448/44 (12, P. L. R. 116; 1945, A. L. R. 97).

2. *Cf.* C. A. 294/44 (12, P. L. R. 28; 1945, A. L. R. 58) where it was held that "the Magistrate sitting as a Land Court" may give declaratory relief.

3. On the *res judicata* point *cf.* C. A. 214/45 (*ante*, p. 61) and note 2.

(*H. K.*)

FOR APPELLANT: M. Yahya & Elia.

FOR RESPONDENT: Cattan & H. Hawa.

JUDGMENT.

De Comarmond, J.: The Appellant was Plaintiff in a case heard by the Magistrate of Acre sitting as a Land Court. Plaintiff's claim was that she is the owner and possessor of six eleventh of an undivided plot of *mulk* land situate at Kabri village; the Defendant (now Respondent) being the other co-owner. Plaintiff's allegation was that the Defendant had been "objecting Plaintiff in her ownership to her share in the land and had been also disputing her possession since two years". Her prayer was for a judgment confirming her ownership of six eleventh of the land and she also asked that such share be registered in the *Tabu* of Acre and that the Defendant be ordered not to object to her possession of the said share and to deliver the said share to her.

The statement of defence was a denial of Plaintiff's alleged ownership and an averment that Plaintiff was estopped on the ground of *res judicata* from claiming ownership.

The learned Magistrate upheld the plea of *res judicata* and dismissed the case after the record in a previous case between the same parties had been produced and the advocates had addressed him. Against this dismissal the Appellant appeals on three grounds which, put shortly, are that there was no *res judicata* and that the Magistrate was wrong to dismiss the case without hearing all the evidence in support of the claim.

Mr. Elia, for the Appellant, has contended that a Magistrate cannot dismiss a case on a plea of *res judicata* taken *in limine* but must hear the Plaintiff's case. He relies on Rule 139 of the Magistrates' Courts Procedure Rules, 1940, and points out that, as regards District Courts, a new Rule 21A was inserted in the Civil Procedure Rules, 1938, in order to enable a defendant to take *in limine* the plea of *res judicata* or want of jurisdiction. Mr. Elia suggested that this rule was made after the decision of the Supreme Court in C. A. 460/44, 12, Palestine Law Reports, p. 138. Being given that a similar rule has not been

introduced into the Magistrates' Courts Procedure Rules, 1940, Mr. Elia contends that a Magistrate must hear Plaintiff's case even if a defence of *res judicata* has been pleaded.

It is obviously undesirable that a case be decided by instalments, but we would have had to scrutinize closely Mr. Elia's arguments and the cases referred to in C. A. 460/44 before deciding that his aforementioned submission is correct, the more so as in the present case it seems that the Plaintiff's advocate in the Court below agreed to have the issue of *res judicata* decided first (in this connection see Civil Appeal No. 94/43, Annotated Law Reports (1943) p. 153). However, we give no decision on this point in view of our findings on the main ground of appeal.

The plea of *res judicata* rests on Land Case 9/43 brought by present Appellant against present Respondent. The statement of claim in that case recited that the Plaintiff had owned and possessed for more than ten years a big room and a sheep pen at Kabri village and she asked that her ownership be confirmed and that the Defendant be prevented from interfering with her. In that statement of claim were set out the so-called boundaries of the room and sheep pen. The learned Magistrate's decision was that he was not satisfied that the room and sheep pen had been built by the Plaintiff but that, being given that Defendant who was her co-owner had erected them with her knowledge, she would be declared to be entitled to ownership on payment of the reasonable expense incurred by the Defendant. In other words, the learned Magistrate proceeded on the basis that Plaintiff was a co-owner of the land and that the dispute was about the buildings erected thereon. It must, however, be added that the Defendant had raised in his defence the issue of ownership of the land.

That first case came on appeal to the Supreme Court (C. A. 231/44) and the Magistrate's judgment was set aside and the Plaintiff's action dismissed with costs. The decision of the Court of Appeal mentions that the Plaintiff in her statement of claim had limited her property to her "right in a large room and a sheep pen". The decision went on as follows: "There was no proof that she even owned the land. The Magistrate, however, seemed to consider that there was a loan by Respondent (*i. e.* Plaintiff) of *miri* land and that she was entitled to recover the loan on paying the reasonable expenses which the Appellant (*i. e.* Defendant) had incurred in erecting the building. Apart from the fact that this seems to have been no part of the case of the Respondent in the Court below, it seems to me that before there could be any question of a loan, the Respondent would have had to prove that she was the owner of the land".

We must confess that we are left in some doubt as to what was finally decided in the first case. It seems that the issue of ownership was not dealt with by the Magistrate and we understand the decision of the Court of Appeal to mean that the Plaintiff should have first established her ownership.

Mr. Cattan, for Respondent, has in the present appeal urged that the question of ownership of the land must be taken to have been settled, but we are not prepared to agree with him. We have reached the conclusion that the *data* before the Magistrate were not sufficient to justify his finding at that early stage of the case. We might add that in the present case the statement of claim refers to the land as being *mulk* property, whereas in the decision in Civil Appeal 231/44 the land is mentioned as being *miri* land. Furthermore, there is a slight difference in one of the boundaries.

For the reasons given above we decide that the appeal should be allowed, the Magistrate's decision set aside and the case remitted for hearing; but we wish to make it quite clear that nothing in this our decision is to be taken to mean that the Magistrate will not be entitled, after fuller investigation, to arrive at the conclusion that the plea of *res judicata* has been substantiated.

We allow the Appellant fifteen pounds (LP. 15) inclusive costs.

Delivered this 7th day of May, 1946.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 235/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Haj Mohammad Salem Suleiman Murtaja. APPELLANT.

v.

Zulfa Ibrahim Husnieh, in her personal capacity and as guardian of her minor children, Atta, Omar, Rashad, Mujdieh, Muti'a, Laila and Nada. RESPONDENT.

Unregistered partition — "Disposition" within the meaning of sec. 2 of the L. T. Ord. — Sec. 11.

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity, dated 26th of May, 1945, in Civil Appeal No. 37/45, from the judgment of the Magistrate, Gaza, dated 25th March, 1945, in Civil Case No. 663/44, allowed:—

A partition of property is a disposition within the meaning of sec. 2 of the Land Transfer Ordinance.

(*A. M. A.*)

ANNOTATIONS: C. A. 138/44 (1944, A. L. R. 721) is to the same effect. For other decisions on similar questions see the cases cited in note 1 in A. L. R. to P. C. 66/38 (12, P. L. R. 282; 1945, A. L. R. 611).

2. On the meaning of "disposition" in sec. 2 of the Land Transfer Ordinance see also P. C. 52/44 (*ante*, p. 402).

(*H. K.*)

FOR APPELLANT: S. Bisseisso.

FOR RESPONDENT: K. Barbari.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa which confirmed the judgment of the Magistrate, Gaza.

The facts are that a dispute arose between the parties in regard to some house property at Gaza. It was referred to arbitrators and the arbitrators awarded the property to the parties as co-owners. This judgment was confirmed by the Land Court. After this the parties agreed to partition of the property, which in the circumstances appeared to be a very sensible arrangement. This partition, however, was not registered, and we must now consider the effect of the provisions of the Land Transfer Ordinance. Section 2 of that enactment defines "disposition" as meaning:—

> "A sale, mortgage, gift, dedication of *wakf* of every description, and any other disposition of immovable property, except a devise by will or a lease for a term not exceeding three years, and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years."

The question now arises whether partition is a disposition. Both the Magistrate's Court and the District Court apparently came to the conclusion that it was not. Their decision on this point cannot be criticised because of the conflicting decisions of this Court on the point.

For myself, I have no doubt that a partition is a disposition within the meaning of the Ordinance. Excepting a devise by will, or a lease for a term not exceeding three years, it appears to me that every transaction by which the ownership of the title is altered is a disposition. In my opinion in any partition ownership of title is altered. It is

altered from complete ownership of the whole property by two persons to exclusive ownership of a half by each. Having arrived at the conclusion that a partition is a disposition within the meaning of section 2 of the Ordinance, and bearing in mind that it is admittedly unregistered, section 11 operates. The partition is null and void. The status of this property remains therefore as it was when it left the Land Court which is that the Appellant and Respondent possess in co-ownership and the Magistrate's Court was fully empowered to hear Plaintiff's (Appellant's) claim. It follows that we must allow the appeal and the case is remitted to the Magistrate to determine it accordingly. Costs to abide the event but to simplify final arrangements we assess the inclusive costs of this appeal at LP. 10.—.

Delivered this 11th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 380/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

Benjamin Prashkovsky. APPELLANT.

v.

Herz Frenkel. RESPONDENT.

Sale of land — Oral evidence — Endorsements on cheque — Onus of proof — Variation in area — Whether purchaser or vendor liable for area transferred to Municipality — Wrong refusal by L. R. to transfer entire plot — Construction of contracts — Procedure on expropriation — Penalty and liquidated damages — C. A. 85/40, C. A. 191/37 — Specific plea — C. P. R. 87.

Appeal from the judgment of the District Court of Tel Aviv dated 16.11.45, Civil Case No. 129/44, whereby the Appellant was ordered to pay to the Respondent the sum of LP. 400 plus interest on the sum of LP. 200 and costs, dismissed:—

Where the Land Registry officials wrongly refuse to transfer the entire area agreed to be sold, the vendor cannot insist on payment of the full purchase price.

(*A. M. A.*)

REFERRED TO: C. A. 191/37 (4, P. L. R. 331; 1937, S. C. J. (N. S.)

464; 2, Ct. L. R. 169); C. A. 85/40 (7, P. L. R. 304; 1940, S. C. J. 474; 8, Ct. L. R. 62).

ANNOTATIONS:

1. *Cf.* C. A. 187/43 (10, P. L. R. 615; 1944, A. L. R. 6) and note 2 thereto in A. L. R.

2. As to the tests to be applied in distinguishing between a penalty and a genuine pre-estimate of the probable damages see note 2 in A. L. R. to C. A. 148/43 (10, P. L. R. 310; 1943, A. L. R. 366); *cf.* also C. A. 203/43 (1943, A. L. R. 739).

3. As regards the necessity of pleading that a sum fixed as damages is in fact a penalty see also C. A. 284/44 (1945, A. L. R. 128) and note.

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: G. Hiller.

JUDGMENT.

This is an appeal from a decision of the District Court of Tel Aviv in Civil Case No. 129/44 whereby the Defendant (now Appellant) was ordered to refund to the Plaintiff (now Respondent) LP. 200 with interest from the date of the lodging of the action and to pay LP. 200 as liquidated damages. A counter-claim made by the Defendant was dismissed, and costs allowed against the said Defendant.

The two parties signed an agreement on the 25th May, 1943, for the sale by the Appellant to the Respondent of a piece of land situate at No. 9, Shabazi Street, Tel Aviv, and known as Parcel 20 of Block 27. The area of the said parcel was guaranteed by the vendor to be not less than 362 sq. metres. The price stipulated was LP. 800 payable as follows: LP. 200 by cheque drawn on the Anglo-Palestine Bank, Allenby Street Branch, to the order of advocate Ruven Schwager and endorsed by the latter; the balance of LP. 600 was to be paid to the vendor or to his order at the time of transfer of the property at the Land Registry office of Tel Aviv. Receipt of the cheque of LP. 200 was admitted by the Appellant in clause 2(a) of the agreement.

One of the issues before the Court below was whether the Plaintiff/Respondent had paid to the Defendant/Appellant LP. 200 at the time of the signing of the contract, and the finding was in the affirmative. I am of opinion that this finding is correct.

The Defendant/Appellant has denied having received the LP. 200 and has tried to bolster up this denial by the fact that the cheque (Exh. D/2) bears on the back the signature of advocate Schwager followed by that of Respondent (*i. e.* the drawer of the cheque). The Appellant's contention is that these endorsements show that the money

was paid by the Bank to the drawer (*i. e.* present Respondent) after the cheque had been endorsed by advocate Schwager who, it must be mentioned, was acting for both parties. I would point out that advocate Schwager did not pass the cheque to the order of the drawer, he merely endorsed it as mentioned in clause 2(a) of the agreement.

Oral evidence was adduced before the District Court regarding the cashing of the cheque, but the Appellant complains that such evidence should not have been admitted against a written document. The learned Judges in the Court below did pay attention to the oral evidence given before them, but I am of opinion that they would have reached the same decision without considering this oral evidence. My reason for so holding is that the Appellant having admitted in writing in the agreement that he had received payment by means of a cheque drawn to the order of advocate Schwager and endorsed by the latter it was for the Appellant to explain what happened after advocate Schwager had endorsed the cheque. This he has failed to do and he did not even give evidence before the Court below. Whether or not oral evidence should have been admitted does not therefore help the Appellant.

I will now pass on to the main issue in the case, namely, whether the Appellant/Defendant failed to carry out his obligation to transfer the land or whether the Plaintiff-Respondent is the party who failed in his undertaking to purchase.

The source of the difficulty is to be found in clause 3 of the agreement which provided that should the survey of the land show that the area was more than 362 sq. metres, the purchaser would not have to pay more than the stipulated LP. 800, but that should the area be less than 362 sq. metres, the purchase price would be reduced at the rate of LP. 2.210 for each square metre found short.

The survey established that the plot was 370 sq. metres and the Appellant's contention is that no question of reduction of price could therefore arise. In other words, Appellant's contention is that clause 3 of the agreement provided for a reduction of price only if the area of the property were found to be less than 362 sq. metres. This interpretation is correct if clause 3 is isolated from the other clauses of the agreement, but I will examine later whether this narrow interpretation is justified in the circumstances.

The plot of land was not transferred by the Appellant to the Respondent because the officials of the Land Registry refused to transfer a strip of 77 sq. metres out of the total area of 370 sq. metres to any person except the Municipality of Tel Aviv (*i. e.* the Local Town Planning Commission). In consequence of this refusal, the would-be purchaser (now Respondent) offered to pay LP. 447.515 which was

the balance due by him less the value of the difference between 362 and 293 sq. metres at the rate of LP. 2.210 per square metre. The vendor (now Appellant) insisted on receiving the whole balance of LP. 600. A deadlock was thus reached and no transfer took place. A memorandum of what took place at the Land Registry was drawn up and signed by the Respondent, by advocate Schwager and by Mr. Reuben Schalit who had acted as broker. This memorandum was produced at the trial and was not objected to.

Mr. Goitein, who appeared for the Appellant, submitted that there was no valid reason for the refusal of the Land Registry officials. His argument was that, although approval of a town-planning scheme and plans had been published in the Official *Gazette* of 1937 at page 811 according to which 77 sq. metres of Appellant's land was to be used to widen the roadway, no steps had been taken to initiate expropriation proceedings. I must here point out that after the approval and coming into force of a town-planning scheme, the Local Commission (*i. e.* the Municipality in this case) may, by virtue of section 27 of the Ordinance, expropriate without compensation one-fourth of any owner's land included in the scheme, and may take possession after giving one month's notice. Mr. Goitein has submitted that the Municipality had not availed itself of the right conferred by section 27, and this seems to be borne out by the evidence given by Mr. Cahanov who is a clerk of the Town Planning Department of the Municipality.

So far as the evidence on record goes, I consider that Mr. Goitein's contention is correct, and I am not satisfied that the whole area of 370 sq. metres could not be disposed of by the Appellant. The fact is, however, that the Land Registry refused to transfer more than 293 sq. metres and there is no indication that the Appellant insisted on his right to transfer the whole plot or took any steps to effect the transfer of the whole area to the purchaser.

The Court below found that the Appellant/Defendant committed a breach of contract by his refusal to accept the price agreed upon and his failure to transfer the land. It must, however, be remembered that the Court below was of opinion that the Municipality had requisitioned the 77 sq. metres which the Land Registry refused to transfer; as already stated, this finding is not justified.

If we assume that the 77 sq. metres had been properly distracted in favour of the Municipality, is the Appellant correct in his contention that the purchaser had to pay the full price for the reduced area? This contention is based, as already explained, on the narrow interpretation of clause 3 of the agreement, and the Appellant's submission is that the guaranteed area of 362 sq. metres having been proved to exist, no

question of diminution of price could arise even if the purchaser were to receive less than 362 sq. metres. I find this interpretation untenable because the basis of the agreement was the sale of the whole plot of land at No. 9, Shabazi Street and clause 3 cannot be construed as meaning that, even if the vendor refused to transfer the whole plot, the purchaser would still have to pay the full price because the whole plot had been found to cover 362 sq. metres and more. Clause 3 must be construed with the other clauses of the agreement and means that the purchaser was entitled to deduct LP. 2.210 for every square metre under 362 sq. metres.

I am, therefore, of opinion that the Respondent was right in offering to pay the reduced price for the diminished area which was stated to be transferable. The Appellant had two courses open to him: either to accept the reduced price and transfer the 293 sq. metres, or to take steps to assert his right to have the whole plot transferred. He did neither but insisted on receiving the LP. 800 for part of the property which he had undertaken to sell.

In the circumstances, therefore, I agree with the finding that a breach was committed by the Appellant (even though I do not agree with the finding that there had been a requisition by the Municipality).

The next point to be considered is whether the Court below was right in ordering payment of the sum of LP. 200 which was stipulated in clause 7 of the Agreement in case of failure to transfer. I would here mention that the actual transfer had to be effected by the Anglo-Palestine Bank under the orders of the Appellant and this is why the agreement provided that should the trustees of the Anglo-Palestine Bank fail to transfer the said property in favour of the Respondent or to his order, for any reason whatsoever, in any way connected with the Appellant, the latter would have to refund to the Respondent the part payment of LP. 200 and to pay him in addition damages to the amount of LP. 200.

The question whether the stipulation regarding payment of LP. 200 by the defaulting party is a penalty or liquidated damages has been argued before this Court and the Court below. The learned Judges in the Court below pointed out that the question had not been raised in the pleadings but they expressed the view that the amount of LP. 200 was not a penalty.

It was held in C. A. 85/1940 of P. L. R. 304 that a plea that a sum claimed as liquidated damages is a penalty must be specifically pleaded and I cannot therefore accept Appellant's contention that, by virtue of Rule 87 of the Court Procedure Rules, 1938, the amount of damages claimed shall be deemed to be *in issue* in all cases. However, I would

add that in this case I consider that the sum of LP. 200 is not so excessive as to warrant the view that it constitutes a penalty (see C. A. 191/37, 4 P. L. R. p. 331 at pages 339, 340 and 347). I therefore hold that the Court below did not err when ordering payment of LP. 200 as liquidated damages.

It is needless to add that I also agree with the dismissal by the Court below of the counterclaim lodged by the Appellant.

The decision of the District Court is therefore upheld and this appeal is dismissed with costs on the lower scale together with LP. 10 (ten) advocate's attendance fee.

Delivered this 21st day of June, 1946, in the presence of Mr. Z. Brand for Appellant and Mr. G. Hiller for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 273/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPEAL OF:—

Antoinette Habib Hawa. — APPELLANT.

v.

Haj Mustafa Steitiyeh. — RESPONDENT.

Magistrates' Courts — Jurisdiction — Claim for part of an amount due severally to a number of persons — Partition — Moneys payable by purchaser into Court — Cause of action.

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 4.7.45, in Civil Appeal No. 59/45 from the judgment of the Magistrate's Court, Acre, dated 26.3.45 in Civil Case No. 521/44, dismissed:—

Where property is sold by auction in partition proceedings, on terms that the purchaser should pay the proceeds into Court, to be divided among the co-owners, the co-owners do not have a cause of action against the purchaser for unpaid purchase money.

(*A. M. A.*)

FOR APPELLANT: Cattan and H. Hawa.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

Curry, A/J.: An action for partition was brought in the Magistrate's Court (Acre Civil Case 527/42). The Magistrate decided that the

land could not be partitioned and must be auctioned. This was apparently done and on the 3rd December, 1943, the Magistrate knocked down two of the houses to the present Respondent for the sum of LP. 2,800. In the course of his judgment the Magistrate said — "I also order that these sums be divided amongst the parties and I shall later hear the parties as regards the assignment of their shares". It is to be noted also that the conditions of Auction Sale provided that the auction fees should be borne by the purchaser. I think there can be no doubt from the judgment and the conditions of sale that the purchaser had to pay the purchase money into Court together with the auction fees. The Magistrate would then distribute among the co-owners of the property their respective shares of the sale price. The purchaser did not pay the balance of the purchase money and it seems to me there can be no doubt that the co-owners could have moved the Court to have the property put up for sale again and the deposit of 10% made by the purchaser forfeited. However they did not do so, but one of the co-owners instituted proceedings in the Magistrate's Court against the purchaser claiming the sum of LP. 47.220 which she alleges to be her share of the sale price. The learned Magistrate held that the true claim was in respect of the sale of the whole land for LP. 2,800 and that therefore the matter was not within his jurisdiction. On appeal to the District Court the learned Judges were divided in their opinion.

The main ground of appeal now before us is that the amount claimed *i. e.* LP. 47.220 was the sole subject matter of the action before the Magistrate's Court and was therefore within the Magistrate's jurisdiction.

It seems to us that the parties in this case went astray at the very outset and fought the case on the wrong issues in the Magistrate's Court and then in the District Court on appeal. The all-important question is whether the Plaintiff had a cause of action against the Defendant. This point was not fully argued before us but it would appear to us that the Plaintiff has not a cause of action.

It is clear that this was not a direct sale by the co-owners of the land to the Respondent. Had it been so it is possible that one co-owner could have instituted an action in the Magistrate's Court for his share of the purchase money. Here, however, the purchaser had no contract at all with the co-sharers and there was no agreement of sale with them. On purchase, it was his duty to pay the total purchase price into Court and not to the co-owner. Moreover it was not the co-owners who could transfer the property, but it was for the Execution Officer to effect the transfer of the property. In these circumstances it

seems impossible for one of the co-owners to allege that as regards the purchaser the contract can be sub-divided and it therefore follows that the action was not within the jurisdiction of the Magistrate's Court and the appeal is dismissed with costs, on the lower scale and an advocate's instruction and attendance fee of LP. 10.—.

Delivered this 18th day of April, 1946.

A/British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 256/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPEAL OF:—

Hussein Ahmad el Jaber, in his personal capacity and on behalf of his father's heirs. APPELLANT.

v.

Musbah son of the late el Haj Mahmoud el Nabulsi, in his personal capacity and on behalf of his father's heirs. RESPONDENT.

Declaratory judgment — Failure to establish claim, disagreement of judges — Bei bil Wafa.

Appeal from the judgment of the District Court of Nablus, dated the 28th of June, 1945, in Civil Case No. 25/44, dismissed, but judgment of the lower Court amended:—

Form of judgment given where the claimant for a declaratory judgment fails to establish his case.

(*A. M. A.*)

FOR APPELLANT: A. Abdul Hadi.

FOR RESPONDENT: Eliash.

JUDGMENT.

The Plaintiff-Appellant sold certain parcels of land by a deed of *Bei-bil wafa,* the consideration therein being stated as 644 jars of oil. Subsequently thereto the transaction was registered in the *Tabu* where the consideration was stated to be 644 × 75 = 48300 Turkish piastres. The Plaintiff wished to redeem his property but apparently the parties

disagreed as to whether the amount to be paid was the 48,300 Turkish piastres or the present value of 644 jars of oil.

The Appellant instituted proceedings in the District Court praying for a declaratory judgment that the amount of the "mortgage" was 48,300 Turkish piastres.

The Judges of the District Court made the following important findings:—

> "1. That the *hijjeh* produced was the one referred to in the *Tabu* registration.
>
> 2. That the *Hijjeh* and the *Tabu* registration together formed one contract of mortgage.
>
> 3. That when the parties went to the *Tabu* they did not go there to change the *hijjeh* but to make a better registration of the agreement.
>
> 4. That the Registrar made the valuation of the jars of oil for the purpose of assessing the amount of fees to be collected."

As regards these findings we would merely say that we consider on the evidence before it the Court was fully entitled to come to those conclusions and we see no reason for differing therefrom.

Strangely enough after agreeing on those findings the Judges disagreed as to what the redemption price was the one holding that it was the 48,300 Turkish piastres and the other that it was the present price of 644 jars of oil and they proceeded to give a declaratory judgment that the amount of mortgage was in the sum of 644 multiplied by the present price of the oil LP. 4.600, *i. e.* LP. 2962.400.

In view of the disagreement of the Judges the application by the Plaintiff undoubtedly had to be dismissed for the onus of proof that the redemption price was 48,300 Turkish piastres was upon him. However in the special circumstances of the case we think that the Court below should not have stated what the redemption value was. It is to be noted that only one statement was made as to what the present day value of the oil was and there was no argument as at what date the oil was to be valued.

We therefore amend the last paragraph of the judgment of the Court below which will read as follows:—

> "Therefore in as much as the Plaintiff has failed to prove that the *Sharia* Court *Hijjeh* was changed or varied by the *Tabu* registration we dismiss his application for a declaratory judgment that the amount of the mortgage is for the sum of 48,300 Turkish piastres. Costs on the lower scale and an inclusive advocate's instruction and attendance fee of LP. 10.— to be paid by Appellant."

Delivered this 10th day of April, 1946, in the presence of Appellant (absent — served) and Podhorzer for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 233/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Edwards, J.

IN THE APPEAL OF:—

Muhammad Ahmad Nasser Abu Soda & 7 ors. APPELLANTS.

v.

Mary Khayat (née Farah) & 9 ors. RESPONDENTS.

Title to land — Claim made in settlement for lands sold by auction — L. S. Ord., secs. 5(1), 6(1), *Law of Execution, Arts.* 114—5 *— Claimant to deposit amount of bid.*

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated 31.5.1945 in Cases Nos. 47 and 54/Tira (consolidated), allowed:—

1. A claim to property sold in execution may be made at any time until registration fees on the transfer are paid.

2. Such a claim may be entertained by the Land Settlement Officer if the land is under settlement.

(*A. M. A.*)

ANNOTATIONS:

1. The main authority on the first point is H. C. 8/40 (7, P. L. R. 121; 1940, S. C. J. 76; 7, Ct. L. R. 101); for later decisions see, *e. g.*, H. C. 119/42 (1942, S. C. J. 942) and cases therein cited, H. C. 76/44 (1944, A. L. R. 494) and C. A. 393/43 (11, P. L. R. 305; 1944, A. L. R. 528).

2. On the second point *cf.* C. A. 338/44 (12, P. L. R. 57; 1945, A. L. R. 8) and note in A. L. R.

3. As regards the effect of sec. 6 of the Land (S. of T.) Ordinance *vide* C. A. 366 & 367/43 (11, P. L. R. 85; 1944, A. L. R. 100) and C. A. 45/45 (12, P. L. R. 347; 1945, A. L. R. 398).

(*H. K.*)

FOR APPELLANTS: J. Salomon.

FOR RESPONDENTS: No. 1 — Absent — dead.
Nos. 2, 4, 5 — Weinshall.
Nos. 3, 6, 7, 8 — O. Merguerian.
Nos. 9—10 — In person.

JUDGMENT.

Edwards, J.: This is an appeal from a decision of the Settlement Officer, Haifa, in Cases 47 and 54/Tira. The facts are fully set out in the decision under appeal and it is unnecessary to repeat them in

this judgment. The Appellants, who were the Plaintiffs before the Settlement Officer, sought a declaration that two parcels of land which had been bought by the father of the Defendants (now Respondents 1 to 8) should be registered in their (Appellants') names. The matter arose thus — the first Plaintiff (now the first Appellant) is the husband of one of the heirs of Ahmad Ali who, along with his three brothers, was the original owner of the two properties in dispute. The wife of the first Plaintiff has a son, Ibrahim. She, along with an uncle and a cousin of Ibrahim, had guaranteed the payment of a debt due by the latter, against whom judgment was later given by the Magistrate of Jenin. In due course, an attachment was laid on the alleged unregistered shares of Ibrahim's mother, uncle and cousin as the heirs of Ahmad Ali and in 1935 the judgment-creditor applied for and obtained an order for the sale of these shares, which were eventually bought by the father of the first eight Defendants (now Respondents). It is not disputed that all the properties had by this time belonged entirely to the Appellants and it is very likely that, had the present Appellants obtained an order from the Court under Article 115 of the Ottoman Law of Execution soon after execution proceedings commenced, much trouble would have been avoided. The execution file was first opened in December, 1935. In 1937 the first Appellant lodged an objection and was referred to Court, but did not bring an action as he was unable to pay the necessary Court fees. In 1938 the sale was ordered to proceed. Fuad Khayat, on behalf of his father, the late Aziz Khayat (the purchaser) in 1938 applied for the refund of his deposit and on 6th July, 1938, Aziz Khayat withdrew the bid which he had made on 29th June, 1938. The sale proceedings were clearly left in abeyance until 1941 and I am therefore of opinion that Article 114 Ottoman Execution Law applies. The properties were not again advertised for sale until March, 1941. On 3rd September 1941 an order for registration was made. On the 11th November, 1941, Aziz Khayat paid the necessary registration fees. In Palestine *Gazette* No. 1134 Supplement No. 2 of 9th October, 1941, page 1157, notice of intended settlement under section 5(1) Land (Settlement of Title) Ordinance was published in respect of the area in which the land in dispute was situated. It is clear, therefore, that after October, 1941, the Appellants could not approach any Land Court or Civil Court because of the provisions of section 6(1) of the Ordinance. As I have said, registration fees were not paid until 11th November, 1941. I am of the opinion that, until registration fees were paid, it was still open to the Appellants to atack the sale before the appropriate tribunal. Because of section 6(1) the Appellants could not approach a Civil Court or Land Court

and I therefore think that the Land Settlement Officer was the competent authority to whom to apply and I also think that he should have decided whether the property which had been sold in auction was in fact the property of the judgment-debtors or of any of them.

While the Settlement Officer in his decision said that, although he had carefully scrutinized the various files of the Execution Office, he could find no flaw in the proceedings, it must be remembered that here it has been found that the property sold was not the property of the judgment debtor or of his guarantors, so that it is quite immaterial whether or not the sale proceedings were regular.

It was not disputed before us that neither of the properties belonged to any of the judgment-debtors but it was tacitly admitted that they belonged in whole to the Appellants and I accordingly think that they should now be registered in the names of the Appellants according to the shares claimed by them. I would merely add that there was abundant evidence to show that the late Aziz Khayat had notice (during the pendency of the sale proceedings) of the claim of the Appellants and that he must then have realised the probable consequences of his continuing to bid and of purchasing the properties put up for sale. The decision of the Settlement Officer should be set aside and the properties ordered to be registered in the names of the Appellants in accordance with the shares claimed by them. The Appellants' advocate at the bar informed us that his clients were prepared to deposit the amount which the late Azziz Khayat had paid at public auction for the properties. We therefore direct that, before any decree is signed or order sent to the Settlement Officer or to the Land Registrar, the Appellants must deposit in Court the total sums paid by the late Aziz Khayat, namely LP. 470, with interest at 6% *per annum* from the 30th September, 1941 (the date of registration), up to the date of payment into Court. No costs of this appeal.

Delivered the 18th day of April 1946 in the presence of Mr. E. Gavison for Appellants and Mr. O. Merguerian for Respondents 3, 6, 7 & 8; no appearance for remaining Respondents.

British Puisne Judge.

FitzGerald, C J.: I concur.

Chief Justice.

HIGH COURT No. 37/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Shaw, J. and Curry, A/J.

IN THE APPLICATION OF:—

Elias Thomas Gelat & an. — PETITIONERS.

v.

The Director of Land Registration, Jerusalem & 5 ors. — RESPONDENTS.

Obligation to state all important facts in petition to High Court — Effect of non-disclosure.

Return to an order *nisi* issued on the 25th of March, 1946, directed to the first Respondent, calling upon him to show cause, if any, why he should not refrain from cancelling the registration of Petitioners as owners of parcel 424 in Urban Block No. 30033, Jerusalem, and/or why he together with the second Respondent should not refrain from executing the order of the District Court, dismissed:—

1. All facts which may influence High Court when deciding whether or not to grant order *nisi* must be stated in petition itself.

2. Failure to disclose a material fact or stating a fact in a misleading way — fatal to petition in High Court.

(*M. L.*)

FOLLOWED: H. C. 54/45 (12, P. L. R. 479; 1945, A. L. R. 818).

ANNOTATIONS: See case followed and annotations in A. L. R., see also H. C. 15/46 (1946, A. L. R. 442; 13, P. L. R. 117) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONERS: Nazzal.

FOR RESPONDENTS: Nos. 1—2 — A/Solicitor General — (Baker).
Nos. 3—4 — Mogannam.

JUDGMENT.

Objection has been taken by the Respondents to this petition on the ground of non-disclosure of material facts which ought to have been brought to the notice of this Court by the Petitioners when they filed their petition.

In H. C. 54/45 (12, P. L. R. 479) the Court observed:—

> "In my judgment it is essential that a very important fact of this kind, which might influence the Court when deciding whether or not to grant an order *nisi*, ought to be stated in the petition, so that there may be no doubt that it has been brought to the notice

of the Court. It should not be left to the Court to discover it for itself by a close perusal of documents attached to the petition, nor should it be left to be disclosed to the Court at the hearing of the application for the order *nisi*."

It appears that the Petitioners, on the same day that they filed their petition in the Court, filed a motion (No. 115/46) in the District Court of Jerusalem in C. C. 78/43 asking that the judgment dated 10.11.43 of the District Court, Jerusalem, in C. C. 78/43 should be set aside. They also filed in the District Court an *ex parte* application for an order to be issued to the Director of Land Registration to stay proceedings in File No. 1879/45 K 1983.

In their petition which was filed on 21.3.46 the Petitioners made no disclosure of these facts. If the motion had succeeded they would not have had to come to the High Court. We have been informed that the motion was yesterday dismissed on the ground that no motion lay and that the Petitioners ought to have proceeded by way of action.

We take the view that the Petitioners ought to have disclosed to this Court the fact that they were pursuing a remedy in the District Court also. They did not even do so when they asked for the Order *nisi* on 25.3.46.

But there is an allegation of a more serious non-disclosure which is that it was stated in clause 2 of their petition that the Petitioners had always enjoyed possession of the land, and that they were in possession up to the present time.

It now appears from what Fayez Eff. Nazzal, advocate for the Petitioners, has told us, that the Petitioners did not become owners of the land until 1940, and that in that year they turned the Respondents out of the land. In our judgment clause 2 of the petition was definitely misleading.

The Petitioners also failed to give any indication of the fact that a considerable amount of litigation had taken place in regard to this land, and we are not satisfied with the explanation of Fayez Eff. Nazzal that when the Petitioners said (in clause 8 of their petition) that they were completely unaware of the proceedings until 10.1.46, they made a mistake in the date which ought to have read 10.3.44.

In the result we find this to be a case in which we ought to dismiss the petition on account of non-disclosure of important facts which ought to have been stated in the petition and we accordingly dismiss it. We, however, allow the Petitioners 14 days time in which to apply to a competent Court for such relief as they may be able to get, that is to say the registration will not be altered for a period of 14 days from this date.

The Acting Solicitor General who represents the 1st and 2nd Respondents will have fixed costs in the sum of LP. 10 (ten), and Respondents Nos. 3 to 6 will have fixed costs in the same amount.

Delivered in open Court this 16th day of May, 1946, in the presence of Fayez Eff. Nazzal for the Petitioners, Mr. Baker, Acting Solicitor General, for the 1st and 2nd Respondents and Mr. Mogannam for Respondents Nos. 3 to 6.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 342/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPEAL OF :—

Government of Palestine. APPELLANTS.

v.

Adel Bint Habibi Seikaly & 10 ors. RESPONDENTS.

Land settlement appeals — Application for leave to appeal — Thirty days from notification — Party summoned for delivery of judgment and failing to attend — C. A. 354/43 — L. S. Ord., secs. 27(8), 63 — Who should grant leave, cf. M. C. J. Ord., sec. 12, C. A. 324/43 — Construction of Statutes, Salmon v. Duncombe.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area, in Case No. 83/Haifa, dated 26.7.45; preliminary objections dismissed:—

1. The period of thirty days to apply for leave to appeal in Land Settlement begins to run from the notification sent to the Applicant, even if the Applicant was summoned to attend for oral notification and did not appear.

2. Leave to appeal need not be granted by the same officer who rendered judgment.

(*A. M. A.*)

DISTINGUISHED: C.A. 354/43 (1944, A. L. R. 600).

REFERRED TO: C. A. 324/43 (11, P. L. R. 67; 1944, A. L. R. 254).

APPLIED: Salmon *v.* Duncombe, 1886, 11 App. Cas. 627, 55 L. J. P. C. 69, 55 L. T. 446.

ANNOTATIONS :

1. It is difficult to see how the Court could interpret the decision in C. A.

354/43 (*supra*) as involving merely a matter of discretion. The judgment in that case begins with the following sentence: "In this application for leave to appeal only one question arises, *viz.* whether the application for leave has been made within the time limit provided in section 63(1) of the Land (Settlement of Title) Ordinance."

2. For the principle enunciated in Salmon *v.* Duncombe (*supra*) see Maxwell on the Interpretation of Statutes, 8th ed., pp. 202—3.

(*H. K.*)

FOR APPELLANTS: Asst. Government Advocate — (Hazou).

FOR RESPONDENTS: Nos. 1, 2, 3 — T. Salomon.
No. 4 — Absent — not served.
Nos. 5—11 — Cattan and S. Khadra.

JUDGMENT.

De Comarmond, J.: This is an appeal by the Government of Palestine from a decision of the Settlement Officer, Haifa Settlement Area.

Mr. Hazou, for the Appellant, informed the Court that he abandoned the appeal in so far as Respondent No. 4 is concerned.

The decision was delivered by the Settlement Officer on the 26th July, 1945. On the 4th July, 1945, the Settlement Officer after hearing the parties had adjourned the case for the 26th July for the delivery of his decision. It is not disputed that the advocate appearing for the Government was present at the hearing of the 4th July when that announcement was made. When the decision was delivered or (to use the words of section 27(8) of the Land (Settlement of Title) Ordinance) notified at the hearing of the 26th July, Government was not represented at the hearing.

Mr. Salomon, for the first, second and third Respondents, raised objections, notice of which had been duly given.

The first objection is that the application for leave to appeal was not made within 30 days of the notification of the decision of the Settlement Officer as laid down in section 63(1) of the Land (Settlement of Title) Ordinance as amended by Ordinances No. 18 of 1930 and 48 of 1939.

It is not disputed that the application for leave to appeal reached the Settlement Officer on the 27th September, 1945, *i. e.* about two months after delivery of the decision. It is also common ground that written notification of the decision was given to the Appellant on the 19th September, 1945.

The question which falls to be decided is whether, as contended by Mr. Salomon, the time for applying for leave to appeal began to run as from the 26th July or from the 19th September.

Mr. Salomon's contention is that where a Settlement Officer gives notice that he will deliver his decision orally on a certain date, the parties who were duly warned but who chose not to be present are not entitled to reckon the period of 30 days for applying for leave to appeal as from the date the written notification of the decision was given to the Appellant. Mr. Salomon quoted in support of his contention a case reported in Annotated Law Reports (1944) page 600 (C. A. 354/43) where the learned Chief Justice in Chambers refused leave to appeal from a decision of a Land Settlement Officer. Mr. Salomon relies on that report as showing that the learned Chief Justice ruled that where a decision has been given orally, it is not necessary for the Land Settlement Officer to follow it up with a written notification to the interested parties who were not present although duly warned to attend.

After reading the aforementioned report, I had doubts as to whether the learned Chief Justice had done anything more than to refuse to exercise his discretion in favour of a party who had failed to attend, although duly warned, at the time when the Settlement Officer read out his decision. After consulting the learned Chief Justice I have ascertained that my doubts were fully justified. I will therefore proceed to examine whether Mr. Salomon's contention is sound. I have no difficulty in holding that a party to settlement proceedings, who has been warned to attend a hearing for delivery of the Settlement Officer's decision and who does attend, has to reckon the period of 30 days from the date of delivery of the decision at such hearing. If, however, a party although duly warned does not attend, I consider that subsection (8) of section 27 of the aforementioned Ordinance as amended by Ordinance 18/1930, cannot be disregarded. The said subsection (8) reads as follows:—

> "The Settlement Officer shall notify his decision in the case of any disputed claim to the parties at the hearing or, if a claimant is not present or represented at the hearing, shall send him written notification thereof."

I am of opinion that the words "within thirty days of the notification of the decision" occurring in subsection (1) of section 63 must be interpreted as meaning a written notification of the decision in the case where the party applying for leave to appeal was not present or represented when the decision was delivered at a hearing.

Being given that, in the present case, leave to appeal was granted on application made within thirty days of the written notification of the decision, I hold that Mr. Salomon's first objection fails.

The second objection is that leave to appeal was not granted by the

Settlement Officer who gave the decision (Mr. Kenyon) but by Mr. Miller who was, at the material time, a Settlement Officer, Haifa Area. Mr. Salomon pointed out that section 63(1) of the Ordinance provides that an appeal does not lie "from the decision of a Settlement Officer as to any right to land save with the leave of such officer or the Chief Justice", and that leave can therefore be granted only by the officer who gave the decision. Mr. Salomon compared section 63(1) with section 12 of the Magistrates' Courts Jurisdiction Ordinance and also quoted C. A. No. 324/43 11, P. L. R. 67.

In section 12 of the Magistrates' Courts Jurisdiction Ordinance No. 45 of 1939, clear provision is made to the effect that where the Presiding Judge of the District Court refuses leave to appeal or is unable to deal with the matter, application may be made to the Chief Justice. In section 63(1) there is no provision made for the case where the Settlement Officer who decided a case dies or is not in office when leave to appeal is applied for; furthermore, application to the Chief Justice cannot be made until leave has been refused by the Settlement Officer. I have reached the conclusion that section 63(1) is not as precisely worded as section 12 of Ordinance 45 of 1939 for the very reason that the former does not purport to make it essential that leave must be obtained from the very officer who presided over the Settlement proceedings, as does the Magistrates' Courts Jurisdiction Ordinance. It must not be overlooked that section 4(1) of the Land (Settlement of Title) Ordinance provides for the appointment of a Settlement Officer and of Assistant Settlement Officers to carry out the settlement of land in a settlement area and I am not prepared to accept the view that a Settlement Officer appointed as such for a particular area cannot validly grant leave to appeal in a case falling within such area even if he has not dealt with the case previously. It would be more convenient and logical that leave be granted or refused by the officer who conducted the settlement proceedings, but I do not consider that section 63(1) makes such procedure imperative. I have read Civil Appeal No. 324/43, 11 P. L. R. 67 which was quoted by Mr. Salomon obviously because it is stated in the judgment that "the advocate had pointed out, quite correctly, that under section 63 leave to appeal must be granted either by the Settlement Officer or by the Chief Justice". My understanding of that case is that the point at issue was whether an Assistant Settlement Officer who had conducted the proceedings could grant leave to appeal in spite of the fact that section 63(1) only mentions a Settlement Officer. I do not think that that case can be regarded as deciding the point now under consideration in the present case, but it does indicate that a wide meaning was given

to the term "Settlement Officer". In interpreting section 63(1) I bear in mind the principle that "where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractibility of the language used" (see Salmon *v.* Duncombe 11 App. Cases 627). My opinion is, therefore, that where leave to appeal has been granted by a Settlement Officer duly authorised to act in a particular settlement area, such leave is valid even if the officer did not personally conduct the proceedings which gave rise to the appeal. Were I to hold otherwise, the result would be to deprive a party of the possibility of appealing, simply because a Settlement Officer has died or is no longer in office. This was surely not the legislator's intention.

I might add that, even if Mr. Salomon's second objection had been upheld, it is probable that the Appellant would still have been entitled to obtain from Mr. Kenyon (if the latter is still in office) a reply to the application for leave to appeal.

To sum up, I hold that the two preliminary objections raised against the hearing of this appeal fail. I direct that a date be fixed by the Chief Registrar for hearing the appeal.

Delivered this day of May, 1946.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 312/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Muhammad Hassan 'Aude el Budeiri. APPELLANT.

v.

Hussein Ibrahim Khalil el Katut, landowner and cultivator, Ramle & 8 ors. RESPONDENTS.

Right of way — Proof of ab antiquo existence of right — Discretion regarding adjournments.

Appeal from the decision of the Assistant Settlement Officer, Ramleh Settlement

Area, dated 22.11.44, in Case No. 92/Ramleh, allowed and case remitted:—

To establish a right of way the claimant must produce such evidence as to entitle the Court to infer that the right existed *ab antiquo*.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* L. A. 87/27 (1, P. L. R. 242; 2, C. of J. 726), C. A. 218/38 (5, P. L. R. 485; 1938, 2 S. C. J. 124; 4, Ct. L. R. 165) and C. A. 80/41 (1941, S. C. J. 220).

Vide also C. A. 310/43 (1944, A. L. R. 632) and note 1 thereto.

2. The "Court will recognise and tolerate a certain looseness of procedure in land settlement operations ...": C. A. 8/44 (11, P. L. R. 487; 1944, A. L. R. 568).

3. On the adjournment point *cf.* C. A. 38/45 (12, P. L. R. 370; 1945, A. L. R. 749) and note 1 in A. L. R.

(*H. K.*)

FOR APPELLANT: Merguerian.

FOR RESPONDENTS: No. 3 — In person.
Others — Absent.

JUDGMENT.

In this case the only point that arises is whether or not the Respondents have established a right of way over this land. Generally speaking, the principles governing the establishment of such a right in Palestine are similar to those under English Law, they are that he who claims the right must satisfy the Court that it has existed *ab antiquo*. This does not necessarily mean that the claimant has to go back step by step to time immemorial, but the onus is on him to produce such evidence as would entitle the Court to infer that in fact the right did exist *ab antiquo*.

In this case the Plaintiffs (the Respondents) did produce evidence which, in the absence of any other evidence, would have entitled the learned Settlement Officer to draw the inference that the right had existed from time immemorial. The Appellant however contends that he had evidence in his possession sufficient to counter this allegation of the Plaintiffs, and if he had the opportunity of placing it before the Settlement Officer the conclusion might have been different. The Appellant did not adduce that evidence before the Settlement Officer because, as he alleges, he was unable to appear owing to illness. He gave this reason for failing to appear but the Settlement Officer refused to grant an adjournment. This Court is reluctant to interfere with the discretion of the Settlement Officer in regard to the grant of an adjournment, and we can say immediately that there were in this case grounds which would justify the Settlement Officer in his refusal, but

we bear in mind that we are dealing with a land case, and that it is desirable to allow a certain amount of latitude to the parties in presenting their claims. The Settlement Officer has given a very careful judgment and he seems to have fully appreciated the law, but for the reasons which we have stated we have decided to remit the case to him on one point only; that is to hear the evidence which the Appellant says he will aduce to rebut evidence adduced by the Respondents in favour of their claim to a right of way, and to reconsider his decision on this issue in the light of the evidence which is adduced. At this rehearing the Respondents should not be precluded from calling further evidence should they desire to do so.

Delivered this 13th day of May, 1946.

Chief Justice.

CRIMINAL APPEAL No. 50/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Shaw, J., Curry, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Mohammad Ibrahim Abu Naja. APPELLANT.

v.

The Attorney General. RESPONDENT.

Tobacco Ordinance, secs. 4(6), 38 — *Heisheh grown in Beersheba Sub-District — Construction of Orders.*

Appeal from the judgment of the District Court, Jaffa, sitting at Gaza, dated the 6th April, 1946, in Criminal Case No. 27/46, whereby Appellant was convicted of an offence contrary to section 38(2) of the Tobacco Ordinance 1921/37 and sentenced to pay LP. 100 as a fine or three months' imprisonment, allowed:—

On the construction of the Order dated 1.10.33, it was held that none of the provisions of the Tobacco Ordinance apply to *heisheh* grown in the Beersheba sub-district.

(*A. M. A.*)

ANNOTATIONS:

1. The order in question is set out in Drayton, Vol. 3, p. 2231.

2. On the strict interpretation of penal statutes see Halsbury, Vol. 31, pp. 536—7, para. 704; *cf.* also H. C. 119/43 (11, P. L. R. 12; 1944, A. L. R. 85).

(*H. K.*)

FOR APPELLANT: K. Barbari.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

Curry, A/J.: The present Appellant has been charged with being in possession of 625 kgs. of contraband *heisheh* tobacco contrary to section 38 of the Tobacco Ordinance. The Trial Court convicted the Accused and he appeals against that judgment.

It appears from the evidence that the Accused was stopped at the Gaza Custom Post on his way from Beersheba and the tobacco was found in his truck. Although there was no direct evidence upon the point the Trial Court appears to have found that the tobacco had been grown in the Beersheba sub-district. In any event, this appears to be agreed by both parties. Section 4, sub-section 6 of the Tobacco Ordinance gives the High Commissioner power by order to exempt from all or any of the provisions of the Ordinance any *heisheh* planted in any area. By an Order dated the 1.10.33 the provisions of the Tobacco Ordinance are not to apply to any tobacco known as *heisheh* planted within the administrative boundaries of the Beersheba sub-district. The point for determination by this Court is the interpretation of that Order. Does that Order mean that the Ordinance shall not apply to *heisheh* tobacco whilst it is actually in a planted condition and growing or does it mean that the Ordinance shall not apply to any *heisheh* tobacco which has been grown or has been planted in the Beersheba sub-district. It is to be noted that certain sections of the Tobacco Ordinance deal with the actual cultivation and growing of the tobacco and other sections with the transport and disposal thereof. It is further to be noted that section 4 sub-section 6 specifically mentions that the High Commissioner has power to exempt tobacco planted in certain areas from *all* or *any* of the provisions of the Ordinance. It appears to us that the Order is certainly open to the construction that none of the provisions of the Tobacco Ordinance shall apply to tobacco which has been planted in the Beersheba sub-district. That being the case, the Accused is certainly entitled to the construction favourable to him and we must hold that in view of the fact that this tobacco was planted in the Beersheba sub-district the Ordinance does not apply and the Accused must be acquitted of the offence with which he is charged. The appeal is accordingly allowed, the judgment of the learned Judges of the District Court set aside, the Accused acquitted and the fine if paid refunded and the *heisheh* returned.

Delivered this 27th day of May, 1946.

A/British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 17/43.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPLICATION OF :—

Yehoshua Hankin. APPLICANT. (APPELLANT).

v.

Zaki Rashid Esh Shanti & 33 ors. RESPONDENTS.

Appeal before Privy Council — Appellant's death during pendency of proceedings — Effect of irrevocable power of attorney.

Application by counsel for Applicant (Appellant) to be declared competent to continue the proceedings now pending before the Privy Council in spite of the death of the Applicant, granted:—

An irrevocable power of attorney does not automatically lapse by principal's death but continues to be in force until third party's rights secured by it have been established.

(*M. L.*)

ANNOTATIONS: On irrevocable powers of attorney see C. A. 303/44 (1945, A. L. R. 142; 12, P. L. R. 64) and annotations in A. L. R. see also H. C. 107/45 (13, P. L. R. 106; 1946, A. L. R. 437).

(*A. G.*)

FOR APPLICANT (APPELLANT): Eliash.

FOR RESPONDENTS: Mulki.

ORDER.

Frumkin, J.: This is an application by Mr. Eliash as attorney for the late Yehoshua Hankin asking to be declared competent to continue the proceedings now pending before the Privy Council in spite of the death of the said Mr. Hankin, in view of the irrevocable power of attorney in his favour executed by the deceased during his lifetime.

The relevant facts bearing on this application are that the late Yehoshua Hankin was an unsuccessful party to an appeal in a land case before the Supreme Court of Palestine, that he obtained leave to appeal to His Majesty in Council, and that after the record has been despatched to the Privy Council he died. In all the proceedings before the Courts in Palestine and in the appeal to the Privy Council, the late Yehoshua Hankin was represented by Mr. Eliash, advocate, who has now produced an irrevocable power of attorney in favour of him-

self and several others jointly and severally executed by Mr. Hankin particularly for the purpose of continuing in his name and in his stead the appeal which he has lodged to the Privy Council. The power of attorney is dated 21st April, 1944. Mr. Hankin died on the 10th November, 1945. The reasons for the issuing of the irrevocable power of attorney are, as it appears from the document, that the land in dispute does not belong and never did belong to the late Mr. Hankin, but to a company named *"Haotzar Haisraeli Haivri* Ltd.", hereinafter called *"Haotzar"*, in which he was at all times manager, and that his name in the Land Registry was a borrowed name only.

Mr. Mulki on behalf of the Respondents objected to the grant of the application on the ground that under Article 26 of the Palestine Appeal to Privy Council, Order-in-Council, 1924, Mr. Eliash may be a person interested, but not the proper person to be substituted or entered on the record in place of the party who has died.

The law as to irrevocable powers of attorney is laid down in the *Mejelle,* Article 1527 of which provides that when the right of a third party is depending upon the execution of a power of attorney the agent is not discharged by the death of the principal. It has been the invariable practice of our Courts that such an irrevocable power of attorney does not automatically lapse by the death of the principal but continues to be in force until the rights of the third party secured by it have been established. In this particular case the power of attorney provides that:—

> "It shall remain in full force and vigour until the Company shall procure and secure completely all its legal rights to and in connection with the said immovable property."

The irrevocable power of attorney having, as said before, particularly been executed to secure the continuance of the proceedings before the Privy Council and in order to secure the rights of *"Haotzar"*, and such rights not having yet been fully secured, I hold, following the practice of this Court, that Mr. Eliash is the proper person to be in this case substituted for Mr. Yehoshua Hankin, deceased, in continuing the proceedings now pending before His Majesty in Council.

Given this 26th day of July, 1946, in the presence of Mr. Kehati for Applicant, and in the presence of Mr. Mulki for Respondents.

Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATIONS Nos. 46 & 50/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPLICATION OF:—

P. C. L. A. 46/45:—

(consolidated with P. C. L. A. Nos. 44, 45, 47, 48, 49, 50, 51 & 52 of 1945 by an order of the Supreme Court dated 4.12.45).

Dov Guterman & an. APPLICANTS.

v.

Joseph Forer. RESPONDENT.

P. C. L. A. 50/45:—

(consolidated with P. C. L. A. Nos. 44, 45, 46, 47, 48, 49, 51 & 52 of 1945 by an order of the Supreme Court dated 4.12.45).

Reuven Lev.

v.

Joseph Forer. RESPONDENT.

Appeal to Privy Council — Renewed application to Court of Appeal for stay of execution.

Application for an *interim* order to stay the execution of the judgment of the Supreme Court sitting as a Court of Civil Appeal in consolidated Civil Appeals Nos. 16—24/45 dated the 26th September, 1945, refused:—

Court of Appeal will not grant stay of execution in a matter pending before Privy Council, after they had on two occasions refused it and Appellant failed to apply for stay to Privy Council.

(*M. L.*)

ANNOTATIONS:

1. For previous proceedings in this case see P. C. L. A. 44—52/45 (1946 A. L. R. p. 230) and annotations.

2. On stay of execution see: C. A. 194/46 (1946, A. L. R. 383); C. A. 201/46 (*ibid.*, p. 387); H. C. 110/45 (*ibid.*, p. 123) and annotations in A. L. R.

(*A. G.*)

FOR APPLICANTS: Scharf.

FOR RESPONDENT: *Ex parte.*

ORDER.

This is an *ex parte* application for an *interim* order to suspend the execution of the judgment of the Supreme Court (in its appellate

jurisdiction) in consolidated civil appeals Nos. 16—24/45 delivered on the 26th September, 1945.

Leave to Appeal to His Majesty in Council has been obtained by the Applicants in the circumstances described below. Provisional leave to appeal to His Majesty in Council was granted by this Court on the 4th December, 1945, and the security to be furnished in respect of each of the nine cases was fixed at LP. 200.—. Stay of execution was refused. The would-be Appellants then applied to the Privy Council representing that the Supreme Court should not have asked for a total security of LP. 1800 which the Appellants could not afford to furnish. The order made by His Majesty in Council was to the effect that leave was granted subject to the deposit of the sum of LP. 300 in the Registry of the Privy Council as security for costs.

It is to be observed that no application was made to the Privy Council for a stay of execution although such a stay had been refused by the Palestine Court in December, 1945.

On the 28th May, 1946, this Court refused to entertain an application for stay of execution, and it should be mentioned that on the 19th April, 1946, this Court had expressed the view that the Judicial Committee of the Privy Council were now seized with the appeals and that any application for the modification of the conditions attached to the grant of leave to appeal would have to be made to the Privy Council.

The advocate for the Appellants has explained that his clients did not apply to the Privy Council for a stay because such an application would have been futile unless the amount of security was so reduced as to enable the Applicants to proceed with the appeal. With all deference to the learned advocate, we consider that this explanation is very feeble and does not alter the position which is that this Court has on two occasions refused to stay execution and that, furthermore, it would not be proper for this Court at the present stage to make any order affecting the position of parties whose cases are pending before the Privy Council.

This application is therefore refused.

Given this 1st day of August, 1946.

British Puisne Judge.

CIVIL APPEAL No. 315/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Curry, A/J.

IN THE APPEAL OF:—

'Aqela Ahmad Barriya & 5 ors. APPELLANTS.

v.

The Palestine Jewish Colonisation Association. RESPONDENTS.

Land settlement — Onus of proof — Registered title — Prescription — Possession by ancestor.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area dated the 31st July, 1945, in Case No. 7/Fureidis, dismissed:—

Prescription may be cumulated from ancestor to descendant, provided both hold adversely. This will therefore not apply in cases where the ancestor sold to the person against whom prescription is set up as a title.

(*A. M. A.*)

ANNOTATIONS:

1. On the evidential value of a registered title see C. A. 416—419 & 421/44 (*ante*, p. 313) and note 3; *cf.* also 151/44 (*ante*, p. 414).

2. Prescriptive title can only be acquired by *adverse* possession: *vide* C. A. 167/42 (9, P. L. R. 701; 1942, S. C. J. 715) and note 1 in S. C. J.; *cf.* also C. A. 408/43 (11, P. L. R. 316; 1944, A. L. R. 628) and C. A. 449/44 (12, P. L. R. 279; 1945, A. L. R. 339).

(*H. K.*)

FOR APPELLANTS: F. Nazzal.

FOR RESPONDENTS: Wittkowski.

JUDGMENT.

This is an appeal from the decision of the Settlement Officer, Haifa Settlement Area. It concernes the parcel of land which is set out in the judgment of the learned Settlement Officer.

Only two points arise. The Respondents, in whose name the Settlement Officer registered these lands, claim by virtue of a registration supported by *kushans* which they produced. Fayez Eff. Nazzal for the Appellants contends that these *kushans* did not cover the land. We have repeatedly stated in this Court that where the Settlement Officer has before him the *kushan*, and he delineates the land in accordance with his interpretation, this Court will not readily interfere with his

decision because obviously he is in the best position to identify the loose descriptions of the boundaries which so often appear in *kushans*. Mr. Nazzal has argued that there was no evidence on which the Settlement Officer could satisfy himself that the *kushans* did apply to the land. As to this we would remark that the best evidence is the fact that the Settlement Officer actually awarded the land to the Respondents on the *kushans* and on the *kushans* alone. He was satisfied, *prima facie* at all events, that the *kushans* did apply to this land and he told the Appellants that they were at liberty to bring evidence to contradict this. Mr. Nazzal has argued that in this the Settlement Officer was wrong; that the onus was not on his clients. To this we cannot agree. He who denounces a duly registered document of title which *prima facie* establishes a fact, must call evidence in support of his denunciation.

We are, therefore, satisfied that the Settlement Officer was justified in his conclusion that the *kushans* covered this land.

The only other point advanced in favour of Appellants is that they have been in possession for a prescriptive period. It appears that the land was sold by Fawzi the ancestor of the present Appellants. He died in 1935. It is admitted that the period from his death to the date of action does not constitute a period sufficient for prescription but Mr. Nazzal argues that the heirs were in possession through Fawzi who sold in 1929. It is true that in some cases prescription can be accumulative from ancestor to descendant, but it depends on the circumstances of the case. Certainly a descendant cannot claim prescription through an ancestor who in fact himself sold the land in question to the person against whom prescription is set up as a title. Having arrived at this conclusion, it is clear that there was not a prescriptive period sufficient to defeat a registered title. The appeal must therefore be dismissed with costs on the lower scale to include LP. 5 advocate's attendance fee.

Delivered this 14th day of May, 1946.

Chief Justice.

CIVIL APPEAL No. 382/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Muhammad Abu Isleih. APPELLANT.

v.

Masmah Eid Masmah. RESPONDENT.

Judgment by default — M. C. P. R. 163 — Appeals, C. A. 272/40, C. A. 235/41, C. A. 300/45 — "Decree" (M. C. P. R. 2).

Appeal from the decision of the Magistrate's Court, Gaza, sitting as a Land Court, dated 25.11.45 in Land Case No. 208/45; preliminary objection dismissed:—

When an appeal is filed from a refusal by a Magistrate to set aside a judgment given *ex parte*, the period of appeal begins to run from the date of the refusal.

(*A. M. A.*)

APPROVED: C. A. 272/40 (8, P. L. R. 90; 1941, S. C. J. 79; 10, Ct. L. R. 45); C. A. 300/45 (13, P. L. R. 7; *ante*, p. 69).

NOT FOLLOWED: C. A. 235/41 (9, P. L. R. 4; 1942, S. C. J. 15; 11, Ct. L. R. 33).

ANNOTATIONS: See the cases cited in note 1 in A. L. R. to C. A. 300/45 (*supra*); *vide* also C. A. D. C. Ha. 57/45 (1945, S. C. D. C. 671) and note.

(*H. K.*)

FOR APPELLANT: F. Dajani.

FOR RESPONDENT: Barbari.

RULING.

A preliminary objection that this appeal is out of time has been raised by Kamal Eff. Barbari for the Respondent.

The facts are briefly as follows: Judgment for the Respondent (original Plaintiff) was given on 29.10.45 in the absence of the Appellant (original Defendant). The Appellant applied under Rule 163 of the Magistrates' Courts Procedure Rules, 1940, to have that judgment set aside. The Magistrate dismissed the application on the ground that the Applicant (present Appellant) had not filed an affidavit in support of his application, and he described his decision (dated 25.11.45) as being a judgment.

Mr. Barbari submits that the decision of 25.11.45 was not a judgment and that this appeal being an appeal against the judgment dated 29.10.45, is out of time since it was not filed till 16.12.45.

In Civil Appeal No. 272/40 (8, P. L. R. 90) the Court stated (at page 93):—

> "In a case such as this there can be no doubt that the proper procedure is to apply to have the judgment set aside under Rule 163, but upon English authority it cannot be said that an appeal from the judgment does not lie to the appellate Court — see Vint *v.* Hudspith, 29 Ch. D. 322, but I do not think, following the *dictum* of this Court in Civil Appeal 230/38, 1938 P. L. R. 563, that both remedies can be pursued at the same time. In my judgment the District Court was right in treating this as an appeal from the Magistrate's refusal to set aside the judgment, and I see no reason to differ from its conclusions."

In Civil Appeal No. 235/41 (9, P. L. R. 4) the Court held that the only way in which a plaintiff whose case had been struck out could proceed was by filing a motion under Rule 163 to set aside the *ex parte* judgment. It does not appear, however, that the attention of the Court had been drawn to the decision in Civil Appeal No. 272/40, so we think that the judgment in that case is still good law and that a party whose case has been dismissed by a decree or order given *ex parte*, or in default of an appearance or pleading, can still, if he so chooses, proceed by way of an appeal. This view has been expressed also in a recent appeal — C. A. 300/45 — which has not yet been reported.

We agree, however, that the proper procedure is to apply to have the judgment set aside under Rule 163, and if that course is followed an appeal lies against an order refusing to set aside the judgment.

There is another point from which the matter may be viewed. The judgment dated 29.10.45 can be regarded as being provisional until the period within which an application to set it aside may be made under Rule 163 has expired. It will then, of course, become a final judgment so far as the Magistrate is concerned. So in effect the decision dated 25.11.45 was more final and conclusive in respect of the rights of the Appellant than was the judgment dated 29.10.45. So it is impossible to say that the decision dated 25.11.45 is not a decree as defined in Rule 2 of the Magistrates' Courts Procedure Rules, 1940.

In the result we find that this appeal must be regarded as being an appeal from the judgment dated 25.11.45 which confirmed the earlier judgment. It follows that the appeal is not out of time and the preliminary objection is therefore dismissed.

Delivered this 28th day of March, 1946.

British Puisne Judge.

CIVIL APPEAL No. 245/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Curry, A/J.

IN THE APPEAL OF:—

Yousef Ahmad Qojeil. APPELLANT.

V.

1. Rahel Zlotnik,
2. The Official Receiver. RESPONDENTS.

Land Transfer Regulations — Power of attorney — Whether intended to defeat Regulations — Oral evidence to contradict deed — Lawful evasion — Act of bankruptcy — Fraudulent sale need not be to a creditor, — Bankruptcy Ordinance, sec. 3(2)(a) and (b).

Appeal from the order of the District Court, Haifa, sitting in Bankruptcy, dated 27th June, 1945, in Civil Case No. 107/44 (Bankruptcy), dismissed:—

1. Oral evidence will not be heard to establish that a deed — regular on the face of it — was given for an illegal object.

2. A power of attorney given by a Palestinian Arab to a non-Palestinian Arab in connection with lands in Zone A does not offend against the Land Transfer Regulations.

3. To constitute an act of bankruptcy under sec. 3(2)(a) and (b) of the Bankruptcy Ordinance, the sale need not be to a creditor, if it is intended to defraud a number of creditors.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* C. A. 279/44 (12, P. L. R. 62; 1945, A. L. R. 90), C. A. 16—24/45 (1945, A. L. R. 628 at p. 637) and see C. A. D. C. Ha. 80/45 (1945, S. C. D. C. 660) where a similar power of attorney is considered.

2. For other authorities on the Land Transfer Regulations see note 1 to L. C. Ha. 8/44 (1946, S. C. D. C. 358).

3. On sec. 3(2) of the Bankruptcy Ordinance *vide* Annotated Laws of Palestine, Vol. 2, pp. 252—3.

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENTS: No. 1 — Eliash.
No. 2 — Absent — served.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from the decision of the District Court of Haifa which sitting in Bankruptcy made a receiving order against the Appellant under section 6(2) of the Bankruptcy Ordinance, 1936.

The relationship between the Appellant and the Respondent which eventually led to the receiving order arose out of a document which was Exhibit A/6, in the trial Court. It purported to be a general irrevocable power of attorney. The reason for the document is to be found in the opening clause which states that the Appellant Yousef Ahmad Qujeil was indebted to Mrs. Rahel Zlotnik, who is the sister of the Respondent, in the sum of LP. 5000 which money had been received by him and which amount became due from him. For the purposes of liquidating this debt, the Appellant appointed Mr. Shaul Mandelman of Haifa to act on his behalf in other words to be his

attorney. There is little doubt that this power of attorney was as wide as it well could have been. In its own words as translated from the original Arabic, it conferred upon the appointee, power to sell and transfer, to mortgage, to lease, to exchange and to dispose of in any other manner, all the rights and interest which he owned in all his immovable properties.

It is admitted that despite this power of attorney, in defiance of it the Respondent alleges, the Appellant sold some property covered by it. The Respondent petitioned in bankruptcy as a creditor, alleging that the Appellant was indebted to him through the power of attorney and that he had committed an act of bankruptcy by the sale.

The District Court agreed with the Petitioner in bankruptcy. It was argued in favour of the Appellant that this document A/6 was a false document, that in fact the Appellant did not owe this money. The purport of the document, he averred, was to cover up some shady transactions by which Jews could acquire land in Zone A. The Appellant sought to lead oral evidence to prove these facts but the District Court refused the application. There may be cause for suspicion in this rather unusual type of agreement between a Jew and an Arab, but in this connection it must be borne in mind that there is nothing fraudulent in taking an advantage of a real or imagined loophole in the law, if that (as it appears) was the intention of the parties. It is not alleged that this document A/6 was fraudulent in the sense that the Appellant's signature was forged or that duress was applied to him to compel him to make it. In so far as he was concerned, at the time when it was executed it was a perfectly genuine document which reduced to writing in the form of a deed what the parties intended to reduce to writing. The Appellant may have had in his mind the ulterior motive of outwitting the regulations, but I consider that the learned Relieving President was justified in refusing on this mere allegation to allow him to call oral evidence to repudiate his signature and a document duly executed by him of his own free will.

Another preliminary point urged by Mr. Cattan was that this sale could not be a fraudulent disposition because, he argued, that under section 3(2)(*a*) and (*b*) of the Bankruptcy Ordinance the sale to be fraudulent must be to a creditor. I agree that fraudulent sales under the Bankruptcy legislation are usually to a creditor with the object of defeating another creditor, but in my opinion the sale need not necessarily be to a creditor; exceptional circumstances may arise as they have in this case, where the fraudulent sale, may be to a person who is not himself a creditor. The test to be applied is whether in fact the

sale does defeat the legitimate rights of other creditors. Here it is quite clear that the sale did defeat the rights, which the Respondent claims were vested in him, and which the Court held were vested in him.

I come now to what was in fact the main ground of appeal. It was that this document A/6 was an illegal document in that it contravened the provisions of the Land Transfers Regulations, 1940, it being admitted by both parties that the land concerned is in Zone A, and the transfer of land in that Zone to a non-Palestinian Arab as the Respondent is, is prohibited. Regulation 3 provides that the transfer of land within Zone A save to a Palestinian Arab shall be prohibited. Regulation 9 defines "transfer" as including leases, mortgages, charges and any other dispositions. That is the sole restriction, which, it must be emphasized, is a restriction on transfer, imposed by those regulations. They do not, as Mr. Cattan argues, bar non-Palestinian Arabs from all connection with land in Zone A. For instance, there is no reason why Messrs. Barclays Bank, which presumably would come under the definition of "non-Palestinian Arab" should not hold a power of attorney from one of its Arab clients enabling them to carry out, on behalf of that client, any transactions that the client could carry out. They could not, of course, carry out a transaction prohibited to the client, and consequently they could not on the client's behalf transfer lands in Zone A to a non-Palestinian Arab. Equally there is no reason why a non-Palestinian Arab, including a Jew, should not hold a power of attorney for a Palestinian Arab authorising him to carry out any transaction which that Palestinian Arab could carry out. Again he could not on behalf of the giver of the power transfer land in Zone A to a non-Palestinian Arab, because the giver himself could not do so. At this stage I turn again to examine A/6. As a power of attorney it is, as I have said, as wide as it could be, but it is still a power of attorney and anything done under it, is done on behalf of the maker. It is obvious that it gives *inter alia* the power to transfer this land on behalf of the Appellant. There is nothing illegal in this. What the Respondent could not do is to transfer the land to a person to whom the giver of the Power of Attorney could not transfer it, because where an authority is given to a person there is a presumption that it must be exercised subject to any limitations imposed by law. There is nothing in the Land Transfers Regulations to prohibit the Appellant from giving to Respondent the power which he did give to him in Exhibit A/6, which was nothing more than the power to exercise as his appointee his legal rights. That power must, as I have indicated, be exercised subject to any limitations imposed by law, and it could

not be invoked so as to violate the provisions of the Land Transfers Regulations, 1940.

For these reasons we are of the opinion that the District Court came to a correct conclusion, and the appeal must be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fees.

Delivered this 8th day of May, 1946.

Chief Justice.

Curry, A/J.: I concur.

A/British Puisne Judge

HIGH COURT No. 23/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF :—

Abdul Raouf Muhammad el-Faris. PETITIONER.

v.

Assistant Superintendent of Police, Hebron & 4 ors. RESPONDENTS.

Order under Prevention of Crime Ord. — Interference by High Court.

Return to a rule *nisi* issued on the 22nd day of February, 1946, directed to the Respondents calling upon them to show cause why they should not refrain from taking any steps to enforce and/or to continue enforcing paragraph 2 of the order made by the 5th Respondent against the Petitioner on the 18th of January, 1946, and to place no hindrance in the way of Petitioner to return to his home in Tallouza village and freely to move in and about Palestine; rule *nisi* made absolute:—

1. High Court will not attempt to substitute its own discretion for that of the person in whom legislature has vested it.

2. High Court will enquire as to whether the person who purported to exercise discretion was acting under authority of law in so doing and whether he followed the procedure set out in that law.

3. Where conclusion arrived at by public officer is unreasonable owing to lack of evidence upon which it could be based, High Court will interfere to prevent a patent miscarriage of justice.

(*M. L.*)

ANNOTATIONS :

1. On point 1 see H. C. 4/45 (1945, A. L. R. 509); H. C. 61/45 (1945, A. L. R. 546; 1945, P. L .R. 450); H. C. 137/44 (1945, A. L. R. 654); H. C.

109/45 (*ante*, p. 167) and H. C. 13/46 (*post*, p. 513).

2. On point 2 see H. C. 18/45 (1945, A. L. R. 563; 12, P. L. R. 248); H. C. 34/45 (1945, A. L. R. 730; 12, P. L. R. 365) and H. C. 107/45 (*ante*, p. 437; 13, P. L. R. 106).

3. On point 3 see H. C. 34/45 (*supra*) see also H. C. 26/45 (1945, A. L. R. 674).

(*A. G.*)

FOR PETITIONER: Scharf.

FOR RESPONDENTS: A/Solicitor General — (Baker).

ORDER.

This is a petition in which it is prayed that an order issued under the Crime Prevention Ordinance be declared null and void. In that Ordinance the legislature has seen fit to confer upon a District Commissioner or a President of the District Court extra judicial power to order a person to give security for good behaviour and to restrict his liberty of movement. There is no right of appeal from the decision. It is clear that a discretion as to whether or not an order should be made is vested in the President of the District Court or the District Commissioner. Now, this Court has repeatedly stated that in such cases it will not attempt to substitute its own discretion for that of the person in whom the legislature has vested it. It will enquire as to whether the person who purported to exercise the discretion was acting under the authority of the law in so doing, and whether he followed the procedure set out in that law. Furthermore, if the conclusion at which the officer has arrived is unreasonable owing to the lack of any evidence upon which it could be based, the Court will interfere to prevent a patent miscarriage of justice.

The third Respondent who is the Police Officer in the Nablus district, states that he was not ill-disposed towards the Petitioner. The averment was, in our opinion, unnecessary because his evidence was quite obviously straightforward and honest. It is also clear that the Assistant District Commissioner, Mr. Livingstone, conducted the enquiry in a painstaking and unbiased manner. But we have now to sift the evidence on which the Assistant District Commissioner's conclusion was founded. It was, in fact, the evidence of Mr. Kennedy, the Police Officer, and his evidence alone. Other witnesses were called but it emerges from a perusal of the proceedings as a whole, that those witnesses did not live up to the expectation of the police and failed to give the evidence which they presumably had led the police to believe they were prepared to give against the Petitioner. It may well be, as Mr. Livingstone has stated in his judgment, that they were terrified to speak out and

therefore refrained from incriminating the Accused. Mr. Livingstone's appreciation of their reasons may have been correct, but the fact remains that they did not give evidence against the Petitioner and, in fact, such evidence as they gave, and the evidence of A. S. P. Abu Fadel, can only be interpreted as being in favour of the Petitioner.

I turn now to the evidence given by A. S. P. Mr. Kennedy. It was nothing more than one would expect to find in a charge-sheet chargig a person with an offence. It went no farther than to state that as far as his information led him to believe the Petitioner was a man whose liberty should be restricted under the Ordinance. This evidence was in fact the charge which set in motion the enquiry. But section 5(4)(b) of the Ordinance makes it a condition precedent to the making of the order that the District Commissioner or President must be satisfied from the circumstances of the case and from the known character of the Accused as proved to the District Commissioner or the President, that an order ought to be made. If we hold, as we do, that Mr. Kennedy's evidence amounted to nothing more than a preferring of the charge, there was no other evidence to prove to the District Commissioner that Petitioner's character was such as to justify the making of an order under the Ordinance.

We are, therefore, forced to the conclusion that there was no evidence upon which the District Commissioner's conclusion could have been founded. It follows that the rule must be made absolute and the proceedings before the District Commissioner quashed.

Given this 28th day of May, 1946.

Chief Justice.

HIGH COURT No. 13/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPLICATION OF :—

Itzhaq Trachtengott. — PETITIONER.

v.

The Acting District Commissioner, Lydda District, Tel Aviv. — RESPONDENT.

and

Ex-Serviceman Zeev Ampel & 2 ors. — APPLICANTS (THIRD PARTY).

Order of requisition by District Commissioner — Non-interference of High Court.

Return to a rule *nisi* issued on the 4th day of February, 1946, directed to the Respondent, calling upon him to show cause why his notice of requisition dated 16th January, 1946, marked "A", and attached to the petition, should not be set aside, the rule discharged:—

High Court will not interfere with discretion exercised by public officer as long as it falls within the scope of his statutory authority and he has not acted *mala fide* or capriciously.

(*M. L.*)

REFERRED TO: H. C. 142/44 (1945, A. L. R. 247; 12, P. L. R. 39); Carltona *v.* The Commissioner of Works & ors. 2 A. E. L. R. 1943, p. 560.

ANNOTATIONS: See cases referred to, see also H. C. 24/46 (*ante*, p. 465; 13, P. L. R. 216) and H. C. 47/46 (*ante*, p. 468) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONER: Goitein.

FOR RESPONDENT: A/Crown Counsel — (Salant).

FOR THIRD PARTY: Sharf.

ORDER.

This is a return to an order *nisi* calling upon the Respondent to show cause why his notice of requisition dated the 16th day of January, 1946, marked "A" attached to the petition should not be set aside. The Respondent who is the District Commissioner in the Lydda District, requisitioned certain premises of the Petitioner for the purpose, as he stated in his affidavit, of providing accommodation for ex-service men. The requisition was made under Defence Regulation 114(1)(y) of the Defence Regulations, 1945, which enables the District Commissioner to requisition premises if he considers that the requisition is necessary or expedient *inter alia* for the maintenance of the public order. In his affidavit the District Commissioner states that in his opinion the requisition was necessary because the existence of thousands of homeless ex-service men constituted a threat to the public order. By the enactment of Defence Regulation 114 the legislature clearly vested a discretion in the District Commissioner. Now, there are long lists of cases both in the English Courts and in the Palestine Courts which clearly indicate the limits within which this Court will interfere in case of this nature. The discretion has been exercised by the District Commissioner and Mr. Goitein for the Petitioner now in fact asks us to review that decision. In High Court 142/44 this Court has stated that it will not attempt to review the discretion provided the District Commissioner confined himself within the four walls of his statutory authority and has not acted with *mala fides* or capriciously or without regard to the

rules of reason and justice. Indeed it appears to me that the very point raised by Mr. Goitein has been dealt with in the case of Carltona *v.* The Commissioner of Works and others, 2 All England Law Reports 1943, p. 560. There Lord Greene, M. R. states:—

> "The last point that was taken was to this effect, that the circumstances were such that, if the requisitioning authorities had brought their minds to bear on the matter, they could not possibly have come to the conclusion to which they did come. That argument is one which, in the absence of an allegation of bad faith — and I may say that there is no such allegation here — is not open in this Court. It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the Courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the Courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no Court can interfere. All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the Courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

Being satisfied as we are that the discretion vested in the District Commissioner was *bona fide* exercised, it follows that the rule must be discharged.

Given this 25th day of June, 1946.

Chief Justice.

CIVIL APPEAL No. 240/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPEAL OF:—

Fahmi Abdul Hadi. APPELLANT.

v.

Awni Bey Abdul Hadi, guardian over the minor

children Tewfiq, Basem, Aszmi, Nidal, Khouleh & A'ide sons of Nazmi Abdul Hadi, & 5 ors. RESPONDENTS.

Jurisdiction — Defence of prescription — C. A. 244/45 — Who should be Plaintiff — Co-ownership — L. Code Art. 20.

Appeal from the judgment of the District Court, Nablus, in its appellate capacity, dated 30th May, 1945, in C. A. 34/44, from the judgment of the Magistrate, Jenin, dated 10th July, 1944, in Civil Case No. 339/43, dismissed:—

Where a Magistrate refuses to entertain an action on the ground that the issue of ownership is raised by a defence of prescription, it is for the Plaintiff to sue for ownership in the Land Court.

(*A. M. A.*)

FOLLOWED: C. A. 244/45 (13, P. L. R. 84; *ante*, p. 129).

ANNOTATIONS: See the case followed and the notes thereto in A. L. R.

Cf. also C. A. 356/45 (*ante*, p. 199), Mo. L. C. Jm. 89/46 (1946, S. C. D. C. 351) and C. A. D. C. Ha. 31/46 (*ibid.*, p. 364).

(*H. K.*)

FOR APPELLANT: Elia.

RESPONDENTS: No. 1 — In person.
Rest — Absent — served.

JUDGMENT.

FitzGerald, C. J.: I find it difficult to appreciate how this case found its way to the Court of Appeal, because it seems to me that the principles of law to be applied to the issues involved are well established by several cases of this Court, the most recent being C. A. No. 244/45.

The Appellant in this case claimed that he was owner of property by virtue of a *tabu kushan*. The Respondent did not deny this *tabu* registration, but he pleaded that he was in a position to defeat it by prescriptive possession. The Magistrate apparently was satisfied that there was a *prima facie* case of prescriptive possession, and he quite rightly held that the issue could only be determined by a Land Court, but he ordered the Respondent to take action in that Court. On appeal the District Court held that it was for the Appellant to initiate the action. In this the District Court were clearly right. As has been pointed out in Civil Appeal No. 244/45 a claim under Article 20 of the Land Court does not give title. Its effect is merely to destroy the power of the owner to oust the person in possession. It can only be pleaded as a defence. If the person holding the *kushan* wishes to oust the person claiming possession he must do so by constituting himself a plaintiff in the Land Court, so that the person in possession will

be able to have the validity of his defence tested. Mr. Elia, for the Appellant, seems to have fully appreciated this principle, but he sought to get over it by submitting that as the parties concerned were co-owners there could be no prescription. If there is substance in his argument that is an issue for the Land Court to determine.

For these reasons we are of opinion that the appeal must be dismissed with costs on the lower scale to include LP. 10.— advocate's attendance fees.

Delivered this 18th day of April, 1946, in presence of Mr. G. Salah by delegation from Mr. Elia for Appellant and Mr. Fuad Eff. Nashashibi for Respondent No. 1.

Chief Justice.

De Comarmond, J.: I concur.

British Puisne Judge.

HIGH COURT No. 32/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Israel Grunwerg. PETITIONER.

v.

Chief Execution Officer, Tel-Aviv & an. RESPONDENTS.

Consent to jurisdiction of Rabbinical Court and attempt to withdraw it — Judgment for alimony as a continuation of a previous judgment.

Return to a rule *nisi* issued on the 5th March, 1946, directed to the 1st Respondent, calling upon him to show cause why his decision of the 11th of February, 1946, should not be set aside and why he should not refuse to execute the judgment of the Rabbinical Court of Tel-Aviv, dated 9th December, 1945, order discharged:—

1. Defendant appearing in person in Religious Court and arguing his case at length, must be taken as consenting to that Court's jurisdiction if consent is necessary; any attempt at the end of the hearing to withdraw consent is to be disregarded.

2. A Rabbinical Court judgment for payment of alimony for a further period after a previous similar judgment had been satisfied may be regarded as a continuation of the first, and consent to jurisdiction originally given when proceedings first started holds good also as regard subsequent proceedings.

(*M. L.*)

ANNOTATIONS :

1. On question of consent to jurisdiction of Religious Court and its effect on later proceedings see H. C. 64/45 (1945, A. L. R. 641) and annotations.

2. On point 2 see C. A. 47/42 (12, Ct. L. R. 126; 1942, S. C. J. 231; 9, P. L. R. 312) and cases referred to therein.

(*A. G.*)

FOR PETITIONER: Gorali.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Eliash.

ORDER.

Frumkin, J.: This is a return to an order *nisi* directed against the second Respondent to show cause why the order of the first Respondent, the Chief Execution Officer of Tel-Aviv, dated 11th February, 1946, should not be set aside. In his order the Chief Execution Officer directed the execution of a judgment of the Rabbinical Court of Tel-Aviv, dated 5th *Tevet*, 5706, against the Applicant ordering him to pay LP. 24.— monthly for six months, to his wife, the second Respondent, as alimony for her and her children. The said judgment was preceded by a previous judgment of the same Court dated 15th *Sivan* 5705, directing the payment of an equal monthly amount for the preceding six months. This first judgment was duly executed without any opposition on the part of the Applicant.

The order of the Chief Execution Officer is attacked on the ground that both judgments of the Rabbinical Court and, in any event, the second judgment, were issued without the Applicant's consent; this being a case where the Rabbinical Court has no exclusive jurisdiction and can only exercise jurisdiction by consent of all the parties concerned.

Now, as regards the first judgment there is no doubt that there was consent. The Respondent appeared in person before the Rabbinical Court, argued his case at length and only at the end of the hearing there is the following statement made by him:—

> "if you will increase the alimony I won't pay and then I will go to the Government Court and I will leave *Kneset Israel*."

At the most this statement can be interpreted as a threat to withdraw the consent already given. When, however, jurisdiction is vested in a Court by the consent of a party he should not be allowed to blow hot and cold. It would be an abuse of the process of the law if a party were allowed to vest a Court with jurisdiction and that the Court should find itself at the end that it had wasted its time because the party anticipating that the judgment might go against him has found it proper

to withdraw his consent. Moreover, as said before, the judgment was executed without any opposition.

We come now to the second judgment of the Rabbinical Court. This judgment was given in the absence of the Applicant and the Rabbinical Court had before it a letter by the Applicant stating that he is a foreigner, and that at the first part of the proceedings he appeared only out of respect and that he does not consent to the jurisdiction of the Rabbinical Court in this matter. On behalf of the second Respondent it has been submitted to us that it is the practice of the Rabbinical Courts when dealing in matrimonial relations between husband and wife to give only periodical orders as to the payment of alimony and revise the orders from time to time according to any possible changes in the relationship of the parties and the material position of the husband. The first judgment did not therefore finally determine the issue which by consent the parties had submitted to jurisdiction. This submission is supported by the judgment of the Rabbinical Court itself which considers the second judgment as a continuation of the first, so that we come to the conclusion that the second judgment too is based upon the consent originally given by the Applicant when the proceedings first started before the Rabbinical Court.

The order is, therefore, discharged, with costs to include LP. 10 advocate's attendance fee.

Given this 11th day of June, 1946.

Puisne Judge.

FitzGerald, C. J.: I agree.

Chief Justice.

Abdul Hadi, J.: I agree.

Puisne Judge.

HIGH COURT No. 115/45(a).

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPLICATION OF:—

Mohammad Rashid Adasi. APPLICANT.

v.

Inspector General of Police and Prisons, Jerusalem. RESPONDENT.

High Court setting aside its ex-parte order.

Application for the setting aside of the *ex-parte* order given in this case on 28th of January, 1946:—

1. For purposes of Court proceedings the client is represented by and identified with his advocate.

2. Where Petitioner to High Court was by misadvertance of his advocate not represented, High Court may set aside its *ex parte* order, if the circumstances of the case warrant such course.

(*M. L.*)

FOLLOWED: H. C. 40/44 (1944, A. L. R. 310).

ANNOTATIONS:

1. On point 1 see C. A. 277 & 278/43 (1944, A. L. R. 224; 10, P. L. R. 196); H. C. 57/44 (1944, A. L. R. 301; 11, P. L. R. 260); C. A. 291/44 (1944, A. L. R. 794; 11, P. L. R. 506) and annotations in A. L. R.

2. On point 2 see case followed (*supra*) and H. C. 144/44 (1945, A. L. R. 410; 12, P. L. R. 117).

(*A. G.*)

FOR APPLICANT: F. Ghussein.

FOR RESPONDENT: Crown Counsel — (Southworth).

ORDER.

In this case we agree with the learned Crown Counsel that for purposes of Court proceedings the client is represented by and identified with his advocate. H. C. No. 40/44 is an authority for upsetting an order made by this Court sitting in its capacity as a High Court where the Respondent had no chance of replying to the petition. In this case the Petitioner did have a chance of replying through his advocate but owing to misadventure of his advocate he in fact was not represented. As it is a question involving the liberty of the subject, we feel that in the circumstances of this particular case full justice can only be done to the Petitioner by setting aside the order of this Court dated the 28th of January, 1946. This we accordingly do. A new return day for the hearing of the order *nisi* will be fixed by the Chief Registrar.

Given this 3rd day of June, 1946.

Chief Justice.

HIGH COURT 115/45(b).

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPLICATION OF:—

Mohammad Rashid Adasi. PETITIONER.

v.

Inspector General of Police and Prisons, Jerusalem. RESPONDENT.

Deportation order under sec. 10(1)(c), Immigration Ord. after acquittal on a charge under sec. 5(1)(g) — Proof of lawful residence in Palestine — Onus of proof.

Return to a rule *nisi* issued on the 19th December, 1945, directed to the Respondent, calling upon him to show cause why his order of deportation of Petitioner from Palestine should not be cancelled, the rule is discharged:—

1. An acquittal on a charge under sec. 5(1)(g) Immigration Ord. is not in itself a bar to a deportation order under sec. 10(1)(c) of the Ordinance.

2. A ration card and an identity card are not in themselves evidence of lawful residence in Palestine.

(*M. L.*)

ANNOTATIONS: For a somewhat similar decision see H. C. 15/46 (1946, A. L. R. 442; 13, P. L. R. 117).

(*A. G.*)

FOR PETITIONER: F. Ghussein.

FOR RESPONDENT: Crown Counsel — (Hooton).

ORDER.

In this case the Petitioner seeks to denounce an order of deportation made under section 10(1)(c) of the Immigration Ordinance, which order was issued on the 24th of October, 1945.

It emerges that the Petitioner was prosecuted for an offence under section 5(1)(g) of the Ordinance, the gist of which was that he was unlawfully in the country. He was duly acquitted, and the substance of Fawzi Bey's argument is that once he was acquitted on that charge, it was final and conclusive in his favour, as to findings of fact which govern application on section 10(1)(c) of the Ordinance.

On the other hand, Crown Counsel argues that a judgment of the Criminal Court under section 5(1)(g) is not *per se* final and conclusive in regard to the application of section 10(1)(c). From section 12(5) of the Immigration Ordinance, it is clear that a judgment of acquittal could have been based on the fact that the prosecution was not taken within two years whereas there is no similar prescription to taking action under section 10(1)(c). It seems to us therefore that the judgment has to be examined to ascertain what facts it did establish. If one of those facts was that the Petitioner did get permission to enter, the judgment would, in our opinion, preclude the issue of an

order of deportation under section 10(1)(c). But an examination of the judgments both of the Magistrate's Court and of the District Court makes it clear that there was no such finding of fact. In the Magistrate's Court he was acquitted on the ground that the fact that he had a ration card and an identity card was a sufficient defence. With all respect, it is difficult to appreciate how a Court could have arrived at such a conclusion seeing that that ration card, and in particular the identity card bear an endorsement to the effect that they are not in themselves evidence of a lawful residence in Palestine. But be that as it may, it cannot be said that the existence of those cards were an authority for finding that the person had in his possession a valid document authorising him to enter the country in accordance with the provisions of this Ordinance. The onus was on him to prove that he had such a document and this he definitely failed to do.

For these reasons the rule is discharged.

Delivered this 17th day of June, 1946.

Chief Justice.

HIGH COURT Nos. 5—9/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Comarmond, J. and Curry, A/J.

IN THE APPLICATION OF :—

The Village Settlement Committee of Arab en Nufeiat. PETITIONERS.

v.

H. C. 5/46:—

Chief Execution Officer, District Court, Haifa and 136 ors. as stated in the petition. RESPONDENTS.

v.

H. C. 6/46:—

Chief Execution Officer, District Court, Haifa and 73 ors. as stated in the petition. RESPONDENTS.

H. C. 7/46:—

'Awad Saqr Suleiman & 2 ors. PETITIONERS.

v.

Chief Execution Officer, District Court, Haifa and 28 ors. as stated in the petition. RESPONDENTS.

H. C. 8/46:—
Fahim Ibrahim Isa al Hajibi & 4 ors. PETITIONERS.

v.

Chief Execution Officer, District Court, Haifa
and 36 ors. as stated in the petition. RESPONDENTS.

H. C. 9/46:—
Fatima Ahmad al 'Afifi & 15 ors. PETITIONERS.

v.

Chief Execution Officer, District Court, Haifa
and 40 ors. as stated in the petition. RESPONDENTS.

Execution of orders for possession of land made by Land Settlement Officer — Stay of execution in case of leave to appeal to Privy Council.

Return to orders *nisi* issued on the 22nd of January, 1946, directed to the first Respondent calling upon him to show cause why he should not refrain from executing the decision in Execution Files Nos. 254, 257, 258 and 259 of 1945; order made absolute:—

1. Whenever a Land Settlement Officer has power to direct and does direct that a person be put in possession, execution must, under rule 14, Settlement of Title (Procedure) Rules, be carried out by Execution Officer of Magistrate's Court, not of District Court. If this rule is disregarded High Court will interfere.

2. Grant of leave to appeal to Privy Council, without mention of execution, does not mean that execution is to be suspended.

3. Court has an inherent power to preserve rights of parties intact pending decision in an appeal to Privy Council.

(*M. L.*)

REFERRED TO: H. C. 57/27 (1, P. L. R. 176; 3, C. of J. 840); N. Bentwich's Practice of the Privy Council in Judicial Matters (2nd Edition), p. 22; Kotia *v.* Nahas P. C. L. A. 13/38 (6, P. L. R. 69; 1939, S. C. J. 98); Palestine Plantations Ltd. *v.* Diamant P. C. L. A. 3/44 (11, P. L. R. 394; 1944, A. L. R. 663).

ANNOTATIONS:

1. On the 1st point see H. C. 57/27 (*supra*); H. C. 14/31 (5, C. of J. 1641); H. C. 85/34 (7, C. of J. 396) and H. C. 3/35 (7, C. of J. 397).

2. On points 2 & 3 see cases referred to (*supra*); see also P. C. L. A. 53/45 (13, P. L. R. 130; 1946, A. L. R. 450) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONERS (in all applications): Cattan.

FOR RESPONDENTS: No. 1 (in all applications) — Absent — served.
Rest (in all applications) — Eliash and Sharf.

ORDER.

We propose delivering one judgment dealing with all five cases enumerated above. The grounds put forward in each petition are similar and the learned advocates who appeared before us (Mr. Cattan for Petitioners and Mr. Eliash for Respondents) did not deem it necessary to argue the cases separately.

We would point out that the word "respondents" when used in this judgment does not include the Chief Execution Officer, who, whenever referred to, will be designated as the "first respondent."

A brief history of the litigation which has preceded the present petitions to the High Court will help to clarify the position and to show why it is possible to deliver one decision covering all the cases.

I 1930 the Land Settlement Officer of Haifa adjudged that the Respondents held registered titles in respect of certain *miri* lands under settlement, but he reserved the rights of any persons who might claim ownership by prescriptive possession.

He subsequently investigated claims of prescriptive possession and in 1932 gave his decision which was to the effect that the titles of the registered owners, *i. e.* the Respondents, still held good. This decision was appealed against, and the appellate Court remitted the case back for retrial with a direction that every claimant should be given an opportunity of establishing his claim (the reason for the direction thus given was that the Settlement Officer had dealt en bloc with the claims of adverse possession put forward by the Arab en Nufeiat as a community). Fresh claims were then put in and it was found convenient to deal with them in five groups: each group consisting of cases involving similar facts. Thus the claims to which High Court 5/46 relates were based on inheritance and long possession; the claims mentioned in High Court 6/46 were based on long occupation of the land for grazing, woodcutting and camping.

The final result of the Land Settlement Officer's further investigation was the rejection of the claims made by the present Petitioners against the present Respondents. On appeal, the Settlement Officer's decisions were confirmed and, subsequently the present Petitioners applied for and were granted leave to appeal to the Privy Council in 1941. The appeals are still pending.

In October, 1945, the present Respondents applied to the Chief Execution Officer of the District Court of Haifa for execution of the decisions of the Land Settlement Officer. It appears from a copy of the execution file placed before us that on the 4th January, 1946, the advocate for the present Respondents applied for delivery of possession

and that an order was accordingly made by the Execution Officer. Execution has not yet been carried out because a stay has been granted pending a decision in the present High Court proceedings.

The first ground put forward by the Petitioners is that the first Respondent, *i. e.* the Chief Execution Officer of the Haifa District Court, has no power to execute the decision of the Land Settlement Officer. This first ground is based upon rule 14 of the Settlement of Title (Procedure) Rules which reads as follows:—

> "An order by a settlement officer directing that any person be put in possession of any land shall have the same effect as a judgment of a Magistrate's Court in a possessory action and shall be executed in the same manner and upon the same conditions".

Our interpretation of this rule 14 is that whenever a Land Settlement Officer has power to direct and does direct that a person be put in possession, the execution must be carried out by the Execution Officer of the Magistrate's Court. (See H. C. 57/27, 1 P. L. R., p. 176). We do not agree with Mr. Eliash's submission that the High Court should not interfere unless it is necessary and equitable so to do; it seems to us that where the law has laid down that execution is to be carried out by a specified agent, the High Court could not countenance disregard of such a provision. We therefore hold (assuming that orders for possession were validly made) that the Petitioners in each case succeed on the first ground of their petition because the first Respondent is not the appropriate Execution Officer for carrying into effect orders for delivery of possession made by a Settlement Officer.

The second and third grounds put forward by Petitioners are:—

> "(2) that the Supreme Court not having directed execution, the Land Settlement Officer's decision cannot be executed until the appeal to the Privy Council has been decided;
> (3) that no security has been furnished by the Respondents with a view to carrying out execution pending the result of the appeal to the Privy Council".

These two grounds obviously refer to Article 7 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, which reads as follows:—

> "Where the judgment appealed from required the Appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in the case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as His Majesty in Council shall think fit to make thereon."

The first question to be considered is whether in the absence of an order directing that execution be carried into effect, the effect of grant of leave to appeal to the Privy Council against a judgment is to suspend execution of such judgment.

We do not accept such a contention. Our interpretation of Article 7 is that it confers discretionary powers and in no way establishes that grant of leave to appeal to the Privy Council, without mention of execution, means that execution cannot be carried out. In this connection we would call attention to the following remarks appended to the Article under reference in the Practice of the Privy Council in Judicial Matters by N. Bentwich (2nd edition), p. 22:—

> "The Appellant may apply to the Privy Council for special leave to appeal from a decision of the Colonial Court refusing to grant a stay of execution in accordance with its discretionary powers under the rule; but, except in a very strong case, the Judicial Committee will not interfere."

Before concluding our remarks on the second and third grounds put forward by the Petitioners, we would like to call attention to the case of Kotia *v.* Nahas reported in 6 P. L. R. page 69 where it was held that, apart from Article 7 of the Order-in-Council, the Court has an inherent power to preserve the rights of parties intact pending the decision in an appeal to His Majesty in Council. We might also usefully refer to the case of Palestine Plantations Ltd. *v.* Diamant, reported in 11 P. L. R. page 394, where it was held that the powers given to the Court by Article 7 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, to direct stay of execution can be exercised only when granting leave to appeal.

In the cases now under consideration, no attempt was made to secure a stay of execution when leave to appeal to the Privy Council was applied for and obtained, and this fact should be kept in view if and when it becomes necessary for an Execution Officer to decide whether or not he should proceed with execution. We therefore hold that the Petitioners fail on the second and third grounds put forward in the petitions. There remains the fourth ground set out in the petitions, which is that the Land Settlement Officer did not order that the Respondents be put in possession. This averment is not correct as regards the decision delivered on the 11th July, 1945, covering a group of 27 cases (which are the subject matter of the petition in H. C. 5/46). In paragraph 13 of that decision, the Settlement Officer directed that:—

> "The *interim* order for possession issued in favour of the Plaintiffs as to one part of the lands and in favour of the Defendants as to the other part is hereby rescinded and replaced by this, my order in favour of the persons whose names appear or will appear as

proprietors in any schedules of rights posted by me under section 33(2) of the Land (Settlement of Title) Ordinance for the land of Arab en Nufei'at."

Whether or not the Land Settlement Officer intended his order of delivery of possession to apply to all the cases dealing with the lands of Arab en Nufei'at is a question which we must leave open. As we do not deem it fit to prejudge in any way execution proceedings which may be initiated afresh before the competent Execution Officer, we will not proceed further with the examination of the aforementioned fourth ground.

By reason of our finding as to the first ground put forward by the Petitioners we make the order *nisi* absolute, in each case, and we direct that the Respondents (except Respondent No. 1) shall in each case pay LP. 5 (five) inclusive costs to the Petitioners.

Delivered this 13th day of May, 1946, in the presence of N. Eff. Germanus for Petitioners and Mr. I. Olshan for Respondents except No. 1.

British Puisne Judge.

I concur.

A/British Puisne Judge.

HIGH COURT No. 49/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF:—

Shlomo Carmel. PETITIONER.

v.

The Chief Execution Officer, Tel-Aviv (His Honour Judge R. Hill) & an. RESPONDENTS.

Judgment of Rabbinical Court confirmed by Rabbinical Court of Appeal — Complaint by judgment debtor that there was a miscarriage of justice.

Return to a rule *nisi* issued on the 10th of May, 1946, directed to the 1st Respondent, calling upon him to show cause why his order dated 25th March, 1946, that execution proceedings in Execution File No. 402/45, Tel-Aviv, from the judgment of the Rabbinical Court dated 3rd December, 1945, in the said file

in faovur of Respondent No. 2 and against Petitioner, should not be set aside, the rule discharged:—

1. High Court is not a Court of Appeal from a Religious Court, they will not interfere merely because they might be of opinion that Religious Court's decision is wrong.

2. High Court will interfere if Religious Courts usurped an authority not vested in them or refused to exercise an authority which by law they are compelled to exercise or if it is patent from the record or from evidence that there has been such a disregard of the recognised forms of legal process as to lead to a substantial miscarriage of justice.

Ed. note: Petitioner complained *inter alia* that the Rabbinical Court did not allow him to lead evidence in his defence and that the payments he was ordered to make were out of all proportion to his means.

(*M. L.*)

ANNOTATIONS: On points 1 & 2 see H. C. 40/45 (1946, A. L. R. 245; 13, P. L. R. 72) and annotations in A. L. R. see also H. C. 100/41 (9, P. L. R. 121; 1942, S. C. J. 85; 9, Ct. L. R. 74) and annotations thereto.

(*A. G.*)

FOR PETITIONER: Rozovski.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Ozer Goldberg.

ORDER.

This is a return to an order *nisi* in which the Petitioner seeks to avoid the consequences of a judgment delivered by the Rabbinical Court, Tel Aviv, and confirmed by the Rabbinical Court of Appeal. Exclusive jurisdiction in the matter which was in issue in this case, has been given by the Order-in-Council to the Religious Courts, the appropriate Courts here being the Rabbinical Court. If there are any complaints as to the manner in which that jurisdiction is exercised the remedy lies in other hands. We repeat what we have said on more than one occasion that we are not a Court of Appeal from the Religious Courts of this territory. We are sitting here in our capacity as a High Court of Justice and our judgment will be confined to the limits dictated by that status. In regard to the decisions of the Religious Courts, this Court sitting as a High Court, will not interfere merely because we might be of the opinion that the decision is wrong. We will interfere if the Religious Courts have usurped an authority which is not vested in them; we will interfere if they refuse to exercise an authority which by law they are compelled to exercise, and finally we will interfere if it is patent from the record or from evidence adduced before us that there has been such a disregard of the recognised forms of legal process as to lead to a substantial miscarriage of

justice. The Petitioner appeals to this Court on the latter ground.

Now, the first observation we feel constrained to make is that not only was this case tried in a Court of first instance but it went to appeal where the Court was presided over by the two eminent Chief Rabbis of Palestine. Another aspect of this case which must be emphasised is that all the objections raised here this morning were raised and considered in the Court of Appeal which gave its decision on the issues. With the merits of that decision, and with great respect to their Eminences we see no reason to criticize it, we are not concerned because the fact remains that the issue was considered, a decision was arrived at and the reasons for that decision were given. It cannot, therefore, be said that there was on the part of the Rabbinical Court of Appeal any such disregard of legal process as would justify this Court in interfering.

For the above reasons the rule must be discharged with LP. 10.— inclusive costs.

Given this 9th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 91/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

Elisheva Ginsburg. APPELLANT.

v.

Ben Zion Shoshani. RESPONDENT.

Irrevocable power of attorney — Whether intended to operate as a will — Succession Ord., sec. 21 — P. C. L. A. 17/43.

Appeal from the judgment of the Land Court of Tel-Aviv dated 15.3.46 in Land Case No. 3/44, allowed:—

An irrevocable power of attorney which is not intended to come into effect only after the maker's death, is not a will for the purpose of sec. 21 of the Succession Ordinance.

(*A. M. A.*)

FOLLOWED: P. C. L. A. 17/43 (*ante*, p. 500).

ANNOTATIONS: See the case followed and *cf.* C. A. 303/44 (12, P. L. R. 64; 1945, A. L. R. 142) and note 3 in A. L. R.

(*H. K.*)

FOR APPELLANT: Rotenstreich and Caspi.

FOR RESPONDENT: Ben-Yaminy.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Tel-Aviv. The Appellant was Plaintiff in the Court below and sought a declaration to the effect that she was the sole person entitled to all the rights of her late mother in a parcel of land in Tel-Aviv.

The background of the case is that Appellant's mother Mrs. Shumacher was the lessee of a certain parcel of land in Tel-Aviv upon which she had erected a house. Before Appellant's mother died she gave an irrevocable power of attorney before a notary appointing Mr. Abraham Efrati to take all the steps necessary for the transfer of all her rights in the said parcel of land to her daughter, the present Appellant. The document recited that Mrs. Shumacher declared having received from the present Appellant consideration in full and explained that she erected the house with money received from the said Appellant.

Mrs. Shumacher died 5 weeks after signing the power of attorney and there is nothing to show that she was not in full possession of her mind when she signed the document or that she signed it under duress or undue influence or fraud. In fact, the evidence is quite to the contrary.

The chief point in this case is that the learned judges in the Court below reached the conclusion that inasmuch as the power of attorney was given by Mrs. Shumacher a short while before her death at a time when she knew she was going to die, it shows that the document is a will in the form of an irrevocable power of attorney. In support of their view, the learned judges ask the question — why did not Mrs. Shumacher transfer the lease to the Plaintiff together with the building during her lifetime? — The obvious reply to this question is that the deceased lady did take steps during her lifetime to have the transfer effected. There is nothing extraordinary in the fact that she put her affairs in order when she knew that death was not far off.

We fail to see any basis for the finding of the Court below that the power of attorney is a will.

The learned advocate for the Respondent has laid stress on section 21 of the Succession Ordinance, Cap. 135, and argued that the land being admittedly *miri* land a Court had to determine the rights of succession to it according to the Ottoman Law "notwithstanding any

disposition made, or power of attorney given, by deceased intended to take effect after death, whether by way of will or otherwise."

Our interpretation of the irrevocable power of attorney in this case is that it was not intended to take effect only after death; it cannot be so interpreted.

It is quite clear that an irrevocable power of attorney does not cease to have effect when the giver of the power dies (see Order in P. C. L. A. 17/43 dated 26.7.46).

We are of opinion that this appeal must be allowed. The judgment of the Court below is therefore reversed and we direct that judgment be entered in favour of the Plaintiff in the Court below in the terms of the declaration sought by her as set out in the statement of claim.

We grant the Appellant costs of this appeal on the lower scale with LP. 10 (ten) advocate's attendance fee and we reverse the order as to costs in the Court below.

Delivered this 17th day of September, 1946, in presence of Mr. Caspi for Appellant and Mr. Hiller for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 354/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPEAL OF:—

Noah Zygler. APPELLANT.

v.

Aharon Zygler. RESPONDENT.

Arbitration — Failure to submit non-enemy declaration — Defence (Courts Applications) Regulations — Signatures on declaration — C. A. 249/43 — Alleged contradiction on the face of the award.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 29th June, 1945, in Civil Case No. 316/44, dismissed:—

Failure by the arbitrators to confirm during the pendency of the arbitration, the Plaintiff's signature on a "non-enemy declaration" is fatal to the validity of the award.

(*A. M. A.*)

FOLLOWED: C. A. 249/43 (10, P. L. R. 549; 1943, A. L. R. 651).

ANNOTATIONS:

1. Compare Mo. D. C. Jm. 310/45 (1945, S. C. D. C. 515).

2. Note that the Defence (Courts Applications) Regulations have meanwhile been repealed; see the Emergency Laws (Continuation of Certain Defence Legislation) (Am.) Order, 1946, P. G. No. 1528 of 17.10.46, Spl. 2, p. 1225.

(*H. K.*)

FOR APPELLANT: Lin.

FOR RESPONDENT: Miller.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv dismissing an application by the Appellant for the enforcement of an award of an arbitrator. The District Court relied on two grounds, namely, first, that a non-enemy declaration was not filed in time, and second, that there was a contradiction on the face of the award by reason of the fact that, although the award stated that it was the award of a majority, yet all three arbitrators signed it. We may say at once that we disagree with the finding of the District Court on the second point because we think that there is no contradiction; the true position being that the arbitrator who disagreed merely signed along with the two other arbitrators in order to show that what was written above his signature was a true record of the result of the arbitration. There is therefore nothing in this ground of appeal.

We now turn our attention to the alleged failure to file a non-enemy declaration within the prescribed time.

The dispute between the parties was referred to arbitration on the 31st July, 1944, *i. e.* at a time when the Defence (Court Applications) Regulations, 1944, were in force. Those Regulations laid down that no civil proceedings could be instituted before an arbitration unless the Plaintiff had filed with the arbitrator a non-enemy declaration. The award was made on the 21st September, 1944. On the 14th of the same month the aforementioned Regulations had been revoked and replaced by the Defence (Court Applications) Regulations (No. 2) 1944, which laid down that no matter could be referred to arbitration unless a non-enemy declaration had been filed with the arbitrator.

In so far as the present case is concerned, we do not find any substantial difference between the two sets of Regulations: the prescribed requirement is the filing of the non-enemy declaration duly made before and signed by one of the prescribed persons.

We have carefully scrutinized the purported declaration filed in these proceedings, namely Exhibit D/2, and we have also perused the record of evidence before the District Court, from which the following fact

emerges, namely, that the Appellant signed the declaration form in front of Dr. Beer, one of the arbitrators, before the end of the arbitration. Unfortunately, however, the signature of Dr. Beer does not appear, so that the declaration is defective in a vital particular, namely, that it does not contain a certificate that the declaration was made before an arbitrator. The signature of another arbitrator, Dr. Schwager, does appear, but this gentleman gave evidence, which does not appear to have been contradicted, to the effect that he did not sign this declaration form until after the delivery of the award. It is true that the declaration form bears date 13.9.44, whereas the award was dated 21.9.44. The position therefore is, that even although the present Appellant may have made the declaration on 13.9.44, there is no certificate by Dr. Beer, before whom we gather the Appellant alleges he made the declaration. The declaration before Dr. Schwager, being subsequent to the award, is useless.

The Appellant's advocate, in arguing that the Respondent never objected to the absence of the non-enemy declaration form until proceedings in the District Court, relied on a statement in "Russell on Arbitration" (13th Edition), p. 385:—

> "The obvious course, therefore, is for a party complaining of irregularity, to protest against the irregularity and to continue to conduct his case in the proceedings before the arbitrator under such protest.
>
> The other alternative is to submit to the irregularity and forego any rights he may have to object to the award on that ground when it is made, for he cannot lie by and then object to the award if it is against him."

We do not, however, think that this statement in Russell can help the Appellant, because we consider that the matter is concluded by authority, namely Civil Appeal 249/43, Annotated Law Reports (1943) page 651 at page 654. The facts of the instant case are similar to the facts in Civil Appeal 249/43 inasmuch as the position in both cases was that no proper enemy declaration form had been filed, nor was the defect, namely, the absence of the signature or certificate by Dr. Beer, ever cured during the arbitration, either prior to the hearing or prior to the date of the award.

For these reasons, unfortunate though the result may be, we think that the District Court came to a correct conclusion on this point.

The appeal is accordingly dismissed, with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.

Delivered this 12th day of August, 1946.

British Puisne Judge.

HIGH COURT No. 112/45.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Edwards, Shaw and De Comarmond, JJ.

IN THE APPLICATION OF :—

Aziz Mustafa El Zahir & 4 ors. PETITIONERS.

v.

1. Acting British Magistrate, Haifa,
2. Attorney General,
3. Superintendent of Police and Prisons, Jerusalem. RESPONDENTS.

Extradition — Extradition Ord., secs. 6(2), 11, 12(1), 13 — *Order by "British Magistrate", "British" and "English" Magistrates — Defence (Judicial) Regulations, Reg.* 3 — *Emergency Powers (Defence) Act, sec.* 1(4) — *"Instrument" — Failure to give particulars of offence in charge sheet — T. U. I. Ord., sec.* 15.

Return to an order *nisi* issued on an application for a writ of *habeas corpus;* order made absolute:—

1. (*Majority judgment*) The expression "English Magistrate" in sec. 10 of the Extradition Agreement with Syria and the Lebanon refers to persons belonging to the ethnical group inhabiting the British Isles. A Magistrate invested with the jurisdiction of a British Magistrate by the Defence (Judicial) Regulations, 1945, does not fall within that expression.

2. An extradition order may not be made in respect of an offence not specified in the letter of reference.

3. A divergence between the letters of request and the letters of reference, resulting in confused proceedings, may prejudice the accused and nullify the proceedings.

4. (*Per Edwards, J.*) The expression "English Magistrate" in sec. 10 of the Extradition Agreement with Syria and the Lebanon is synonymous with the term "British Magistrate" in the Defence (Judicial) Regulations, 1945. It therefore refers to the Magistrate's appointment and not to his nationality.

5. (*Per Edwards, J.*) The charge on which extradition is sought should be reduced to writing and read over to the Accused.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* CR. A. D. C. Jm. 114/45 (1945, S. C. D. C. 105) where the question arose: "When is a British Magistrate not a "British Magistrate" within the meaning of section 6(1)(a) (of the M. C. J. O.)?"

2. Palestinian authorities on extradition are collated in note 1 in S. C. J. to H. C. 25/40 (7, P. L. R. 162; 1940, S. C. J. 384; 7, Ct. L. R. 115); for later

decisions see H. C. 124/42 (9, P. L. R. 683; 1942, S. C. J. 975) & note 1 in S. C. J. and H. C. 48/45 (12, P. L. R. 402; 1945, A. L. R. 741).

(*H. K.*)

FOR PETITIONERS: W. Salah.

FOR RESPONDENTS: A/Crown Counsel — (Salant) and Assistant Government Advocate — (Kokia).

JUDGMENT.

Edwards, J.: This is the return to a writ of *habeas corpus* issued under section 13, Extradition Ordinance, in respect of the Petitioners who had been ordered by the Acting British Magistrate to be extradited to the Lebanon pursuant to the Provisional Agreement of 1921 entered into between the High Commissioner for Palestine and the High Commissioner for Syria and the Lebanon, Article 10 of which provides for the High Commissioner for Palestine referring the application for extradition to an "English Magistrate". The Acting British Magistrate, who made the order now complained of, was Khalil Eff. Shehadeh, himself a Palestinian Arab, appointed to perform the duties assigned by law to a British Magistrate by virtue of the provisions of Regulation 3 of the Defence (Judicial) Regulations, 1945. The Petitioners' advocate contends that Khalil Eff. had no jurisdiction to make the order inasmuch as he is not an "English Magistrate". To this Mr. Salant, Acting Crown Counsel, replies that under section 1(4), Emergency Powers (Defence) Act, 1939, the Defence (Judicial) Regulations, 1945, have effect notwithstanding anything inconsistent therewith contained "in any enactment other than this Act or in any instrument having effect, *etc.*" The argument proceeds that the Defence (Judicial) Regulations supersede Article 10 of the Agreement already referred to. Mr. Salant points to the words in Regulation 3(2) of the 1945 Regulations "shall be deemed to be a British Magistrate". Before dealing with this point, I would say that learned Acting Crown Counsel has assured us that the word in the original French text of Article 10 of the Agreement before "Magistrate" is "Anglais". In my view, what is contemplated by the words "English Magistrate" is a person who is himself what one might popularly describe as a "Britisher", that is, a British subject who comes from Great Britain (England, Wales, *etc.*) or Ireland or even from Australia, or Canada *etc.* It cannot have been intended to limit the choice to persons who come from England as distinct from, say, Scotland or Wales or Ireland. It is well known that, of recent years, there have been "British Magistrates" who have hailed from the Irish Free State and one, at least, from Wales. Section 6(2) Extradition Ordinance is in the following terms:—

> "Notwithstanding anything contained in this Ordinance, extradition under the said agreements and any modification thereof that may be made from time to time shall be regulated by the provisions of the agreement under which it is demanded, both as to the limits within which extradition may be granted and as to the procedure to be followed with reference thereto, subject nevertheless to the restrictions specified in section 7."

This provision would seem to require a strict compliance with the agreement already referred to, more particularly Article 10 thereof, which makes provision for an "English Magistrate". In my view, the term "English Magistrate" is synonymous with the term "British Magistrate". As I view the matter, the over-riding factor, and the one which is decisive on the point, is the appearance in line 4 of subsection 4 of section 1 of the Emergency Powers (Defence) Act, 1939, of the word "instrument". It can surely not be denied that the Extradition Agreement of 1921 is an "instrument" for the purpose of section 1(4) of the 1939 Act. I, therefore, conclude that a Palestinian can by a Defence Regulation be deemed to be a British Magistrate, by reason of the 1945 Regulations which, in my view, over-ride the provisions of Article 10 of the 1921 Provisional Agreement for Extradition between Palestine and the Republic of the Lebanon. In my view, Khalil Eff. Shehadeh has jurisdiction. This ground of the petition ought, therefore, to fail.

Another ground of the petition is that "there was no charge sheet stating the offence with which the Petitioners are charged nor were any particulars of the offences stated so that the Petitioners were not in a position to know precisely what charges they are to face." It is clear from the provisions of section 12(1), Extradition Ordinance, that the person sought to be extradited must be informed of the crime of which he is accused. Because of the words in section 12(1) "justify the committal for trial of the prisoner if the crime of which he is accused had been committed in Palestine" one must turn to the provisions of section 15 of the Criminal Procedure (Trial Upon Information) Ordinance which expressly provide for the charge or charges made against the accused person being reduced to writing and read to him. Unless this is done, I fail to see how a Magistrate in Palestine could ever commit for trial.

It now becomes necessary to ascertain what actually happened before the Magistrate. It seems that the Crown, represented before the Magistrate by an experienced lawyer, namely, one of the Government advocates, called as a witness a Mr. Sperling, the officer in charge of a branch of the Chief Secretary's Office dealing, amongst other matters, with applications for extradition who seems merely to have handed in

what he calls "these two files". What these two files were we are left to guess; but, from the voluminous documents forwarded to this Court, I gather that the two files contained several papers but it is not clear that the Magistrate ever read to the Accused any of those papers or even the gist of the contents thereof.

It is true that all the Petitioners were represented in the Magistrate's Court by the same experienced advocate who has appeared before us, namely, Walid Eff. Salah. Nevertheless, although I have carefully perused the record of proceedings before the Magistrate, I have been unable to discover that the Petitioners were ever informed of the charge or charges made against them. It might be argued that their advocate had access to both the Secretariat files which were received in evidence by the Magistrate and marked "folios (1) and (2)" respectively; but, even although this is conceded, there should have been a compliance with the spirit of sections 15(1), 15(2) and 15(3), Criminal Procedure (Trial Upon Information) Ordinance — in other words, we should be left in no doubt as to what the charges were that were read to the Accused and we should also be satisfied that these charges were, in fact, read to them and a duplicate of what the Magistrate did read out to the Accused should be on the file, and identified by the certification of the Magistrate. As there was no compliance with the above, the Petitioners should have been discharged under section 12(1) Extradition Ordinance as they could not, in my view, after what happened before the Magistrate, have been justifiably committed for trial if the crimes with which they were charged had been committed in Palestine.

As a matter of interest, I now turn to enquire what were the contents of the two folios, that is, the two Secretariat files. There were two letters from His Excellency the Officer Administering the Government of Palestine, dated respectively 9th and 14th July, 1945. The former related to the surrender of five persons, namely, Fahd Hasan et Taher, Muhammad Jarwan el Awad, Mahmoud Nimer el Awad, Awad Mahmoud el Mansour and Aziz Mustafa et Taher, all charged with possession of firearms and burglary committed in the Lebanon, while the latter related to seven persons, namely, Ahmed Hmeidi el Ballout, Ali Hmeidi el Ballout, Aziz Mustafa Taher, Fahed Husain Taher, Ali Mustafa Taher, Jarwan Awad Taher and Muhammad Jarwan Awad Taher, all of whom were charged with possession of arms and ammunition and breaking into a building in the Lebanon. It will be noted that the two "el Ballouts" do not appear in the letter of 9th July and do not appear as among the five accused persons who were before the Magistrate. It may, I suppose, be assumed that the following three

persons cited in the letter of 9th July, namely, Aziz, Fahed, and Muhammad Jarwan are also mentioned in the letter of 14th July. But in the letter of 14th July there appear also the names of Ali Mustafa Taher and Jarwan Awad Taher. The names of these two persons I cannot find in the letter of 9th July. The names of Mahmoud Nimer and Awad Mahmud el Mansur appearing in the letter of 9th July do not appear in the letter of 14th July although, curiously enough, that letter contains the names of seven wanted persons while the letter of 9th July contains the names of only five wanted persons. The five Petitioners are Aziz Mustafa el Zahir, Fahd Hussein el Zahir, Ali Mustafa Zahir, Jarwan Awad el Ayoub and Muhammad Jarwan Awad el Ayoub. There are on the "folios", or "files", two letters to the High Commissioner of Palestine from the Minister of Foreign Affairs, Lebanese Republic, namely, one of 31st May and one of 1st June, 1945. The one of 31st May asks for the extradition of Ahmad Hameidi el Ballout *"et cts."* The words *"et cts"* I understand mean *"et Consorts"*, that is, "and companions". "Ahmad Hameidi *et cts"* were accused of the theft of five sheep and three goats committed at night *"avec effraction"* (presumably housebreaking) at a place called Blida to the prejudice of one Daoud Muhammad Farhat. The letter of 1st June requested the extradition of "Fahd Hassan Daher *et cts"* accused of theft of thirty four goats and two hundred and fifty Lebanese pounds and carrying arms serviceable for war in the village of Alman el Kassir, Lebanon. Who are the *"et cts"* I do not know. Looking at both the letters of 31st May and 1st June, I can find only the names of Ahmad Hameidi and Fahd Hassan. The other persons presumably are *"et cts"*. I can, however, find nothing on the record of Khalil Eff. Shehadeh which can show me what documents he read out to the present Petitioners or what charge or charges he informed the Petitioners, or each or any of them, were alleged against him. I am, therefore, of the opinion that these Petitioners could never have been committed for trial if the offences had been committed in Palestine. For that reason alone the petition must succeed.

I accordingly find it unnecessary to decide the other matters raised by Walid Eff. Salah, such as inadequacy of proof of identity of the Petitioners with the persons whose extradition the Lebanese Authorities sought, or the question of whether the offences charged were extraditable and so on.

The rule *nisi* should, in my view, be made absolute.

Shaw, J.: I agree that this petition must be allowed. With regard to the question whether or not Khalil Eff. Shehadeh had jurisdiction, I agree with my brother de Comarmond that Khalil Eff. was not an

"English Magistrate" for the purposes of the law under which he purported to act.

De Comarmond, J.: The Petitioners have put forward thirteen grounds in support of their application that the extradition order made by the first Respondent on the 15th December, 1945, be set aside and Petitioners released.

The first two grounds deal with jurisdiction and are to the effect that Article 10 of the Provisional Agreement for Extradition of Offenders between Syria and Palestine provides that an application for extradition emanating from the Syrian authorities shall be referred to and dealt with by an English Magistrate. It is averred on behalf of the Petitioners that Khalil Eff. Shehadeh, who is the Magistrate who made the extradition order, is an Arab, and therefore had no jurisdiction.

It is not disputed that the first Respondent, Khalil Eff. Shehadeh, is an Arab. It is not disputed either that the first Respondent has been duly appointed by the Chief Justice to perform the duties assigned by law to a British Magistrate: this was done in exercise of the powers conferred by the Defence (Judicial) Regulations, 1945. The said regulations provide that the Chief Justice may authorise by warrant under his hand any Magistrate who is not a British Magistrate to exercise the jurisdiction and powers of, or perform any duties assigned by law to, a British Magistrate, in relation to any civil or criminal cause, and also provide that a Magistrate authorised as aforesaid shall be deemed to be a British Magistrate for the purpose of exercising the powers and performing the duties thus conferred upon him by the warrant.

Mr. Salant, Acting Crown Counsel, has submitted that the first respondent was fully qualified to deal with the application for extradition because he had been vested with all the powers of a "British Magistrate", which expression — according to Mr. Salant — must necessarily include an English Magistrate.

This is an ingenious argument, which deserves consideration.

I find that the provisions of the Provisional Agreement regulate extradition procedure as between Syria and Palestine, and that Section 6(2) of the Extradition Ordinance (Chapter 56) gives legal force to the provisions of the Agreement, notwithstanding anything contained in the said Ordinance. The effect of Section 6(2) therefore is that instead of a District Court Judge having jurisdiction, as laid down in section 11 of the Extradition Ordinance, it is an "English Magistrate" who is to exercise jurisdiction in the case of an application for extradition made by the Syrian authorities.

What is the meaning to be ascribed to the expression "English

Magistrate" in Article 10 of the Agreement? On this point I hold that the only satisfactory interpretation is that the adjective "English" was advisedly used to denote a person belonging to the ethnical group inhabiting the British Isles. I do not consider that the context or the object of the Agreement call for a narrower interpretation of "English", and I therefore hold that the word, as used in the Agreement, refers to the British Isles generally. In this connection it may not be out of place to point out that this interpretation agrees with the popular meaning of the word "Anglais" in France. In support of my interpretation I would also point out that the words "British" and "English" are both used in the Agreement; thus Article 5 reserves to the High Commissioner the right of refusing the surrender of a "British" subject in certain circumstances. It would therefore be difficult to hold that a distinction need not be made between the words "British" and "English" appearing in the said Agreement.

The logical outcome of my interpretation is that the Defence (Judicial) Regulations, 1945, cannot have the effect suggested by Mr. Salant, because these Regulations merely confer powers and do not purport to transmute a Magistrate of Arab or African origin (even if he is a British subject) into an Englishman.

Having reached this conclusion I must now examine whether the petitioners are entitled to raise the point of jurisdiction, or whether it is only the Syrian authorities who could lodge a protest through the diplomatic channel. On this point it seems to me quite clear that the petitioners' objection is well founded, because were it not for Article 10 of the Agreement, the jurisdiction would be exercised by a District Court Judge and not by a Magistrate (Section 11 of the Extradition Ordinance).

The third ground of objection set out in the petition is to the effect that the letter referring the extradition demand to the Magistrate wrongly included the offence of possession of firearms, which is not an extradition crime (because it is not punishable with at least one years' imprisonment). There were two letters of reference to the Magistrate — one dated the 9th July, 1945, and the other the 14th July, 1945, and both letters came from the Officer Administering the Government, and not from the second Respondent. The letter dated the 14th July mentions "possession of firearms", which the learned Magistrate found is not an extradition crime unless 'the arms be of military value". (I quote from the Magistrate's order). The learned Magistrate however, was satisfied that "the offenders or some of them did carry firearms of a military kind, etc.", and although such offence had not been mentioned in either of the letters of reference addressed

to him by the Officer Administering the Government, he reached the conclusion that extradition for such offence could be approved. I do not consider that the learned Magistrate was justified in granting an order in respect of an offence which had not been specified in the letters of reference.

The Petitioners' fourth ground of complaint, which is that there was no charge sheet stating the offences with which Petitioners were charged, nor were any particulars of the offences stated, is that Petitioners were not in a position to know precisely what charges they had to face. It is not clear to me what are the objections raised against the form of the proceedings and I will confine myself to the question whether Petitioners were in any way embarrassed or misled as to the charges against them.

On comparing the aforementioned letters of reference with the letters of request emanating from the Syrian authorities, I find that in the letter of request of the 31st May, 1945, the extradition of Ahmed Himeidi el Ballout and six others, is requested on the charge of larceny with night-breaking on 14/15th February at Blida, of five sheep and three goats belonging to Daoud Muhammad Farhat; while in the letter of request of the 1st June, 1945, the alleged offenders are Fahd Hassan Daher and four others, and they are charged with (1) larceny of thirty-four goats and two hundred and fifty Lebanese pounds, and (2) conveying military weapons at a place called Alman-el-Kassir.

It therefore seems fairly clear that the two letters of request refer to different offences committed at different places and, I believe, on different dates. I fail to understand why the two requests were not dealt with separately. I need not investigate how or why confusion occurred, but I feel bound to hold that it is very likely that the Petitioners have been misled or at least embarrassed. The proceedings before the Magistrate lacked clarity and precision, and were so unsatisfactory that the Petitioners are entitled to have the order made by the Magistrate on the 15th December, 1945, set aside. The rule nisi is hereby made absolute.

I have not dealt with the other grounds of objection formulated on behalf of the Petitioners. They relate chiefly to the question of identification of the alleged culprits, and I would rather abstain from expressing views which might prove embarrassing, should further action be taken before a Magistrate.

Order: The order of the Court is that the Petitioners be released from custody unless they are detained on another charge or charges.

The Petitioners will have one set of costs, fixed costs at LP. 10.

Delivered this 13th day of March, 1946.

British Puisne Judge.

CIVIL APPEAL No. 89/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards, A/C. J. and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Fatmeh Mohammad El Far. APPELLANT.

v.

Hafez El Haj Mohammad El Far. RESPONDENT.

Sale of land — Illegal disposition and irrevocable power of attorney — Compared: *C. A.* 150/45, *C. A.* 38/44, *C. A.* 179/45, *C. A.* 90/43, *C. A.* 254/45.

Appeal against the judgment of the Land Court of Ramleh, dated 5.5.46 in Land Case No. 34/46, dismissed:—

Unlike an irrevocable power of attorney, an out and out sale cannot confer equitable rights on the purchaser.

(*A. M. A.*)

FOLLOWED: C. A. 38/44 (11, P. L. R. 274; 1944, A. L. R. 335); C. A. 150/45 (12, P. L. R. 345; 1945, A. L. R. 455).

REFERRED TO: C. A. 90/43 (10, P. L. R. 225; 1943, A. L. R. 326); C. A. 254/45 (*ante*, p. 155).

DISTINGUISHED: C. A. 179/45 (12, P. L. R. 505; 1945, A. L. R. 108).

ANNOTATIONS: See the cases cited and the notes thereto in A. L. R.

(*H. K.*)

FOR APPELLANT: Salameh.

FOR RESPONDENT: Maswady.

JUDGMENT.

This is an appeal from a judgment of the Magistrate of Ramle sitting as a Land Court whereby he dismissed an action by the Appellant who had in her statement of claim asked that a certain house be registered in the Land Registry in her name. In the witness box the Appellant who relied on a certain document of 1930, in cross-examination admitted that the document was one of out and out sale. In the document itself the words "outright sale" appear three times. The Magistrate therefore not unnaturally had no difficulty in holding that the document was one of an outright sale. With this finding we are unable to quarrel. Having regard to the decisions of this Court in Civil Appeal No. 150/45, Annotated Law Reports (1945) p. 455 and

Civil Appeal No. 38/44, Annotated Law Reports (1944) p. 335, the Appellant was bound to fail. Mr. Salameh, for the Appellant, has relied on Civil Appeal No. 179/45 Annotated Law Reports (1945) p. 708 and Civil Appeal No. 90/43 Annotated Law Reports (1943) p. 326 and Civil Appeal No. 254/45, Annotated Law Reports (1946) p. 155. Civil Appeal No. 179/45, however, seems to have dealt with another matter, namely, an irrevocable power of attorney, and, in our view, is not an authority which can help the Appellant. In the result the appeal fails and must be dismissed with fixed costs in the sum of LP. 5.—.

Delivered this 17th day of September, 1946, in the presence of Mr. S. Salameh for Appellant and Mr. Maswady for Respondent.

Acting Chief Justice.

HIGH COURT No. 48/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF —

Dr. Muhammad Yosef Elias Akkawi. PETITIONER.

v.

1. The Asst. Chief Execution Officer, District Court, Jaffa.
2. Alya bint Tannus Shibli, widow of Anton Akkawi. RESPONDENTS.

Petitioner alleging that he was not served with notice of hearing before Religious Court — Allegation not supported by evidence — Non-interference of High Court.

Return to a rule nisi issued on the 10th of May, 1946, directed to the 1st Respondent calling upon him to show cause why he should not refrain from executing the judgment of the Greek Catholic Melkite Court of Appeal dated 14th November, 1945, against Petitioner.

1. If Religious Court disregarded recognised forms of legal process by determining a case in absence of interested party without giving him notice or any chance of stating his side of the argument, High Court will interfere.
2. There is always a presumption that the Courts in Palestine proceed in accordance with fundamental principles of justice and mere averment by petitioner that there was a disregard of such principles would be insufficient to justify High Court's interference.

(*M. L.*)

FOLLOWED: H. C. 49/46 (1946, A. L. R. 527).

ANNOTATIONS: See case followed and annotations in A. L. R.

(*A. G.*)

FOR PETITIONER: Eliash and Scharf.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Cattan, Beirouti and Mulki.

ORDER.

This is a return to an order nisi. The gravamen in the Petitioner's case was an allegation of miscarriage of justice in the Greek Catholic Melkite Court. Before proceeding to the facts of this case, we find it necessary to state once again the principles which this Court will follow when proceedings in Religious Courts are questioned before it. In High Court No. 49/46 we reiterated that we were not a Court of Appeal, and in discharging the rule in that case we stated —

> "We will interfere if the Religious Courts had usurped an authority which is not vested in them. We will interfere if they refuse to exercise the authority which by law they are compelled to exercise. And finally, we will interfere if it is patent from the record or from evidence adduced before us that there has been such a disregard of the recognised forms of legal process as to lead to a substantial miscarriage of justice."

In this case the Petitioner alleges that he was not served with a notice of the hearing of his case before the Religious Court. Now we can say immediately that to determine a case in the absence of an interested party, without giving him notice or any chance of being present to state his side of the argument would be such a disregard of the recognised forms of legal process as would warrant interference by this Court.

But again we emphasise that the mere averment of the Petitioner to this effect would be far from sufficient to satisfy us that there had been such a disregard. It must be patent from the record or from the evidence produced before us, as there is always a presumption that the Courts of the Territory proceed in accordance with the fundamental principles of justice. The allegation of the Petitioner has been strenuously contested by the Respondent. The cross-examination threw no great light on the matter; indeed, if anything, it would seem to indicate that steps were taken to bring to the notice of the Petitioner the fact that a review of the case was being undertaken on a specific date by the Court of Appeal. The record of the Court of Appeal is not before us and therefore it is not patent either from the record

or from the evidence produced before us that there has been the disregard of legal process alleged by the Petitioner.

For these reasons the rule must be discharged with LP. 10.— inclusive costs.

Given this 25th day of July, 1946.

Chief Justice.

HIGH COURT CASE No. 63/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF:—

Musbah Shukeifeh & 16 ors. PETITIONERS.

v.

1. The District Commissioner, Haifa District, Haifa.
2. The Chairman, Municipal Commission, Haifa. RESPONDENTS.

Refusal to grant a permit — Non-interference of H. C.

Return to a rule *nisi* issued on the 18th of June, 1946, directed to the Respondents calling upon them to show cause why they should not refrain from closing the quarries of the Petitioners and the sealing of their stone crushing machinery and why the Petitioners' machines should not be released and Petitioners allowed to carry on with their quarrying and trade as hitherto for the past century until such time as they are completely compensated for the closure of their mining (quarrying) industry or given other sites reasonably suitable to the Petitioners.

If under Ordinance regulating certain trades a permit from a specified authority is required and permit is refused with a view to acquiring private rights without paying compensation, High Court will interfere.

(*M. L.*)

ANNOTATIONS: For grounds upon which High Court will interfere with discretion of public authority see H. C. 13/46 (1946, A. L. R. 513) and H. C. 23/46 (1946, A. L. R. 511).

(*A. G.*)

FOR PETITIONERS: Habiby and Nuseibeh.

FOR RESPONDENTS: Weinshall.

ORDER.

This is the same Court that granted the order *nisi* in this High Court application. We made the order because a question of principle appeared to be involved. Where an Ordinance provides that the operation of certain trades is to be regulated by statutory provisions, and where, for the purpose of ensuring that these provisions are carried out, a permit is required from a specified authority, the Ordinance cannot be invoked merely for the purpose of acquiring without compensation private rights, and if this Court were of the opinion that the real ground for the refusal of the permit was to achieve this object we would be prepared to say that the discretion which was vested in the authority was unreasonably exercised and we would intervene.

Turning now to the facts of this case. The Court is not satisfied that there was any intention on the part of the authority concerned to acquire this property without paying such compensation as the people claiming it were entitled to. Indeed, all the correspondence which is before us indicates that negotiations are being conducted with a view to ascertaining what compensation, if any, is payable. We do not doubt that the principle which we have enunciated will be borne in mind and this may enable those negotiations to be brought to a close.

For these reasons the rule must be discharged. No costs.

Given this 22nd day of July, 1946.

Chief Justice.

HIGH COURT CASE No. 105/45.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Shaw and De Comarmond, JJ.

IN THE PETITION OF:—

Moshe Goldenberg. PETITIONER.

v.

1. The A/Chief Execution Officer, District Court, Tel-Aviv.
2. Mrs. Dela Goldenberg. RESPONDENTS.

Support of wife as an ancillary prayer in a matrimonial suit — Valid consent of foreigner to jurisdiction of Rabbinical Court in a matter of marriage — Membership in Jewish Community — Limits of jurisdiction

of Rabbinical Court — Power to grant alimony pendente lite — Proper time for contesting jurisdiction — Maintenance — Imprisonment of judgment debtor.

Return to an Order Nisi dated 17.1.46, directed against 1st Respondent calling upon him to show cause why his orders dated 23rd November, 1945, and 30th November, 1945 given in Tel-Aviv Execution File No. 399/45 should not be set aside, and why he should not refrain from executing the judgment given by the Tel-Aviv Rabbinical Court in file No. 24/5706 dated 14th October, 1945, and why he should not refund to the Petitioner the amount of LP. 75 paid by the Petitioner under protest on 3.12.45, or any remaining part thereof.

1. a) Claim for restitution of conjugal rights may include question of support for wife, and prayer to fix amount of support is a prayer in regard to an ancillary matter.

b) If Religious Court can properly make an order for restitution of conjugal rights it can make the ancillary order in respect of the wife's support.

2. (Obiter). If a Court orders custody of child to be given to the mother a further order for the child's maintenance must be regarded as ancillary to principal order for custody.

3. While second part of art 53(2), Palestine Order in Council precludes a Religious Court from granting a decree of dissolution of marriage to a foreigner, a foreigner may validly consent to a matter of marriage being tried by a Religious Court.

4. Foreigner filing an action in Religious Court must be taken to have consented to its jurisdiction.

5. A member of the Jewish Community means a person who is on the Register of the Vaad Leumi.

6. No amount of consent and no misapprehension of the facts by the parties and/or the Court can give a Court jurisdiction where that jurisdiction is dependent upon the law.

7. Rabbinical Court has no jurisdiction to deal with a case in which the Plaintiff (or Defendant) is not a member of the Jewish Community ; an order made by such Court under assumption of jurisdiction is a nullity.

8. High Court is not a Court of Appeal from a Religious Court, it exercises its jurisdiction on broad principles of equity and justice.

9. Judgment of Rabbinical Court for maintenance for 3 months given upon application by wife to that effect is of the nature of a provisional or temporary judgment, as undoubtedly further proceedings must have been contemplated.

10. Court may in its discretion award alimony *pendente lite* to a wife notwithstanding that husband is raising a substantial question of jurisdiction and even if some months were to pass before it could be determined.

11. Where Defendant contests jurisdiction of Rabbinical Court alleging that one of the parties is not a member of the Jewish Community, he must raise this point when the matter first comes before that Court; it is too late to raise it before the Chief Execution Officer, who is not a Court of Appeal from the Rabbinical Court.

12. High Court will not set aside orders of Chief Execution Officer already carried out.

13. A simple claim for maintenance by a wife who has been deserted by her husband or who had to leave him owing to his cruelty comes under Art. 53(2), Palestine Order in Council.

14. (*Obiter*): Any person arrested for non payment of a judgment debt should if he so requests, be taken without delay before the officer who issued the warrant of arrest.

(*M. L.*)

REFERRED TO: H. C. 50/45 (1945, A. L. R. 777, 12, P. L. R. 445); C. A. 246/40 (8, P. L. R. 55, 1941, S. C. J. 17, 9 Ct. L. R. 54); H. C. 101/42 (9, P. L. R. 553; 1942, S. C. J. 569; 12, Ct. L. R. 209); C. A. 131/41 (1942, S. C. J. 728); H. C. 124/43 (11, P. L. R. 54; 1944, A. L. R. 21); Rayden and Mortimer on Divorce, 3rd Edition, p. 207; Ronalds *v.* Ronalds (1875, L. R. 3, P. & D. 259); English and Empire Digest, Vol. 27, p. 406, para. 4062; Fr. Goadby, International and Inter-Religious Private Law in Palestine, p. 162.

ANNOTATIONS:

1. On the right of a Religious Court having jurisdiction in a certain matter to make ancillary orders see H. C. 2/46 (1946, A. L. R. 170; 13, P. L. R. 76) and annotations in A. L. R.

2. On question of consent to jurisdiction of Religious Court see H. C. 32/46 (1946, A. L. R. 517) and annotations in A. L. R.

3. On point No. 5 see C. A. 246/40 (*supra*), H. C. 101/42 (*supra*), C. A. 131/41 (*supra*) and H. C. 124/43 (*supra*).

4. On point No. 7 see C. A. 234/45 (1946, A. L. R. 337; 13, P. L. R. 201) and annotations in A. L. R.

5. On point No. 8 see H. C. 49/46 (1946, A. L. R. 527) and annotations.

6. On point No. 10, see Rayden and Mortimer on Divorce (*supra*) and Ronalds *v.* Ronalds (*supra*).

7. On point 11, see H. C. 64/45 (1945, A. L. R. 641) and annotations.

8. On point 12, see H. C. 77/45 (1945, A. L. R. 821, 12, P. L. R. 481) and annotations in A. L. R.

9. On the punultimate point compare Special Trib. 1/28 (1, P. L. R. 395) where a widow's claim for maintenance was held to be a "matter of marriage".

10. On point 14, sec. 2(*a*), Debt (Imprisonment) Ord., see also H. C. 106/44 (1944, A. L. R. 536, 11, P. L. R. 465) and annotations in A. L. R.

11. For Petitioner it was submitted *inter alia* that if the words "marriage", "divorce", "wills" in Art. 53(i) have to be given the meaning they have in Jewish law, see (H. C. 22/39, C. A. 23/43 and 33/43) and "maintenance" in Art. 51(1) its meaning in Moslem law (H. C. 49/45) it would appear inconsistent with rules of interpretation to assign to the word "alimony" a meaning other than obtained in Jewish law i. e. payments by a husband for support of his wife.

As to the meaning of "alimony" and "maintenance" in English law, see Latey on Divorce, 12 Ed., p. 976 and Halsbury, Hailsham Ed., vol. 10, p. 785 and p. 714.

(*A. G.*)

FOR PETITIONER: Weyl.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — M. Levanon.

ORDER.

Shaw, J. : This is a return to a Rule Nisi dated 17.1.46 calling upon the first Respondent to show cause why his Orders dated 23.11.45 and 30.11.45 given in Tel-Aviv Execution File No. 399/45 should not be set aside, and why he should not refrain from executing the Judgment dated 14.10.45 given by the Tel-Aviv Rabbinical Court in file No. 24/5706, and why he should not refund to the Petitioner the amount of LP. 75, paid by the Petitioner under protest on 3.12.45, or any remaining part thereof.

Many points have been raised at the hearing of this petition, but the principal question is whether the Rabbinical Court had jurisdiction to deal with the matter, in view of the fact that the second Respondent is admittedly a foreigner and allegedly not a member of the Jewish Community.

The second Respondent, who is the wife of the Petitioner, filed a claim in the Rabbinical Court at Tel-Aviv. This claim was described as being a claim for "maintenance", and it is agreed that the same Hebrew word is used both for alimony and for maintenance. The prayer was in the following terms — I quote from the translation —

> "I request that the Defendant be summoned and that he be ordered to live (behave) with me according to the Jewish Law, and to pay me for my maintenance *etc.* LP. 60 *per mensem* for a period of three months and to return me my clothing."

Before the Rabbinical Court the Petitioner objected that the Court had no jurisdiction either formal or in substance. He submitted that it was a matter of "maintenance" which could be entertained only with the consent of both parties, and he also submitted that the second Respondent was a foreign subject.

The Petitioner asked the Rabbinical Court to call on the second Respondent to prove her case, and he asked for an opportunity to prove his allegations and to show what his income was. The Rabbinical Court without hearing any evidence gave a judgment dated 10.10.45 ordering the Petitioner to pay his wife LP. 25.— per month for a period of three months as from the date of filing of the action. They further ordered that the second Respondent should reside in the present home of the Petitioner in Tel-Aviv, and that the Petitioner should return all her clothes and articles.

The first point to be decided is what kind of action this was. Was it a "matter of marriage" for the purpose of Article 53(1) of the Palestine Order in Council, 1922, or was it a matter of the kind contemplated in Article 53(2), or was it a combination of both ?

Dr. Weyl, when asked by me, agreed that the claim was one for

restitution of conjugal rights, and he agreed too that such a claim was a "matter of marriage". But he submitted that the prayer for support was a prayer for "maintenance". That is to say, his submission is that this was an action falling partly under Article 53(1) and partly under Article 53(2). Having given this submission the closest consideration I am unable to agree. I regard the matter before the Rabbinical Court as being a "matter of marriage". A claim for restitution of conjugal rights, in my opinion, may obviously include the question of support for the wife, and the prayer that the Court should fix the amount to be paid for her support is a prayer in regard to an ancillary matter. I think that the relation between the two is similar to that existing between an order for the custody of children and an order for their maintenance. If a Court orders the custody of a child to be given, say, to the mother, a further order for the child's maintenance must be regarded as being ancillary to the principal order for custody. It follows therefore that if the Rabbinical Court could properly make an order for restitution of conjugal rights it could make the ancillary order in respect of the wife's support.

The second Respondent is admittedly a foreigner, and the next question is whether the Rabbinical Court can in any circumstances deal with a matter of marriage where one of the parties is a foreigner. Article 65 of the Order in Council reads as follows —

> "65. Nothing in the preceding Article shall be construed to prevent foreigners from consenting to such matters being tried by the Courts of the Religious Communities having jurisdiction in like matters affecting Palestinian citizens.
>
> The Courts of the Religious Communities other than the Moslem Religious Courts shall not, however, have power to grant a decree of dissolution of marriage to a foreign subject.
>
> For the purposes of this Article, a decree of dissolution of marriage includes a decree of divorce and a decree of nullity".

Dr. Weyl submits that the reply must be in the negative, and he has referred to H. C. 50/45 (1945, A. L. R. 777) in which case the Court said:—

> "We consider that the subject matter of the claim was 'divorce and alimony' under Article 53(1) Palestine Order in Council, 1923, and that the Petitioner for the purposes of that article is a 'foreigner'. The Petitioner, immediately on the receipt of the summons, submitted that the Rabbinical Court had no jurisdiction and he never gave his consent to that court assuming jurisdiction, although this fact is no longer material, since we do not think that Article 53(ii) applies."

When the Court, in that case, says "We do not think that Article 53(2) applies" I am unable to take that as meaning that Article 53(1)

cannot in any circumstances apply. The question is whether a foreigner can consent to a "matter of marriage" being dealt with by the Rabbinical Court. The second part of Article 65 precludes a Religious Court from granting a decree of dissolution of marriage to a foreigner and that is not a matter falling under Article 53(2) but under 53(1). And having considered the definition of "foreigner" in the old Article 59 I am unable to find that there is any distinction to be drawn between the term "foreigners" in the first part of Article 65 and "foreign subject" in the second part of that Article. The Religious Court having jurisdiction in a "matter of marriage" where the parties are both Jewish Palestine citizens, who are members of the community, is undoubtedly the Rabbinical Court. I find that it is open to a foreigner, if a member of the Jewish Community, to consent to such a matter being tried by the Rabbinical Court. By filing her action in the Rabbinical Court the second Respondent must obviously be taken to have consented to its jurisdiction.

I now come to the next and very important question, and that is whether the second Respondent is a member of the Jewish Community for the purposes of Article 53(1). In the affidavit which the Petitioner filed in support of his petition dated 25.11.45 to the President of the District Court, Tel-Aviv, as Chief Execution Officer, he swore that the second Respondent was never a registered member of the Jewish Religious Community. That of course meant that she was not on the register of the Vaad Leumi. Again in paragraph 3 of his petition to this Court the Petitioner stated that —

> "Petitioner is a Palestinian citizen and a member of the Jewish Community. The second Respondent is a foreigner and she is not on the register of the Jewish Community which Petitioner states to have personally perused; her statement in her a/m claim that she was a Palestinian was and is false."

In her affidavit in reply dated 1.2.46 the second Respondent does not deny the allegation that she is not on the Register of the Jewish Community, and it must be taken as admitted.

Mr. Levanon for the 2nd Respondent has been at pains to show that the word "Community" in Article 53(1) does not mean what the word "Community" means in the Jewish Community Rules (see Vol. 3, Laws of Palestine, p. 2132). Those Rules contain the following definition —

> "'Community' includes all Jews who, in the manner hereinafter prescribed, are registered as members of the Community."

Whatever the term "Community" may have meant before the Jewish Community Rules were enacted in 1927, there can be no doubt at

all that for the purposes of Article 53 that term is now defined in rule 2 of those Rules. It cannot be suggested that the word "Community" in Article 83 of the Order in Council means something different from the word "Community" in Article 53, and it is beyond question that the word "Community" in Article 83 now has the meaning which the Jewish Community Rules give to it. It is relevant to observe that Rule 6 of the Jewish Community Rules provides that each Rabbinical Office shall sit as a Rabbinical Court of first instance, and clearly it is no other than a Rabbinical Court of the Jewish Community as referred to in Article 53.

There is ample authority for the proposition that a member of the Community means a person who is on the Register of the Vaad Leumi. Dr. Weyl has referred to C. A. 246/40 (8, P. L. R. 55), H. C. 101/42 (9, P. L. R. 553), H. C. 131/41 (1942, A. L. R. 728) *) and H. C. 124/43 (11, P. L. R. 59).

I find that the second Respondent is not a member of the Community for the purpose of Article 53. If she is not a member of the Community then any judgment or order given by the Rabbinical Court is a nullity. No amount of consent, and no misapprehension of the facts, can give a Court jurisdiction where that jurisdiction is dependent upon the law. It makes no difference, so far as the legal position is concerned, that the Rabbinical Court and the parties did not realise that the second Respondent was not a member of the Community. The Rabbinical Court had no jurisdiction to deal with the matter at all, so its order was a nullity.

I have now to decide what order ought to be made on the petition in view of this finding. The High Court is not a Court of Appeal from the Rabbinical Court. It exercises its jurisdiction on broad principles of equity and justice. Dr. Weyl has asked not only that the Order *Nisi* be made absolute, but that this Court should order restitution in respect of the LP. 50 already recovered from the Petitioner through the Execution Officer. Another sum of LP. 25.— is still lying in the Execution Office.

In the first place, I would say that in my view the judgment dated 7 Heshvan 5706 (corresponding to 14.10.45), of the Rabbinical Court was of the nature of a provisional judgment. The second Respondent had asked for maintenance for three months only, and there is no doubt that further proceedings must have been contemplated. I am supported in this my view by the judgment dated 12 Shavat 5706 (corresponding to 14.1.46) of the Rabbinical Court of Appeal which refers to the

*) Scil. C. A. 131/41 (1942, S. C. J. 728).

judgment of the Rabbinical Court of first instance as being provisional or temporary.

At p. 207 of Rayden and Mortimer on Divorce (3rd Edition) the following appears —

> "The Court may in its discretion, award alimony *pendente lite*, to a wife notwithstanding that the husband is raising a question as to the Court's jurisdiction to entertain the suit."

One of the cases there referred to was Ronalds v. Ronalds (1875, L. R. 3, P. & D. 259), which appears in Vol. 27, English and Empire Digest, p. 406, para. 4062. The following appears in the latter report —

> "Where there was a substantial question of jurisdiction, and some months were to pass before it could be determined, the Court, in the exercise of its discretion, allowed alimony pendente lite."

When the Petitioner appeared before the Rabbinical Court at the hearing before the judgment dated 7th Heshvan (14.10.45) he did not plead that the second Respondent was not a member of the Jewish Community. I therefore hold that the provisional order for *mezonot* was validly made. When the parties appeared before the Chief Execution Officer on 9.11.45 the Petitioner again failed to plead that the second Respondent was not a member of the Community, and on that occasion the Chief Execution Officer granted a stay of execution till 7.12.45. On 23.11.45, however, the Chief Execution Officer, having been informed that the Rabbinical Court of Appeal had refused to stay execution of the judgment of 14.10.45, gave an *ex parte* order for execution to proceed, and a notice was served on the second Respondent on the same date calling on him to pay LP. 75 within three days under pain of imprisonment. Thereafter the second Respondent filed his application dated 25.11.45 before the Chief Execution Officer and, as far as I can see, it was then for the first time that he alleged (supporting his allegation by an affidavit) that the second Respondent was not a member of the Jewish Religious Community. On 30.11.45 the Chief Execution Officer gave an order on that application stating that he was not prepared to alter his decision of 23.11.45. I consider that it was very late in the day for the Petitioner to put forward the objection that the second Respondent was not a member of the Jewish Community. He ought to have done so when the matter first came before the Rabbinical Court. It was a fundamental point going to the very root of that Court's jurisdiction. In view of this fact and of the fact that the Chief Execution Officer does not sit as a court of appeal from the Rabbinical Court, I am unable to find that the Chief Execution Officer was unjustified in refusing to alter his decision. It is true, however, that if he had then held an enquiry he would

doubtless have come to the conclusion that the second Respondent was not a member of the Jewish Religious Community, and it would have followed that there was no judgment which could be executed.

On 3.12.45 the Petitioner was arrested and he paid the LP. 75 in order to secure his release. Out of that amount the sum of LP. 50 has been paid out to the second Respondent. The position now is that the Petitioner has established that the provisional judgment of the Rabbinical Court is a nullity, and I therefore find that the Petitioner is entitled to recover the LP. 25 which still lies in the Execution Office. It is too late to set aside the orders dated 23.11.45 and 30.11.45 of the first Respondent, as those orders have been carried out. But the Order Nisi is made absolute to this extent — that the first Respondent is directed to refrain from taking any further steps in execution of the judgment dated 14.10.45 in file No. 24/5706 of the Rabbinical Court of Tel-Aviv, and the first Respondent is further directed to refund to the Petitioner the sum of LP. 25 now lying in the Execution Office in file No. 399/45. I make no order in respect of the LP. 50 already paid out to the Petitioner.

There are certain other points which I think I ought to refer to. In the first place I would like to say that I consider that a great deal of the time of this Court would be saved if Ecclesiastical Courts would of their own motion enquire into the question of jurisdiction at the first hearing. The question whether one of the parties is a member of the community is fundamental, and it is one which in most cases could be settled without much difficulty. The same observation applies to the question whether each of the parties is a Palestinian citizen. Whenever consent to the jurisdiction is required it would be a good practice if the written consent of the party or parties concerned were obtained and placed in the file.

An attempt has been made to show that a wife's maintenance always falls to be dealt with under article 53(1) of the Order-in-Council (where the parties are Jews). That, of course, is not in accordance with the decided cases. Briefly, I find the position to be that a simple claim for maintenance by a wife who has been deserted by her husband has been held to fall under article 53(2) and not under article 53(1). In other words, such a claim is not regarded as being a "matter of marriage", or as arising out of a matrimonial suit. There is no doubt, I think, that a simple claim for maintenance by a wife who has had to leave her husband owing to his cruelty would similarly fall under article 53(2). It may be unsatisfactory that this should be so but it is the legal position as settled in the decided cases. Mr. Levanon, for the second Respondent, has referred us to a passage at p. 162

of International and Inter-Religious Private Law in Palestine by Goadby, which reads as follows:—

> "Under the Palestine Order in Council (Art. 51) suits for alimony and maintenance are included among matters of personal status and are, therefore, governed by national or religious law. Alimony alone is mentioned in Arts. 53 and 54 as within the exclusive jurisdiction of non Moslem Courts of Personal Status. This is in accordance with the Turkish practice under which the non Moslem Courts had jurisdiction in matters of alimony (payments by a husband for the support of his wife) but not as regards maintenance (payments by parents for the support of children, by children for parents of by other relatives *inter se*)."

It may well be that those who drafted the Order-in-Council did not intend to alter the legal position existing in Turkish times, but the Courts have held otherwise and it is not for us to try to upset those decisions. If Jewish opinion is strongly in favour of reverting to the position as it used to be in Turkish times I think that the matter ought to be dealt with by legislation.

Dr. Weyl, for the Petitioner, has complained that after the Petitioner had been arrested he asked to be taken before the Chief Execution Officer, but was kept in custody until he had paid the LP. 75. Any person so arrested ought, if he so requests, to be taken without unnecessary delay before the officer who issued the warrant of arrest. It is doubtful I think, in this case, whether the Chief Execution Officer would have modified his order, but the Petitioner would at least have had an opportunity of making any further submission that he might wish to make.

In view of the relationship between the parties I think it is right to order the Petitioner to pay the costs of the second Respondent which I allow in the fixed sum of LP. 20.— (twenty pounds).

Given this 11th day of April, 1946 in the presence of Dr. Weyl for Petitioner and Mr. Levanon for 2nd Respondent.

British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 82/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, A/C. J., De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

David Schechter. APPELLANT.

v.

The Attorney General. RESPONDENT.

"Bank note" — C. C. O. secs. 349(1), 336 — Post Office Ord., secs. 21. 91 — Uttering, forgery — Sentence.

Appeal from the judgment of the District Court, Haifa, dated the 21st June, 1946, in Criminal Case No. 68/46, whereby Appellant was convicted of an offence contrary to section 74(c) of the Post Office Ordinance and on 2 counts contrary to section 349(1) of the Criminal Code Ordinance, 1936, and sentenced to 4, 5 and 6 years' imprisonment to run concurrently, dismissed:—

A money order, which by virtue of sec. 91 of the Post Office Ordinance, is included in the definition of "bank note" in the Criminal Code Ordinance, does not include a "postal order". The latter is therefore not a "bank note".

(*A. M. A.*)

FOR APPELLANT: Levitzky and S. T. Cohen.

FOR RESPONDENT: Crown Counsel — (Hooton) and Legal Assistant — (Weston).

JUDGMENT.

The Appellant was at a trial in the District Court of Haifa convicted on three counts, namely, of stealing two postal orders of LP. 1.— each contrary to section 74, Post Office Ordinance, forgery of postal orders contrary to section 349(1) Criminal Code Ordinance, and uttering forged postal orders contrary to section 349(1) Criminal Code Ordinance. He was sentenced to four years' imprisonment for theft, five years for forgery and five years for uttering, the sentences to run concurrently. Against all those convictions and sentences he now appeals. After we had heard his advocate, Mr. Levitzky, we decided that it was unnecessary to hear Crown Counsel on the charge of theft as, in our view, there was ample evidence to support the conviction. The facts, as found by the learned President of the District Court, shortly stated, are that the Appellant was a clerk at Nabla Post Office, which is a small branch Post Office in Haifa. The clerk in charge there was a Miss Loulon and the only other clerk at about 30th—31st January, 1945, were the Accused and one Rathans later replaced by Miss Akiva Rothstein. On 30th January, 1945, a Mr. Fleger purchased three postal orders for LP. 1.— each. He inserted the name "Esther Leb" on each of the notes as that of the intended payee. In one of them he omitted the letter "h" in Esther. That particular postal order was in due course received by Miss Leb, who was a member of the A. T. S. stationed at Tel-el-Kebir, Egypt; the other two which were never received by her were the subject matter of the charges against the Appellant. On the day following the purchase, namely, on 31st January, 1945, as appears from Exh. 4, which is the certificate of posting of a registered letter — Mr. Fleger put the postal orders (complete with

counter-foils, which Mr. Fleger had not detached) in a registered envelope. This he did in view of the clerk who was on the other side of the counter. Mr. Fleger put stamps on the envelope which he then handed over to the clerk. It was not denied that the Appellant's initials appeared on the certificate of posting and there was abundant evidence, including the evidence that it was the Appellant who prepared the "special list" which is prepared in connection with the despatch of registered mail, to support the finding that the Appellant was the clerk to whom Mr. Fleger was referring when in evidence he spoke of the clerk seeing him (Fleger) place the Postal Orders in the envelope. The learned trial judge was justified in holding that the Appellant had full opportunity, if he so wished, of taking out of the letter handed to him by Fleger the documents (in this case the two postal orders) which were missing from it when it was received by Miss Leb through the post. On 16th April, 1945, the three counterfoils of the postal orders sent by Fleger were found in a book which was lying on a small table near the Appellant's bed in his living apartment. The learned President found, on the evidence, that it was established, beyond reasonable doubt, that the Appellant had extracted from the postal packet not only the three counterfoils but also the two postal orders which never reached Miss Leb. We think that this finding cannot be impeached in spite of the persuasive arguments of Mr. Levitzky. Mr. Levitzky tried to convince us that it does not appear from the judgment that the learned President had considered the possibility of some one other than the Appellant having abstracted the counterfoils and the postal orders nor does it appear that the President had considered the possibility of the counterfoils having been abstracted by another person and then left lying about so that the Appellant might, not knowing where they had come from, have picked them up and put them in his pocket, to use as scrap paper or book markers. A perusal of the judgment, which is a lengthy and exhaustive and most careful one, convinces us that the learned President directed his mind to all the proper considerations. There was abundant evidence to justify the finding that it was the Appellant and no one else who stole the two postal orders Nos. 201074 and 201076 from the postal packet addressed to Miss Esther Leb and the appeal from the conviction under section 74(c) Post Office Ordinance is therefore dismissed.

With regard to the conviction on the charge of forgery of postal orders the facts found were that the letters "ovic" had been added by someone to the word "Leb" in the two postal orders the subject matter of the charge of forgery. Mr. Levitzky has argued that this count was bad for duplicity inasmuch as there were two charges, namely, adding the

letters "ovic" and forging the signature of the recipient on the receipt part of the postal order. Mr. Levitzky further argued that the receipt formed no part of the postal order as such although it appeared on the same piece of paper. Mr. Levitzky further observed that the Appellant was, in fact, acquitted of adding the letters "ovic". This however, is not so, as at pages 11 and 12 of the typed judgment the learned President says:—

> "I think further that there is sufficient evidence to lead me to the irresistible conclusion that it was the Accused who altered the name "Leb" to "Lebovic"."

Mr. Levitzky then argued that the President was not prepared to act on the evidence of the handwriting expert, Mr. Ragolsky. This again is not correct because what the learned trial judge did, in effect, say was that he was always slow to act on the evidence of a handwriting expert alone, but that, having considered this evidence and all the surrounding circumstances, he was satisfied that it was the Accused who had added "ovic". In fairness to the Appellant we would say that Mr. Ragolsky was unable to say who had written the letters "ovic", although he was quite certain that the signature of the payee on both the postal orders was in the handwriting of the Appellant. Nevertheless, we consider that the trial judge was right in holding that there was an irresistible presumption that it was the Appellant who had altered the name "Leb" to "Lebovic".

We now return to the question whether a postal order is a "bank note" for the purposes of section 349(1) of the Criminal Code Ordinance. The learned trial judge was satisfied that it was. We are unable to agree with the learned President for the following reasons, namely, section 21, Post Office Ordinance does not say that "money order" shall be deemed to include "postal order" nor that "money order" shall mean "postal order". This being so, we are not prepared to interpret the words "money Order" in section 91, Post Office Ordinance so as to include "postal order". For these reasons the conviction for forging a bank note is quashed and we substitute a conviction for an offence contrary to section 336, Criminal Code Ordinance.

Lastly, we have to deal with the conviction on the charge of uttering. Mr. Levitzky argued that there was absolutely no evidence that the Appellant had uttered either or both of the two postal orders. The short answer to this submission is that it was established that the two postal orders were paid, or encashed, on 2nd February, 1945, and on that day, according to the Appellant's own evidence, only he and Miss Loulon were on duty, and that only he or Miss Loulon could have cashed the postal orders. It was also established that the Appellant's

initials appeared upon the paper as the officer effecting payment. The trial judge accepted Miss Loulon's evidence as to the Accused's initials and as to all other matters.

There was evidence on which the trial judge could properly find that the Appellant had uttered the two forged postal orders. The conviction of uttering will stand but will be under section 340.

As regards sentence, while this Court is always reluctant to interfere with the discretion of trial Courts, we feel that, as we have quashed the convictions for forging and uttering bank notes we are unable to say to what extent the mind of the learned trial judge was influenced when he came to pass sentence by the gravity of the offences of forging and uttering bank notes. Moreover, all the three convictions are connected with the one transaction, namely, the transaction of stealing two postal orders of a total value of LP. 2.—. In the circumstances, although we entirely agree with the remarks made by the learned President when passing sentence as to the gravity of such offences by Post Office clerks and officials, we feel that a sentence of two years' imprisonment on each of the three counts, the sentences to run concurrently, will meet the ends of justice. We shall allow the Appellant special treatment. The sentences will run from the 21st June, 1946. We so order.

Delivered this 15th day of August, 1946.

Acting Chief Justice.

CRIMINAL APPEAL No. 95/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, A/C. J., De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Yacoub Iskandar Dabit. APPELLANT.

v.

The Attorney General. RESPONDENT.

Premeditation — Murder, C. C. O. secs. 4, 216 — Holmes v. D. P. P., R. v. Mason, English law compared, provocation — Preparation — Evidence of previous convictions or acquittals — Sentence for manslaughter.

Appeal from the judgment of the Court of Criminal Assize sitting at Jaffa delivered on the 25th day of July, 1946, in Criminal Assize Case No. 29/46, whereby Appellant was convicted by majority of the Court of murder under section 214 of the Criminal Code and sentenced to death; appeal allowed and conviction for manslaughter substituted:—

1. Sec. 216 of the Criminal Code Ordinance, so far as it relates to premeditation, differs from English law. There is no premeditation under that section unless the Accused has had time (however short) to meditate.

2. Evidence of conviction or acquittal should not be given orally.

(*A. M. A.*)

REFERRED TO: R. *v.* Mason, 1912, 8 Cr. App. Rep. 121; Holmes *v.* D. P. P., 1946, 2 All E. L. R. 124, 30 W. N. 146.

ANNOTATIONS:

1. "In Palestine the term "manslaughter" covers forms of killing which in England would rightly be charged and dealt with as murder": CR. A. 1/39 (6, P. L. R. 51; 1939, S. C. J. 32; 5, Ct. L. R. 32) — *per* Copland, J.; similar words appear in CR. A. 163/42 (9, P. L. R. 663; 1942, S. C. J. 685).

2. "The three essential ingredients (under sec. 216 of the C. C. O.) are cumulative": P. C. 66/43 (11, P. L. R. 237; 1944, A. L. R. 465).

3. For local authorities on the defence of provocation see CR. A. 33/42 (9, P. L. R. 203; 1942, S. C. J. 246; 11, Ct. L. R. 103), CR. A. 119/44 (1945, A. L. R. 69) and CR. A. 8/46 (13, P. L. R. 39; *ante*, p. 194) and notes to these cases in S. C. J. and A. L. R.

4. On proof of previous convictions see CR. A. 153—155/45 (12, P. L. R. 447; 1945, A. L. R. 605) and note 3 in A. L. R.

(*H. K.*)

FOR APPELLANT: Cattan and F. Ghussein.

FOR RESPONDENT: Asst. Government Advocate — (Wa'ari).

JUDGMENT.

De Comarmond, J.: The Appellant was convicted of murder by the Court of Criminal Assize sitting at Jaffa. The victim was one Boulos bin Yousef Abu Yaghi. One of the learned judges dissented on the question of premeditation and held that, in his opinion, premeditation had not been established.

The first three grounds of appeal relate to the questions of premeditation and provocation. As to ground No. 4 it was discovered during the hearing of the appeal that it was misconceived. As to ground No. 5 I need only say that Prisoner's counsel in the Court below was right in objecting to oral evidence of conviction or acquittal in another criminal matter. The danger of such a course is strikingly demonstrated by the fact that in the present case the learned trial judges were misled by the evidence given by Inspector Yallad regarding the outcome of previous proceedings in which three men (including the abovementioned

Boulos) had been charged with murder. The true position is that Boulos together with Basil Abu Yaghi and Aissa il Barbari were all charged on each of two separate informations with the murders of one Saliba and of one Saleh; Boulos and Eissa were acquitted after trial, of having murdered Saliba, and Basil was convicted; no evidence was offered by the prosecution against Boulos and Aissa in the other case and they were acquitted, but the charge against Basil remained on the file. The position at the end of these two cases was, therefore, that Basil was still liable to be tried on the charge of having murdered Saleh; this fact does not appear to have been made clear to the Court of trial and further confusion arose because the Appellant's fourth ground of appeal was drawn up in ignorance of the fact that Boulos had in fact been acquitted of the murder of Saleh. However, the position was cleared up before this Court by the production of a certified copy of the relevant records and we are of opinion that, apart from the technical question of proof of a record by oral evidence, grounds of appeal 4 and 5 are not important.

Before dealing with the first three grounds of appeal we will give an outline, mainly based on the findings of the two learned judges who convicted the Appellant of murder (hereinafter referred to as the "trial judges").

The Appellant's son Saleh and Appellant's nephew Saliba were killed on the 24th September, 1945. As already explained, Boulos bin Yousef Abu Yaghi was charged and acquitted in respect of both deaths. The acquittals took place on the 8th April, 1946. On the 12th April, Boulos was travelling in a bus in Jaffa when he was shot at and then stabbed by the Appellant. Boulos died very soon after from the result of five bullet wounds and two stab wounds. The facts accepted by the Court below are the following: when the Appellant boarded the bus it was so full that he had to stand on the running-board; at a subsequent stop, he entered the bus and secured a seat, and the deceased called out to him addressing him as Abu Saleh; after Appellant had sat down, the deceased turned round, winked at him and put out his tongue, and then made a certain obscene gesture locally interpreted as referring to the act of sodomy and commonly described as sitting on a stick or on a stake. The learned trial judges recorded their view that:—

> "within a minute or two and before the next bus stop the Accused rose from his seat and fired two shots at the deceased. The bus then stopped and most of the passengers got out. The Accused got out of the rear door, but re-entered by the front door and fired three more shots at the deceased. The pistol then jammed, whereupon he opened the clasp-knife he habitually carried and twice stabbed the deceased in the back of the neck."

We might here mention that the deceased was sitting in the first row of seats immediately behind the driver whereas the Appellant was in the third row of seats on the same side.

In a careful analysis of the facts, the learned trial judges recorded the following very important findings. They found that there was no evidence of any expression of hostile intention by the Appellant prior to the date of the killing; that the carrying of a pistol was compatible with the allegation that it was for the purpose of self-defence and was not to be regarded as evidence of resolve or preparation.

Mr. Cattan, for the Appellant, has urged before the Court below and before this Court that Appellant acted under immediate provocation and could not, therefore, be found guilty of premeditation. The accepted facts as to provocation are that the deceased (Boulos) addressed the Appellant as Abu Saleh whereas he well knew that the Appellant was called Abu Iskandar after the name of his eldest son; the innuendo is that this was a sarcastic reference to the fact that Saleh had been killed. Boulos followed this first provocation by winking and putting out his tongue and then making the final obscene gesture suggesting contempt and triumph.

It is of importance to mention that the learned trial judges found as a fact that the words and gestures were undoubtedly an insulting and cruel attack on Appellant's feelings, but they added that "it is not sufficient that a person should have been greatly angered to constitute provocation" and that the words and gestures must be such as to deprive a reasonable man of his self-control and must have, in fact, had that result.

The conclusion reached by the learned trial judges was that, although the words and gestures might have constituted provocation in law, on the evidence before them they did not find that they amounted to provocation in fact; they, however, added that if provocation there was, it was "immediate provocation".

What we have to examine is whether the law as to the effect of provocation was correctly applied to the facts as found by the Court below. Appellant's counsel has submitted that it was not, and he also submitted that the trial judges were not justified in having recourse to English case law in order to decide the issue of provocation.

It is stated in the judgment that the English principles as to provocation were adopted, and the learned trial judges mentioned that it was proper to do so because section 4 of the Criminal Code Ordinance provides that expressions used in the Code shall be presumed to be used with the meaning attached to them in English law. We would point out that the presumption created by section 4 only holds good so far

as is consistent with the context and except as may be otherwise expressly provided. For the reasons given below, we consider that section 216(b) of the Criminal Code Ordinance is self-contained and that it is neither necessary nor justifiable to have recourse to English jurisprudence when construing it.

Section 216 of the Criminal Code Ordinance, 1936, defines premeditation. We cannot refrain from pointing out that this section presents the rather unusual feature of being too copiously worded; and it seems to us that the legislator in his endeavour to make his meaning abundantly clear has gone perilously near to defeating his object by going into too much detail. Mr. Cattan has mentioned that the Palestine law has maintained the distinction between intention to kill and premeditation which is derived from Ottoman law and French law. Whatever may be the origin of section 216 it is abundantly clear that it is fundamentally different from the English criminal law and we therefore consider that the utmost circumspection should be exercised when referring to English case law for the interpretation of the said section 216.

For the purpose of the present case, we are mainly concerned with paragraph (b) which reads as follows:—

> "He has killed in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his action."

Mr. Cattan has submitted that paragraph (b) imposes three independent requirements, namely, killing in cold blood, no-existence of immediate provocation, and possibility of thinking and realising the result of the intended act. (At the risk of appearing pedantic, we would add that a division in four parts would seem more correct, because the words "able to think" do not join up well with the words "the result of his action").

We are unable to accept without reserve Mr. Cattan's submission. It seems to us that the only reasonable way of construing paragraph (b) is to consider its competent parts as being interdependent, or, if we may so express it, mutually explanatory. Nobody would suggest that any kind of immediate provocation, however trivial, would render premeditation impossible, and yet, if Mr. Cattan's submission were correct, we would not be entitled to qualify or explain the words "immediate provocation" by referring to the rest of the paragraph. Our view is that the existence of immediate provocation does not put premeditation out of the question unless the provocation be such as to affect the person concerned to such a degree as to cloud his normal powers of thinking to such an extent as to deprive him of that coolness of mind

which is necessary to consider and appreciate clearly the result of the act he is going to commit.

Returning to the facts of the present case, we have to ask ourselves whether the trial judges correctly applied section 216(b) to the facts as found by them. If we were satisfied that they kept in mind section 216(b) properly interpreted, we would find no reason to intervene. The position, however, is that the finding that there was no provocation in fact was based on the principle of English case law. The case of R. *v.* Mason 8 Cr. Appl. Reports, p. 121, is specially referred to in the judgment. Put broadly, the principle in English law is that murder is reduced to manslaughter when the provocation was sufficient to deprive a reasonable man of his self-control (not whether it was sufficient to deprive of his self-control the particular person charged). We would add that importance is attached in England to the instrument with which the homicide was effected and, if a deadly weapon is used, the provocation must be great indeed to reduce the offence to one of manslaughter. In a recent decision reported in 30 Weekly Notes p. 146 (Holmes *v.* Director of Public Prosecutions) it was stated that the doctrine is based on sudden and temporary loss of self-control whereby malice which was the formation of an intention to kill or inflict grievous bodily harm was negatived.

We are of opinion that our section 216(b) involves a more delicate test than that applied under English law, because, although the Accused may have formed the intention or resolve to kill, there can be no premeditation unless it is sufficiently established that he had the opportunity and capacity to "meditate". The interval of time for meditation need not be long; it may indeed be extremely short.

In the present case we are driven to the conclusion that the learned trial judges did not give sufficient effect to the provisions of section 216(b) with regard to the existence of premeditation. Our chief reason for thinking so is that they arrived at the conclusion that there was no provocation "in fact" although they admitted that the words and gestures might constitute provocation in law and recorded their opinion that the words and gestures were undoubtedly "an insulting and cruel attack" on the feelings of the Accused. We consider that it would be dangerous, in presence of such a finding, and in view of the other circumstances of the case, to dismiss the possibility that the Appellant was so upset that he was deprived of the clarity of thought necessary to enable him to realise the implications of the act which he committed. We are afraid that the trial judges attached too much importance to physical provocation such as a blow or spitting and lost sight of the important fact that, although a man's mind may not be so disturbed as

to preclude him from knowing that he is going to kill, yet it may be enough disturbed to deprive him of the lucidity of mind which is necessary for the existence of premeditation.

For the foregoing reasons we decided that the judgment appealed against could not be supported in so far as premeditation is concerned and we accordingly substituted a conviction on a charge of manslaughter.

This disposes of the appeal, but we wish to refer to Mr. Cattan's argument that, apart from premeditation, another ingredient, namely preparation, had not been established. We reminded counsel that preparation exists within the meaning of paragraph (c) of section 216 if the Accused has prepared himself to kill or has prepared the instrument, if any, used for the killing. We consider that due weight must be given to the words "prepared himself" and that it is almost impossible to imagine a set of circumstances where a person who has had opportunity to think and realise the result of his actions would not at the same time have "prepared himself" to kill.

One last observation we also desire to offer, namely, that the final paragraph of section 216 is of great importance because it makes it clear that the time factor is only of relative importance.

Delivered this 11th day of September, 1946.

British Puisne Judge.

Edwards, A/C. J.: I agree.

Acting Chief Justice.

Abdul Hadi, J.: I agree.

Puisne Judge.

We are all of the opinion that the conviction for murder cannot stand and must be quashed, and we substitute therefor a conviction for manslaughter, contrary to section 212 and punishable by section 213 of the Criminal Code Ordinance.

We shall prepare a written judgment and deliver it after the vacation on notice to the Attorney General and the Appellant's advocate. In the meantime we shall hear Mr. Cattan and the Assistant Government Advocate on the question of sentence.

Mr. *Catan*: The Court knows the whole background of this case. It has had evidence from the Police that this man has always enjoyed an excellent reputation in Jaffa. He is a very peaceful man and he has never committed even a breach of the peace. It is important for the Court to bear in mind one fact, namely, that it was not the Accused who started this whole business, that on two occasions it was the other family who did. On the first occasion he had his son killed in the

prime of youth and that was a terrible tragedy by itself. On the other occasion he himself was provoked by a person who has been charged and acquitted four days before, for the murder of his own son, and he found himself in the second tragedy in which he was himself involved. This man would never have been in the dock at all, and he has several children to support and I ask that the Court may find its way to pass a lenient sentence. Further, I would say that the Court does not have before it the type of criminal that kills for the purpose of killing, but a man who has enjoyed a good reputation and is here because he found himself being provoked. It is hoped (I am informed by Fawzi Bey) to effect peace between the parties.

Edwards, A/C. J.: It is impossible for us to deal with that.

Omar Eff. Wa'arie, Asst. Government Advocate: May I submit that the Accused has no previous convictions and that he has been in custody since the 12th of April, 1946.

SENTENCE.

Yacoub Iskandar Dabit, we have listened carefully to what has been said on your behalf by your advocate, Mr. Cattan; but we feel that we are dealing as leniently with you as we can when we impose a sentence of 12 years' imprisonment to run from the 12th April, 1946, the date of your arrest.

Delivered this 17th day of August, 1946.

Acting Chief Justice.

HIGH COURT No. 31/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abbas Muhammad Abu Khalil & 11 ors. PETITIONERS.

v.

Assistant District Commissioner, Jerusalem District & 9 ors. RESPONDENTS.

Dispute over land dealt with under Land Disputes (Possession) Ord. — Powers and duties of District Commissioner under the Ordinance.

Return to an order *nisi*, directed to the first Respondent, calling upon him to show cause why his judgment of the 16th February, 1946, should not be withdrawn, and to Respondents 2 to 10 to show cause why they should take possession of the Eastern Barryia lands, the order *nisi* made absolute:—

1. Sec. 4, Land Disputes (Possession) Ordinance, does not apply to disputes about right to cultivate.

2. District Commissioner acting under sec. 2(4), Land Disputes (Possession) Ord. shall not pay attention to merits or claims of any of the parties to a right to possess the subject in dispute, but shall, if possible, decide whether any of the parties was at date of preliminary order in actual possession.

3. The remedies provided by Land Disputes (Possession) Ord. are very special and must therefore be applied in conformity with the law.

(*M. L.*)

ANNOTATIONS: For other cases under Land Disputes (Possession) Ordinance see H. C. 34/45 (1945, A. L. R. 730, 12, P. L. R. 365) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONERS: Levitsky and S. T. Cohen.

FOR RESPONDENTS: No. 1 — Crown Counsel — (Hooton).
The rest — O. Saleh.

ORDER.

The Petitioners in this case are *Mukhtars* and elders of Hizma village. The Respondents Nos. 2—10 are elders of the village of Anata, and are hereinafter referred to as the Anata Respondents.

In November, 1945, an incident occurred between the villagers of Anata and the villagers of Hizma on the lands known as Eastern Barryia lands. The incident was brought about, so it seems, by a dispute over the right of cultivating certain areas in the said lands. As further breaches of the peace were apprehended, the first Respondent (who was the Assistant District Commissioner in charge of the area) issued a preliminary order under section 2(1) of the Land Dispute (Possession) Ordinance, Cap. 76, forbidding ploughing and cultivation of the Barriya lands pending an investigation to be held by him under the said Ordinance. After investigating, the first Respondent decided and ordered on 16.2.46 that the Eastern Barriya lands were to be in the possession of the Anata villagers for the purposes of cultivation and grazing until dispossessed therefrom in due course by law or by land settlement. The Hizma villagers were, however, to continue to exercise rights of grazing their cattle and sheep in the area, provided that cultivation and crops belonging to the Anata villagers be not disturbed.

It is this last mentioned order given by the first Respondent which has led to the present High Court proceedings. The prayer at the end of the petition is that the first Respondent should withdraw his

order of the 16.2.46 and command the Anata Respondents not to take possession of the Eastern Barriya lands.

It is necessary to explain that the so-called Barriya lands consist of a wide expanse of hilly and mostly barren country, which is cultivable only in patches and during a favourable rainy season. It appears that Anata, Hizma and several other villages have, or claim, rights on certain portions of the Barriya lands.

Before looking into the merits of the Petitioners' case, I would recall that the object of the Land Disputes (Possession) Ordinance is to prevent land disputes degenerating into breaches of the peace. The mode of achieving this end is to empower District Commissioners to make an order giving temporary possession to the party who is in actual possession at the time of the preliminary order, or who was forcibly dispossessed within the period of two * months prior to the making of such order. The object is to maintain the *status quo* until the competent Court has determined the rights of the contending parties.

According to the copy of the order annexed to the petition, the order was made under section 2(4) of the Land Disputes (Possession) Ordinance, but there must be an error either in the original or in the copy, because sub-section (6) is the sub-section which gives power to issue such an order under section 2. This is of no great importance, but what is deserving of attention is that the order, instead of declaring one of the contending parties to be entitled to possession of the subject-matter of the dispute (*i. e.* the land) until evicted in due course of law, proceeded to allot such possession to the Anata villagers for purposes of cultivation and grazing, subject to the right of the Hizma villagers to exercise grazing rights on the same land (provided that the areas cultivated by Anata be not damaged). In effect, the order regulates the exercise of rights of cultivation and grazing by the two contending parties and allows both parties to be on the land at the same time.

When disputes arise regarding the exercise of right of user of any land or water for grazing, cutting wood or reeds, watering animals, irrigation, fishing, or other like purposes, it is section 4 of the Ordinance which applies. In the present case it was not disputed even by the Anata Respondents that the Hizma villagers did graze their cattle and sheep on the Eastern Barriya lands. The cause of the trouble was the proposed cultivation by the Anata villagers of a few small portions of cultivable land situated in the aforementioned Barriya lands and sur-

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Ed. note: This is obviously a clerical slip and should read "three".

M. L.

rounded by a large expanse of hilly and barren country (the learned advocate for the Anata Respondents mentioned that the area in dispute was about 10,000 *dunums* in extent).

It seems to me that the investigation should have been restricted to three small portions of cultivable land which were the cause of the dispute. Had this been done, the first Respondent would perhaps have succeeded in finding out who were the persons in actual possession and would have made the appropriate order under section 2(6). But although the dispute relates only to proportionally small portions of land, the first Respondent allowed the issue to embrace an extensive area of land, with the result that he found himself in the difficult position of being unable to decide that the whole of such area was in the actual possession of one set of villagers. I might perhaps add that it was also open to the first Respondent, if not satisfied on the question of actual possession, to appoint a manager under section 3 of the Ordinance, pending the determination of the rights of the parties.

I have considered whether it would be possible to take the view that the order was made in accordance with the provisions of section 4 of the Ordinance, which deals with disputes concerning the user of land. Unfortunately, such a view would not be justified, because the first Respondent did not direct his mind to the matters which have to be investigated regarding rights of user, and furthermore the section does not, in my opinion, apply to disputes about the right to cultivate land.

I will now refer to the issue which was fully argued before us. On behalf of the Petitioners it was urged that the investigation made by the first Respondent aimed at finding out who was entitled to the Eastern Barriya lands, and not who was in actual possession at the material time. One of the arguments in support of this contention was that the preliminary order made by the first Respondent called for evidence to establish which of the two parties was in occupation "for the last few years". This, said Mr. Levitsky, is not the issue to be investigated, and he called attention to section 2(4) which clearly lays down that the District Commissioner shall not pay attention to the merits or the claims of any of the parties to a right to possess the subject in dispute, but shall, if possible, decide whether any of the parties was at the date of the preliminary order in actual possession.

Counsel for the Respondents contended, on the other hand, that the first Respondent did direct his attention to the necessity of finding out who was in actual possession at the material time, and their submission was that the proceedings are not nullified simply because the first Respondent did go beyond the ambit of the investigation prescribed by the law.

I have perused the record in the light of the comments offered by learned counsel, and I find that there is only one witness, who made the statement that the Anata villagers had been in possession since Turkish times; this witness, however, does not give any further precisions regarding the nature of such possession. On the other hand, there was evidence to the effect that Hizma villagers had ploughed and cultivated certain parts of the Eastern Barriya lands. Furthermore, it is clear from the reasons given by the first Respondent for his decision that he was impressed by a village map produced by the Anata Respondents, by crop assessment registers for 1943/44, and by the evidence of a contractor who took sand from the land in 1942 and 1943. All these facts do not help to decide who was in actual possession on the 3rd December, 1945, which was the date of the issuing of the preliminary order under the Ordinance.

There is, therefore, some substance in the Petitioners' complaint that the first Respondent did not conduct the investigation and did not decide the case on the lines traced out in the law. Had this been the only defect in the case, I would have examined whether the first Respondent's order was supported even by a scintilla of evidence, and whether justice had on the whole been done. Being given, however, that I am of opinion that the order issued by the first Respondent is clearly not in conformity with the section under which it purports to have been made, I must come to the decision that such order cannot stand. I would add that the remedies provided by the Land Disputes (Possession) Ordinance are very special, and that it is therefore necessary that they should be applied in conformity with the law. In the present case, the very basis of the proceedings was wrong, because the subject-matter of the dispute was not the extensive area known as the Eastern Barriya lands but very small portions thereof. This wrong basis influenced the whole of the proceedings.

I therefore make the order absolute, and allow the Petitioners LP. 10 (ten) inclusive costs, to be paid by all the Respondents except Respondent No. 1. Should this case come up again before the District Commissioner, he will no doubt deal with the matter in the light of our observations in this judgment.

Given this 27th day of June, 1946, in the presence of Dr. H. Hopp for Petitioners, and Mr. Hooton for Respondent No. 1 and in absence of the rest.

British Puisne Judge.

HIGH COURT No. 54/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF:—

Abdul Fattah Mohammad el Qomi & 7 ors. PETITIONERS.

v.

The Assistant District Commissioner, Hebron & 7 ors. RESPONDENTS.

Possession for purposes of Land Disputes (Possession) Ord. — Complaint of non-observance of technical rules of procedure.

Return to a rule *nisi*, issued on the 28th of May, 1946, directed to the 1st Respondent, calling upon him to show cause, if any, why his order dated 7th May, 1946, purporting to have been made under the Lands Disputes (Possession) Ordinance, 1932, should not be set aside; rule *nisi* discharged:—

1. A temporary trespass on land such as ploughing secretly at night is not sufficient to transfer possession for purposes of Land Disputes (Possession) Ordinance from one party to other.

2. Land Disputes (Possession) Ord. envisages only enquiry, not establishment of permanent rights; non-observance of technical rules of procedure will not vitiate enquiry unless it results in miscarriage of justice.

(*M. L.*)

ANNOTATIONS: For other cases under Land Disputes (Possession) Ordinance see H. C. 34/45 (1945, A. L. R. 730, 12 P. L. R. 965) and annotations in A. L. R. see also H. C. 31/46 (*ante*, p. 566).

(*A. G.*)

FOR PETITIONERS: Nazzal.

FOR RESPONDENTS: No. 1 — Pinhassovitch — Asst. Government Advocate.

2—8 — Nusseibeh.

ORDER.

This is a return to an order *nisi* calling on the Assistant District Commissioner of Hebron District to show cause why an order made by him under the Land Disputes (Possession) Ordinance should not be set aside.

The order was attacked by Mr. Nazzal on behalf of the Petitioners mainly on technical grounds based on failure to conform to what he described as the correct procedure. His criticisms fell under two heads:—

The first was that even granting that the order of the Chief Execution Officer had any relevance to this case, which Mr. Nazzal was not inclined to admit, there was no evidence that the land in dispute was the land covered by the order of the Chief Execution Officer. As to this, we need only say that the Assistant District Commissioner himself visited the land with the advocates for both sides and we cannot believe that there could have been any doubts in the minds of these persons as to what was the issue for which they went to the land on this particular day. They must have been well aware that disputes concerning this plot of land were the concern of both the Administration and the police.

We are of opinion that Petitioners had ample opportunity of putting forward their submissions in regard to the boundaries of this land on the occasion of the inspection. We consider that the Assistant District Commissioner visiting the land was in the best position to identify and demarcate it, and we see no reason to reject his finding which was to the effect that this was the same land as that covered by the order of the Chief Execution Officer.

We come now to the question of the order of the Chief Execution Officer the effect of which, if accepted, was that the Respondents were in possession of this land. The only doubt as to that possession was the incident in January when it has been established, the Petitioners did in fact plough this land. This in itself would be evidence of possession and it should be borne in mind that for the purposes of this judgment it is immaterial whether the possession was lawful. As to the question of the ploughing in January Mr. Miller the Assistant District Commissioner gave an explanation. He said that he did not regard this temporary trespass as he called it, which consisted only of ploughing secretly at night, as sufficient to transfer the possession which according to the order of the Chief Execution Officer was in the Respondents. We think that this was quite a legitimate finding and we accept it.

Other technical points were raised in regard to the production of documents. As to this, we are of opinion that the Assistant District Commissioner was justified in accepting the report of the Inspection Officer which was attached to the judgment of the Chief Execution Officer, without actually calling on the Inspection Officer to produce it, a course which might have been necessary in strict Court proceedings. But the Lands Disputes (Possession) Ordinance is an enquiry only. It establishes no permanent rights and the non-observance of technical rules of procedure will not vitiate the enquiry unless it results in a miscarriage of justice.

For these reasons the rule must be discharged. No costs will be awarded.

Given this 8th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 67/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

Franz Levy. APPELLANT.

v.

Consolidated Refineries Ltd. RESPONDENT.

Dismissal of employees — Defence (War Service Occupations) Regs., Regs. 5, 7, 12.

Appeal from the judgment of the District Court of Haifa, dated 11.2.46 in Civil Case No. 62/45, dismissed:—

The Defence (War Service Occupation) Regulations, while making it an offence to terminate employment in certain circumstances, do not avoid a dismissal or resignation nor do they affect legal remedies available by law to employer and employee.

(*A. M. A.*)

ANNOTATIONS: *Cf.* the third — and second — last paragraphs of the judgment in C. A. 376/44 (12, P. L. R. 179; 1945, A. L. R. 239) where a similar question is discussed regarding the construction of sec. 5 of the Land Transfer Ordinance.

(*H. K.*)

FOR APPELLANT: Klug.

FOR RESPONDENTS: Weston Sanders.

JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa. The Appellant was the Plaintiff in the Court below and claimed from the Defendant salary for 27 months as from the 1st December, 1942, till the 28th February, 1945. His claim also included high cost of living allowances to which employees of the Defendant were entitled. The learned President of the District Court gave judgment in favour of the Plaintiff/Appellant in respect of the months of December, 1942,

and January, 1943, so that the major part of the claim failed.

The cause of action is set out in paragraph 2 of the statement of claim which reads as follows:—

> "In or about January, 1943, Defendants purported to dismiss Plaintiff from his employment but this dismissal was illegal and/or null and void as contrary to the Defence (War Service Occupations) Regulations. Plaintiff is therefore still in Defendants' employ and was and is always ready and willing to do his work."

It is not disputed that the Appellant was in the employ of the Respondents as from 1940, and that he was employed in a war service occupation within the meaning of the Defence (War Service Occupations) Regulations, 1942.

For the purposes of this judgment it will be sufficient to outline the following facts:—

Towards the end of November, 1942, the Appellant was charged by the police with the theft of certain goods belonging to the Respondents and the latter suspended the Appellant from employment. A firm of lawyers, acting for the Appellant, wrote to the Respondents asking them to decide whether they were prepared to continue to engage the Appellant pending the investigations of the police and the hearing of the case, and if not, to kindly give a certificate to that effect so as to enable the Appellant to make arrangements for his future. On the 17th of January, 1943, the Respondents were again written to and asked to pay Appellant's salary for December and January. In reply to this last letter the Respondents wrote on the 27th January, 1943, explaining that their premises being under the supervision of the police in accordance with the Defence Regulations, and the police not allowing a person against whom a charge is pending to enter the said premises, the Appellant would not be able to attend work in the near future. The letter concluded with the information that the place could not be kept open indefinitely and that the employment of the Appellant was terminated as from the date of the letter.

In answer to the last mentioned letter, the Appellant's lawyers wrote to the Respondents pointing out that it was not correct that the police objected to the Appellant's going to his work on the Respondents' premises and adding that the termination of employment was wrongful and that the Appellant reserved "his rights against you in respect of compensation for the termination of his services and for arrears of salary".

Subsequent correspondence ensued, but for the purposes of this judgment we will only refer to a letter from the Appellant's lawyer dated 5th March, 1944, announcing that their client had been acquitted and concluding with a request for his re-instatement and if possible for

compensation to such extent as the Respondents might think adequate. In that letter salary for the month of December, 1942, and January, 1943, was again claimed.

The Respondents did not re-employ the Appellant and explained that there was no suitable vacancy.

It was only in a letter dated the 6.4.44 that a half-hearted attempt was made on behalf of the Appellant to suggest that his dismissal was not effective owing to the fact that he had been employed in a war service occupation. The statement of claim was filed on the 3.4.45.

It appears from the evidence given by the Appellant that in January, 1943, he saw the Controller of Man Power after receiving the letter of dismissal, but it was only after his acquittal that a decision was given on the 5th August, 1944, by the Controller to the effect that the Appellant was not to continue in the employ of the Respondents and that the decision would have effect from the date of the Appellant's discharge. The Appellant went to the Appeal Tribunal constituted under the Regulations, and the decision of the Controller was confirmed.

The basis of the claim in this case is that the termination of the Appellant's employment in January, 1943, was null and void by virtue of Regulation 5 of the Defence (War Service Occupations) Regulations, 1942, and we will now proceed to examine this contention.

Regulation 5 reads as follows:—

> "5. (1) Notwithstanding the provisions of any contract to the contrary, no person who is employed in any war service occupation shall relinquish such occupation without the consent of his employer except with the permission in writing of the Controller.
>
> (2) Notwithstanding the provisions of any contract to the contrary, where any person is employed in any war service occupation his employer shall not, except with the permission in writing of the Controller, terminate the employment of such employee without such employee's consent or unless such employee has been guilty of gross misconduct or gross insubordination, or unless the employer has no more suitable work to offer to such employee.
>
> (3) Any employee who is employed in any war service occupation and who is dismissed by his employer without his consent or without the permission of the Controller may appeal against such dismissal to the Controller who shall decide whether the employer shall or shall not continue to employ such employee."

The first remark that must be made is that regulation 5 does not provide that a termination of employment will be null and void unless it is in accordance with the regulation. What the regulation does is to

lay down the basis for a prosecution under regulation 12 if either the employer or the employee does an act within the mischief of the Regulations. Thus, if an employee relinquishes his employment without the permission of the Controller or without the consent of the employer paragraph (1) of regulation 5 cannot and does not mean that the employee has not in fact ceased to be employed: the only effect of the regulations is that the employee may be prosecuted and punished under the provisions of Regulation 12. In the same way, if an employer dismisses an employee without the latter's consent or without the Controller's permission, the only effect of the Regulations is to render him liable to be punished unless it is proved that the employee was dismissed for misconduct or insubordination or that there was no longer any suitable work for him. In this connection we would point out that regulation 7 of the Regulations makes it clear that although decisions of the Controller (subject to the decisions of the Appeal Tribunal) are final and conclusive, yet this finality does not deprive any person of any right of action which he may have before a competent Court. In other words, if, by virtue of a contract an employer is bound to keep an employee on his staff even if there is no suitable work for him, such an employee would be entitled to sue for his remuneration although the Controller of Man Power has refused to compel the employer to retain the employee.

In the present case, the employee's claim fails on two grounds. The first ground being that the Regulations did not render the termination of employment null and void and the second ground being that (even if the Regulations could be interpreted in the most favourable way for the Appellant) the claim was doomed owing to the fact that the Controller of Man Power sanctioned the termination of employment.

The decision of the learned Judge in the Court below was that the Plaintiff-Appellant had no right to claim salary from the date of termination of his appointment as signified to him in January, 1943. For the reasons given above, we cannot find fault with the decision and we therefore dismiss this appeal with costs on the lower scale together with LP. 15 advocate's attendance fees.

Delivered this 1st day of October, 1946, in the absence of Attornies for both parties (served).

British Puisne Judge.

CIVIL APPEAL No. 226/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Assistant Registrar (M. Cotran).

IN THE APPLICATION OF :—

Rachel Goldberg. APPLICANT.

v.

Julia Levin & an. RESPONDENTS.

Deposit for appeal — Extension of time — C. P. R. 327, 361 — Good cause.

Application for extension of time within which to pay the deposit fixed in the above appeal from the judgment of the District Court Tel Aviv, dated the 28th of May, 1946 in Probate Case No. 290/45, dismissed:—

Extension of time to pay deposit for appeal refused.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 162/46 (*ante*, p. 418) and notes thereto.

(*H. K.*)

FOR APPLICANT: Matussevich.

FOR RESPONDENTS: No. 1 — Polonsky.
No. 2 — Absent — served.

ORDER.

This is an application under Rule 327 of the Civil Procedure Rules to extend the time for payment of the deposit fixed by me. Rule 361 of the same Rules does not apply because that Rule provides for enlargement of time in cases where it is not otherwise expressly provided by the Civil Procedure Rules.

I have carefully listened to the arguments of both Mr. Matussevitch and Mr. Polonsky and I find that no good cause had been shown by Mr. Matussevich to enable me to extend the time for payment of the deposit fixed.

The facts are briefly as follows:—

On the 27th June, 1946, I fixed the sum of LP. 46.— to be paid within fifteen days from the date of service of notice to pay. The notice to pay was duly served on Mr. Matussevich on the 9th July, 1946 and on the 16th of July, 1946, Mr. Matussevich filed an application asking that the amount of deposit should be reduced on the ground that the second Respondent had waived her right for any costs. On the 20th

July, 1946, I granted the application and ordered that the deposit be reduced to LP. 23.—. Mr. Matussevich's own messenger was duly notified of the reduction on the 20th July and Mr. Matussevich has admitted before me that his messenger communicated to him my order of the 20th July on the 22nd July, 1946. The time for payment expired on the 24th July, 1946, that is to say Mr. Matussevich, on his own showing, had still three days within which to pay, but he failed to do so.

I am not concerned with the dealings between Mr. Matussevich and his client. In my view Mr. Matussevich should have taken steps to ensure that the money was ready with him by the time he had to pay it. I go further and say that an advocate for an Appellant should always secure a sufficient sum of money from his client at the time of filing the notice and grounds of appeal so that he may be ready to pay the deposit by the time he is ordered to do so.

The application is dismissed with inclusive costs fixed at LP. 2.—.

Delivered this 30th day of September, 1946.

Assistant Registrar.

CIVIL APPEAL No. 105/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Dr. Kamel Abu Seoud. APPELLANT.

v.

Manouk Agnoni & an. RESPONDENTS.

Appeal listed for dismissal — C. P. R. 327 — Failure to pay amount fixed in lieu of deposit — Application for extension of time — Appeal from District Court in appellate capacity — C. P. R. 317, M. C. J. O., sec. 12 — Order of Registrar regarding deposit, C. P. R. 28, 212 — "Process" (r. 2), "application" (rr. 305—6) — Effect of established practice.

Appeal from the order of the District Court Jerusalem, sitting in its appellate capacity, dated 26.2.46 in Civil Appeal No. 6/46, dismissed:—

1. An appeal lies (by leave) from an order of the District Court dismissing an appeal for non prosecution.

2. It is not necessary to serve the Appellant with an "order" of the Registrar under r. 327. It is sufficient to notify him of the Registrar's directions.

3. The application under r. 327 is made without notice, in writing.

(*A. M. A.*)

ANNOTATIONS:

1. The order of the District Court is reported in 1946, S. C. D. C. at p. 373.

2. On the first point *cf.* C. A. D. C. T. A. 14/45 (1945, S. C. D. C. 454) where a similar ruling was given on the construction of the words "the decision of a Rent Commissioner" in sec. 8 of the Rent Restrictions (B. P.) Ord., 1941.

3. Rules 305 *et seq.* of the C. P. R. were held to be inapplicable to "applications" under r. 327 in C. A. 27/39 (6, P. L. R. 255; 1939, S. C. J. 260; 5, Ct. L. R. 239) and C. A. 101/39 (6, P. L. R. 499; 1939, S. C. J. 423; 6, Ct. L. R. 133).

4. *Vide* C. A. 226/46 (*ante*, p. 577) and note thereto.

(*H. K.*)

FOR APPELLANT: Levitzky and S. T. Cohen.

FOR RESPONDENTS: W. Salah.

JUDGMENT.

This is an appeal by leave from an order of the Acting Relieving President of the District Court of Jerusalem dismissing an appeal which was listed for dismissal in accordance with the provisions of Rule 327 of the Civil Procedure Rules, 1938.

It is necessary to set out the following facts before dealing with the points which fall to be decided.

The present Appellant wished to appeal to the District Court from a decision of a Magistrate's Court. Instead of filing a bond for the indemnification of the Respondent for the costs of appeal (as provided by rule 325) the Appellant availed himself of rule 327 and annexed to his notice of appeal a written application for an amount to be fixed by the Registrar of the District Court to be paid into Court in lieu of furnishing a bond. This application was made on the 17.1.46 and the next day the Registrar fixed the amount of LP. 15 to be paid 10 days from date of service. A notice issued by the Registry was served on Appellant's advocate on the same day informing him of the amount fixed by the Registrar and of the time within which the amount had to be paid into Court.

The amount was not paid in as directed and it is not disputed that the matter was lost sight of by the clerks of the Appellant's advocate.

On the 21st February, 1946, the case was listed for dismissal and the Appellant then took steps to apply to the Court for an enlargement of time for payment of the deposit. On the 26th February the learned

Relieving President dismissed this last mentioned application and then dealt with the question of dismissing the appeal under rule 327. He decided to dismiss the appeal. It is against the last mentioned decision that the present appeal is made (this results clearly from the application for leave to appeal and the order granting leave). The fourth ground of appeal is therefore irrelevant. Before proceeding further, we will deal with a point raised before the Court below and before us on behalf of the Respondent by advocate W. Salah.

Mr. Salah pointed out that section 12 of Ordinance 45 of 1939 lays down that the decision of the District Court in an appeal from a Magistrate's Court shall be final but that the presiding judge of the District Court which heard the appeal may, in proper cases, grant leave to appeal to the Supreme Court. Mr. Salah's submission is that the District Court never heard the appeal and that leave to appeal to this Court could not, therefore, be granted, and he added that rule 317 of the Civil Procedure Rules only applies to orders made by the District Court in its capacity as a Court of first instance.

It is true that the appeal was not listed for hearing, but for dismissal. Being given, however, that the appeal had been filed in the Registry it could not be dismissed without a decision of the appellate Court (*i. e.* the District Court). We are of opinion that the words "the decision of the District Court in an appeal", occurring in section 12 of Ordinance 45 of 1939, are wide enough to include a dismissal under rule 327 of the Civil Procedure Rules, and we consider that for the purpose of the said Article 12, such a dismissal must be construed as being made by a Court which heard the appeal.

We will now turn to rule 327.

It must be borne in mind that where a would-be Appellant files a bond in form 31 of Schedule I to the Civil Procedure Rules, the Respondent is thereby fully protected because the bond secures payment of all the costs which an unsuccessful Appellant may have to pay. If a bond is not filed together with the notice of appeal and other documents, the appeal should not be accepted for filing (rule 330) unless an application is made under rule 327. In such cases, the appeal is filed pending deposit of the amount fixed by the Registrar. When such deposit is not effected, the appeal is listed for dismissal.

We have been told that the established practice under rule 327 has been the one followed in the present case and described above. The gist of the objection raised by the present Appellant is that he was not served with a copy of the "order" made by the Registrar but only with a notice purporting to set out the terms of the "order". Relying

on rules 28 and 212, the Appellant contended that the ten days fixed by the Registrar never began to run because copy of the order was not served upon him.

We are of opinion that the fallacy of Appellant's argument lies in the fact that the word "process" in rule 28 does not apply to the Registrar's order ("directions" would be a more correct word) fixing the amount to be deposited and the time within which it is to be deposited. "Process" is defined in rule 2 as meaning any document including any order, to be delivered or served under these rules. There is nothing in rule 327 concerning service. Moreover, it is important to bear in mind that no one can compel the would-be Appellant to make a deposit as directed by the Registrar under rule 327, if he fails to do so his appeal may be dismissed. We would lay stress on the fact that rule 327 affords a concession to the Appellant and that the presumption is that the rule was not intended to enable an appellant, who asks for a privilege, to protract the proceedings.

Mr. Levitsky who appeared for the Appellant called our attention to the word "application" in rule 327. We have devoted special attention to rule 327 and also to rules 306 and 206 and have found some difficulty in construing the words "accompanied by an application" which occur in rule 327. For facility of reference we reproduce rule 327 which reads as follows:—

> "The Appellant may, instead of filing the bond referred to in rules 325 and 326, offer to pay into Court an amount to be fixed by the Registrar of the Appellate Court or offer to give other reasonable security to the satisfaction of the Registrar, and in such case the notice of appeal shall be accompanied by an application to fix the amount to be paid into Court or to settle and approve the security offered. The Registrar shall fix a time within which such payment is to be made or security, if approved, given and in the event of non-compliance therewith the appeal shall forthwith be listed for dismissal on notice being given to the parties, provided that the Registrar may, on good cause being shown, extend the time limit aforesaid upon application being made to him before the expiration thereof."

It will be noted that the word "application" occurs twice. It is also of interest to note that the word "therewith" in the phrase "in the event of non compliance therewith" does not refer to any word such as "order" or "directions".

It is not easy to understand how the notice of appeal can be "accompanied by an application" if "application" is to be construed in the light of rules 305 and 306 which lay down that an application, unless it is otherwise expressly provided, must be by motion. A motion may

be with or without notice to parties affected thereby (rule 306). A motion is a verbal application and it is not clear how it can "accompany" other documents. One possibility which we have envisaged is that it was intended that the application be made by motion with notice to the Respondent and that the notice of motion would have to be filed with the other documents. We have, however, discarded this interpretation because rule 329 indicates clearly that the intention was that the Respondent would not take part in the fixing of the deposit under rule 327. We have been strongly tempted to hold that "application" where it first occurs in rule 327 was meant for "request" but we have reached the conclusion that such a construction, although more logical, is hardly justifiable being given that the word "request" is used in other rules such as rule 330. We have finally reached the conclusion that we had to respect the meaning of "application" as given in rule 306, but we consider that the application accompanying the notice of appeal is to be made without notice. Strictly, such an application should be made verbally but we feel justified in recognising the established practice of a written request. A strict construction of rule 327 would, however, be that the motion for an amount to be fixed is made at the time the notice of appeal and other documents are brought to the Registry: such a procedure would do away with any difficulty about notification.

As already stated, we do not deem it imperative to condemn the established practice. We feel that the Appellant runs no risks, because when the appeal is listed for dismissal he has the opportunity to satisfy the Court that there were good reasons why he failed to pay the deposit within the time fixed. In the present case, the learned District Court Judge was, in our opinion, justified in dismissing the appeal under the provisions of rule 327 and we therefore dismiss the present appeal with costs on the lower scale and LP. 5.— advocate's attendance fee.

Delivered this 1st day of October, 1946, in the presence of Mr. Cohen for Appellant & Mr. W. Salah for Respondent.

British Puisne Judge.

CRIMINAL APPEAL No. 98/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, A/C. J., De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Dahshat Farid Abu el Iyoun & 6 ors. RESPONDENTS.

Amendment of information — T. U. I. Ord. — Sec. 72(1)(c) — Mistake in date in information.

Appeal from the judgment of the District Court of Nablus, dated 12th June, 1946, in Criminal Case No. 89/46, whereby Respondents were acquitted on charges *contra* section 152(1)(c) of the Criminal Code Ordinance, 1936, allowed:—

Before acquitting the Accused on that ground, the Court should apply its mind to the question whether an information containing a mistake should or not be amended.

(*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 171/45 (*ante*, p. 75) and note thereto; see also CR. A. D. C. Jm. 52/46 (1946, S. C. D. C. 426).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Hooton).

FOR RESPONDENTS: Y. Hamoudeh.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Nablus holding that an information was bad and acquitting the seven persons charged. The facts are that an information had been filed containing two counts of sodomy against the same victim, the first count alleging that all the seven Accused had committed sodomy on 7th February at Kfar Yona, and the second count alleging that the first three Accused had committed sodomy near Tulkarm on the same day against the same victim.

After the Accused had all pleaded not guilty, the prosecutor informed the Court that the date in the information as to the second offence was wrong and should have been 22nd February. The learned trial Judge thereupon held that the information was bad, apparently as regards the second count only, because he acquitted the first three Accused on the second count. The Accuseds' advocate then asked for a ruling on the first count, whereupon the Court found that the information as a whole was "in its present form bad", and acquitted all the seven Accused. Against these acquittals the Attorney General now appeals.

We are of the opinion that, if the learned trial Judge considered that it was not right to try both counts of the information at one trial, he should have ordered separate trials of each count, but should not have found the information to be bad and should not have acquitted the Accused. In any event, the learned trial Judge does not seem to have

applied his mind to the question of whether he should exercise the wide powers of amendment of the information given to him by the Criminal Procedure (Trial Upon Information) Ordinance.

We accordingly allow the appeal and set aside the judgment of the Trial Court acquitting the Accused, and we remit the case to the District Court of Nablus for a new trial under section 72(1)(c) of the Criminal Procedure (Trial Upon Information) Ordinance. The trial will be on the information as filed. The Attorney General and the Respondents will respectively be at liberty to apply for such amendments to the information as they may think fit and for separate trials on the two counts. This judgment will not preclude the defence from raising at the retrial such objections as they may think fit.

Delivered this 25th day of September, 1946.

Acting Chief Justice.

HIGH COURT No. 56/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPLICATION OF :—

Sarah Rivka Mondeschein. PETITIONER.

v.

Chief Execution Officer, Magistrate's Court, Jerusalem & an. RESPONDENTS.

Judgment embodying condition precedent to execution — Decision of Court exonerating judgment creditor from carrying out condition — Question of laches.

Return to a rule *nisi*, issued on the 7th June, 1946, directed to the 1st Respondent, calling upon him to show cause why his order dated the 15th April, 1946, in Execution file (Magistrate's Court, Jerusalem) No. 1197/44 should not be set aside, and why he should not execute the judgment of the Magistrate's Court, Jerusalem, in file No. 1843/43, dated 23rd July, 1944, which forms the subject-matter of the said execution file, the rule *nisi* made absolute:—

1. If a condition precedent to execution of judgment which was embodied in Court's decision was not carried out, Chief Execution Officer is right in refusing execution.

2. Decree holder petitioning High Court cannot be said to have slept on his rights, if upon Chief Execution Officer's order not to execute because of

failure to carry out condition embodied in judgment he took action in competent Court to be exonerated from condition precedent and by no fault of his it took a long time before judgment was given.

3. A judgment carries with it a fundamental right to be executed, unless it is incapable of being executed or unless its execution has been subject to a restriction which it is in Chief Execution Officer's discretion to impose.

(*M. L.*)

ANNOTATIONS: In the following cases High Court refused to interfere owing to Petitioner's delay in applying: H. C. 147/42 (1943, A. L. R. 35; 10, P. L. R. 7); H. C. 17/43 (1943, A. L. R. 190); H. C. 58/45 (1945, A. L. R. 638).

In the following cases delay was excused: H. C. 14/39 (6, P. L. R. 190; 1939, S. C. J. 163; 5, Ct. L. R. 171); H. C. 102/44 (1945, A. L. R. 213); H. C. 121/44 (1944, A. L. R. 771).

On point 3 see H. C. 139/44 (1945, A. L. R. 469) and annotations.

(*A. G.*)

FOR PETITIONER: Eliash.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — P. Rabinovitch.

ORDER.

This is a return to an order *nisi*, calling upon the Chief Execution Officer, Jerusalem, to show cause why he should not execute a judgment. The judgment in respect of which the complaint has been made, was a compromise judgment between the Petitioner and the 2nd Respondent. When that judgment was submitted for execution, the First Respondent on the 30th of November, 1944, made the following order:—

> "After consideration I find that in view of the circumstances in this file I shall not be able to execute the judgment."

Now there is no doubt in our minds that in the light of the circumstances, such an order was fully justified. The circumstances were that a condition precedent to the execution of the judgment which was embodied in the Court's decision had not been carried out. The Petitioner thereupon took action in the Magistrate's Court of Jerusalem, and, briefly stated, the effect of the decision of the Magistrate was that the Petitioner was exonerated from carrying out the condition precedent because he was prevented from doing so by the 2nd Respondent. The Petitioner then went back to the Chief Execution Officer and asked for a review of the 1944 order not to execute in the light of the Magistrate's later decision, the Chief Execution Officer on that application made the following order on the 15th March, 1946:—

> "After taking into consideration all the circumstances and in view of the present state and the long time which has elapsed, I find no ground to alter my decision of the 30.11.44."

Mr. Rabinovitch has argued that this complaint is a complaint against the non-execution of the judgment of 1944, and he asks that the rule be discharged because of laches. Certainly, if no action had been taken by the Petitioner since 1944 we would not hesitate to accept Mr. Rabinovitch's argument that there has been such laches on the part of the Petitioner as would prevent us from granting any relief now. But the facts must be examined and the circumstances appreciated.

It seems to us that there was no laches on the part of the Petitioner in the sense that he slept on his rights. He took action in the Magistrate's Court, and this course was vindicated to this extent that the Magistrate's decision unravelled the knot which prevented the 1944 judgment from being executed.

It must be emphasised that when a person obtains a judgment, that judgment carries with it a fundamental right to be executed, unless it is incapable of being executed, or unless its execution has been subject to a restriction which it is in the discretion of the Execution Officer to impose. The reason why the Execution Officer did not execute on the second application, was, because of the long time which in his opinion had elapsed. But it seems to us that he failed to take into account the activity of the Petitioner meanwhile. The fact that the case took such a long time to go to judgment was not the fault of the Petitioner. Moreover the Petitioner was fully justified in not taking any further action pending the Magistrate's decision which obviously would have a bearing on the question of the execution of this judgment. It has not been argued that there was laches since the date of delivery of the 1946 order of the Chief Execution Officer.

For these reasons the rule must be made absolute with LP. 10.— inclusive costs to Petitioner.

Given this 25th day of July, 1946, in the presence of Mr. Scharf for Petitioner and Mr. Dostrovsky for Respondent.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 30/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards, A/C. J., De Comarmond and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Solomon Felman. APPLICANT.

v.

Edward Z. Felman. RESPONDENT.

Failure to furnish in due time bank guarantee in connection with Privy Council leave to appeal — Unsuccessful application to Court of appeal for extension of time.

Application for extension of time for the payment of the Deposit in lieu of security, refused:—

Court of Appeal will not exercise its discretionary power under Art. 6, Palestine (Appeal to Privy Council) Order-in-Council, 1924, if Applicant by showing very little anxiety to comply in due time with a condition imposed by Court has allowed time limit for compliance to expire.

(*M. L.*)

REFERRED TO: P. C. L. A. 25/44 (12, P. L. R. 204; 1945, A. L. R. 486); P. C. L. A. 44—52/45 (1946, A. L. R. 230).

ANNOTATIONS: See cases referred to and annotations in A. L. R.

(*A. G.*)

FOR APPLICANT: Michaeli.

RESPONDENT: In person.

ORDER.

De Comarmond, J.: On the 29th May, 1946, Mr. Solomon Felman obtained conditional leave to appeal to the Privy Council. One of the conditions was that, within six weeks from the date aforesaid, a Bank Guarantee in the sum of LP. 300.— had to be furnished for the due prosecution of the appeal and as security for costs. The period thus fixed expired on the 10th July, and the condition was not complied with by that date.

Mr. Solomon Felman has now applied for an extension of the six weeks period on the ground that his failure to comply with the aforementioned condition is due to the fact that on the 10th July, 1946, his clerk was detained by the military for interrogation while on his way from Tel Aviv to Jerusalem to deposit LP. 300 with the Chief Registrar, and ultimately reached Jerusalem too late. The Applicant has put in two affidavits, one sworn by himself and the other by his clerk; he has also produced a certificate to the effect that, LP. 300 were tendered on the 11th July to the Chief Registrar who refused to accept the same because the time limit had expired.

The Applicant's contention is that this Court had discretionary power under Article 6 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, to enlarge the period originally fixed by the Court provided that the total period does not exceed three months. This contention is supported by the rulings given by this Court in P. C. L. A. 25/44 (12, P. L. R. 204) and P. C. L. A. 44—52/45 (Annotated Law

Reports, 1946, page 230). We would point out that it is clear from both these rulings that the Court would only exercise its discretion in cases where there are special circumstances which justify such a concession. We would add that in our opinion it is most important to ensure that an appellant should not be permitted to treat lightly the conditions imposed by the Court and to delay the due prosecution of the appeal; it seems to us that the Respondent is entitled to be protected against unnecessary waste of time due to the Appellant's negligence or lack of foresight.

The Respondent, Mr. Edward Zwi Felman, has appeared in person and has resisted the application for extension of time. He mentioned that he had come to Court on very short notice and had had no time to put in counter affidavits. The Respondent's main point is that no sufficient cause had been established for the exercise of the discretion vested in the Court; he contested the genuineness of the explanation furnished by the Applicant and submitted that, at any rate, the Applicant had been negligent.

We will now proceed to scrutinise the facts set out in the two affidavits. These documents purport to establish that the Applicant's clerk left Tel Aviv by bus at 9.30 *a. m.* on the 10th July, that on that day buses were stopped and searched at Latrun by the military, that Applicant's clerk happened to be without his identity card and was therefore detained for investigation. According to the clerk's affidavit he was released at 12.30 *p. m.* and reached Jerusalem when the Registry of the Supreme Court was closed. The time of arrival at Jerusalem is not given; no effort was made to communicate with the Registrar or assistant Registrar; there is no corroboration of the clerk's story.

In the circumstances, can it be said that good cause has been established for the exercise of the discretion vested in this Court? We do not think so.

Assuming that the story unfolded to us is true, we are of opinion that a litigant who has shown so little anxiety to comply in due time with a condition imposed by the Court, does not deserve special consideration. Any prudent man would be fully alive to the danger of waiting till the eleventh hour and would show more foresight in guarding against the ordinary hazards of road travel such as breakdowns *etc.* But, in the present case, we must go further and say that we are not favourably impressed by the evidence. It seems to us difficult to believe that the Applicant would have waited until 9.30 *a. m.* to send his clerk by bus to Jerusalem and we are very sceptical about the extraordinary coincidence of the bus being searched and the clerk being

without his identity card. We also attach some importance to the fact that the affidavits were not sworn until the 17th July.

For the foregoing reasons, we are of opinion that the Applicant has failed to satisfy us that this is a proper case for the exercise of our discretion in his favour. The application is therefore refused.

In respect of this application we grant LP. 10.— inclusive costs to the Respondent.

Given this 12th day of August, 1946, in presence of Mr. A. Michaeli for Petitioner and Mrs. Rubinstein for Respondent.

British Puisne Judge.

Edwards, J.: I agree.

Acting Chief Justice.

CRIMINAL APPEAL No. 87/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, A/C. J., De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abed el Salam Abdel Majid. APPELLANT.

v.

The Attorney General. RESPONDENT.

Evidence of co-accused — Accused called as a witness by prosecution — Cross-examination of accused as to character — Confessions.

Appeal from the judgment of the District Court of Jaffa in Crime No. 149/46, dated 2nd July, 1946, whereby the Appellant was convicted of burglary contrary to section 295 of the Criminal Code Ordinance, 1936, and sentenced to 18 months imprisonment, allowed:—

1. An accused may not be called as a witness against a co-accused before the close of the case for the prosecution.

2. An accused who has not set up the defence of good character or attacked the character of the prosecution witnesses, may not be cross-examined as to previous convictions.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* R. *v.* Payne, 1872, L. R. 1 C. C. R. 349, 41 L. J. M. C. 65, 26 L. T. 41 and R. *v.* Hadwen, 1902, 1 K. B. 882, 71 L. J. K. B. 581, 86 L. T. 601, 18 T. L. R. 555; see Phipson on Evidence, 8th ed., pp. 446—7.

2. Note that in Palestine an attack on the character of a prosecution witness does not expose the Accused to cross-examination in connection with previous convictions: CR. A. 121/45 (1945, A. L. R. 774).

(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: Assistant Government Advocate — (Koukia).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa whereby the Appellant was convicted of the offence of burglary and sentenced to eighteen months' imprisonment.

At the trial there was no evidence whatsoever against the Accused except that of a co-accused and an alleged confession. The prosecution was conducted not by one of the Government advocates but by a Police Inspector. There were at least 2 irregularities in the conduct of the trial, the first being that before the close of the case for the prosecution and before the other Accused, one Mustafa, was called upon to enter on his defence, the prosecutor asked that the said Mustafa be allowed to give evidence apparently with the intention of testifying against his co-accused, the present Appellant. Now, not only had Mustafa never been a witness in the Court below but his name did not appear on the reverse of the information as a witness. Moreover, he being an accused himself, it was quite irregular for him to be called either by the prosecution or by the judge as a witness at that stage. Nevertheless, the trial Judge allowed this unusual procedure to be followed and Mustafa at that stage, that is to say, before he himself had entered on his defence and, of course, before he was convicted, was called upon to answer questions with regard to the other Accused, the present Appellant.

The second irregularity was that the present Appellant, who gave evidence on his own behalf in the witness box, was cross-examined by the prosecutor with a view to admitting previous convictions and he did in fact admit 4 or 5 previous convictions notwithstanding the fact that he, the Appellant, had not set up the defence of good character nor had he attacked the character of the witnesses for the prosecution. This, of course, was also quite irregular.

Mr. Koukia, for the Crown, contends that the trial Judge was entitled to act on the evidence of an alleged confession made by the Appellant to a Police inspector. It is true that, although the Appellant alleged that the confession was made as a result of being beaten by a Police corporal, yet the trial Judge, as he was entitled to do, disbelieved the Appellant and believed that the confession was a voluntary one.

Had the matter depended on the confession alone and if the trial Judge had convicted on the confession alone, perhaps this might have been sufficient to justify the dismissal of this appeal. But the trial

Judge in his judgment obviously relied on the evidence of Mustafa. It is accordingly impossible for us to know to what extent the mind of the learned trial Judge was influenced by the wrongful admission of the evidence of Mustafa or by the wrongful admission of the evidence as to the previous convictions of the Appellant.

For these reasons we think that the conviction cannot stand and must be quashed.

The Accused will accordingly be set at liberty unless he is detained on another charge.

Delivered this 7th day of August, 1946.

Acting Chief Justice.

HIGH COURT No. 57/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF:—

Elias Moussa Abboud, in his capacity as administrator of the estate of the late Moussa Elias Abboud. PETITIONER.

v.

Jamil Sima'an Abboud & an. RESPONDENTS.

Acknowledgment of debt in Notarial Deed — Execution proceedings after debtor's death — Scope of Art. 69, Notary Public Law.

Return to a rule *nisi*, issued on the 28th May, 1946, directed to the Respondents, calling upon them to show cause why they should proceed with the execution of the Notarial Deed No. 2146/34 dated 3rd December, 1944, for LP. 300 before a judgment of a competent Court is obtained by the 1st Respondent against the Petitioner for the value of the deed, the rule *nisi* made absolute:—

Art. 69, Notary Public Law (enforcement of Notarial Deed) only holds good if action is taken during debtor's life; creditor cannot start execution proceedings against debtor's heirs before obtaining a judgment of a competent Court against them.

(*M. L.*)

FOR PETITIONER: J. Habiby.

FOR RESPONDENTS: No. 1 — J. Sahyoun.
No. 2 — Absent — served.

ORDER.

Petitioner's son, Moussa Elias executed in 1944 a Notarial deed acknowledging his indebtedness to the 1st Respondent in the sum of LP. 300 payable on the 4.6.45.

Mussa died on the 27.7.45 and prior to his death no steps had been taken by the creditor to recover the sum due to him. It was only in December, 1945, that the 1st Respondent began execution proceedings and in March, 1946, the Petitioner was served with a notice of execution. Petitioner objected to execution and asked that the proceedings be cancelled. The Chief Execution Officer (2nd Respondent) did not uphold Petitioner's contention and ordered execution to proceed unless the Petitioner brought an action within 1 month and established payment. This decision was given on the 13th May, 1946.

The points raised by the Petitioner before the 2nd Respondent are set out in the petition and were argued before us.

The main contention is that a creditor cannot proceed to execution under Article 69 of the Law of the Notary Public of the 28th October, 1913, unless he obtains judgment against the representatives of the deceased debtor or unless he has begun to take action under the said article prior to the death of the debtor. The relevant articles of the law of the Notary Public are 66 and 69. The former enacts that deeds and other documents drawn up by a Notary in conformity with the provisions of the said law shall be accepted in proof and acted upon by the Courts and other Government departments without other evidence. It is clear that this Article 66 does nothing more than to proclaim the authenticity of the notarial document. In this connection it is of interest to remember that Articles 72 and 74 of the Ottoman Code of Civil Procedure, which were in force when the Notaries' Law was passed, referred to such documents as "officially authenticated documents" and declared that they were admissible as evidence of agreements as between the contracting parties and their heirs and assigns.

Executory force is derived from Article 69 and the question which falls to be decided in this case is whether Article 69 holds good when the debtor dies before proceedings are started.

The relevant part of Article 69 reads as follows:—

> "When an acknowledgment of debt has been drawn up by a Notary under section 63 of this law, and the debt is not paid by due date, the Notary, if so required by the creditor, will issue a notice calling upon the debtor (if alive) to pay within 8 days. If the debtor does not comply the Execution Office, on the petition of the creditor,

will proceed at once to attach his movable and immovable property ....."

The learned advocate for the Petitioner has suggested that the translation reproduced above is not quite satisfactory and his submission is that the words "if alive" should not be between brackets. We do not think that the variations suggested by the learned advocate would make much difference in the interpretation of the article. We do not accept the view that where the debtor is not alive, Article 69 still holds good as against his representatives. In other words, we attach great importance to the words "if alive."

It is important to note that Article 69 provides that even where a debtor is still alive he may raise certain objections to execution and may for example aver that he has paid an amount on account or by way of set-off, and in such circumstances the Execution Office may suspend execution until a Court of competent jurisdiction has decided the matter. It seems to us difficult to accept that Article 69 would take no account of the difficulty in which the representatives of a deceased debtor are placed when faced by execution in respect of a debt which they probably know nothing about. If such were the idea embodied in Article 69 there would be great danger of a dishonest creditor claiming payment twice, and if we look at other provisions contained in the *Mejelle* and in the law of execution we are confirmed in our idea that Article 69 only holds good so long as action is taken during the debtor's life.

We would call attention to Article 31 and 36 of the Ottoman Execution Law and also to Article 32 which refers to Article 1746 of the *Mejelle* and lays down that where a debtor dies before paying his debt, the creditor must take the oath before the Court of the District in which he lives that the debt has not been satisfied (Article 32 obviously refers to a judgment creditor and to a judgment debtor).

We therefore hold that Petitioner's contention in this case is correct and that the execution proceedings should not be proceeded with before a judgment of a competent Court has been obtained by Respondent No. 1 against the Petitioner. The rule *nisi* is hereby made absolute and the Petitioner is granted LP. 10— inclusive costs to be paid by the 1st Respondent.

Given this day of July, 1946.

Chief Justice.

HIGH COURT No. 50/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPLICATION OF :—

Itshaq Har-Tsvi. PETITIONER.

v.

Assistant Chief Execution Officer, Tel-Aviv & an. RESPONDENTS.

Husband alleging lack of jurisdiction of Rabbinical Court because of his not being a registered member of Jewish Community — Rabbinical Court of Appeal overruling plea of non jurisdiction — Husband submitting in High Court that his wife, too, is not a member of the Jewish Community — Non-interference of High Court.

Return to a rule *nisi* issued on the 6th of May, 1946, directed to the 1st Respondent calling upon him to show cause why his order dated 29th April, 1946, given in District Court Execution file No. 333/46, Tel-Aviv, ordering that the amount of LP. 170 deposited in the said file be paid to Respondent No. 2 should not be set aside, the rule is discharged:—

If judgment of Rabbinical Court of Appeal shows that husband's allegation of non jurisdiction because he was not a registered member of the Jewish Community was baseless and no question has arisen as to his wife's membership, High Court will not interfere and will not entertain the contention of non membership of the wife.

(*M. L.*)

ANNOTATIONS :

1. Petitioner's affidavit stated *inter alia* that he never consented to the jurisdiction of the Rabbinical Court and that both he and his wife were not members of the Jewish Community. Attached to the affidavit was a letter from the *Vaad Leumi* in support of the latter averment.

2. *Cf.* H. C. 105/45 (13, P. L. R. 180; 1946, A. L. R. 546) and annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: Kolodny.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Y. Goldenberg.

ORDER.

This is a return to an order *nisi*. We find it desirable in the first instance to state briefly the facts as they appear from the record before

us. This is a matrimonial dispute which arose first in the Rabbinical Court of Haifa. The Court made an order covering two phases of the action; it gave the mother custody of the child with a maintenance allowance of LP. 12 per month and it decided that LP. 170 which apparently by the consent of the parties was deposited in the Bank, should be handed over to the Respondent. The Petitioner did not appear in the Court of first instance, but asked for an adjournment on a ground which did not raise the issue of jurisdiction. He appealed against the judgment of the Court of first instance to the Rabbinical Court of Appeal and the main ground of his appeal which is also the main issue before this High Court, was the lack of jurisdiction. The Rabbinical Court of Appeal considered, as it was entitled to consider, the question of its own jurisdiction, and in the event it came to the conclusion that both the Court of first instance and the Appeal Court had jurisdiction. Their judgment on this issue is framed in the following words:—

> "The Appellant's contention of lack of jurisdiction must fail as it was found that he is registered in the books of *Knesset Israel* the Jewish Community of Haifa."

We agree with counsel for the Petitioner that this Court sitting as a High Court will always enquire into the jurisdiction of the Religious Communities. Coming then to the question of jurisdiction it appears to us that we must infer from this extract of the judgment of the Rabbinical Court of Appeal that the decision as to the Petitioner's allegation of non jurisdiction depended on the answer to the question whether or not the Petitioner was a member of the Jewish Community. In so far as the judgment goes no question appears to have arisen as to the wife's membership of that community. Now the Rabbinical Court of Appeal came to a conclusion on this issue on certain facts which were adduced before it. We will not now enquire whether the evidence which was led to establish those facts was worthy of credence, because that was essentially an issue for the Rabbinical Court. For these reasons the rule must be discharged. We do not award any costs.

Given this 16th day of July, 1946.

Chief Justice.

CIVIL APPEALS Nos. 128 & 206/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEALS OF :—

C. A. 128/46:—

Eli Lindheimer & an. — APPELLANTS.

v.

Ilse Lindheimer. — RESPONDENT.

C. A. 206/46:—

Ilse Lindheimer. — APPELLANT.

v.

Eli Lindheimer & an. — RESPONDENTS.

Succession — Legitimacy of child — Evidence of non-access, Russell v. Russell — Evidence Ord., sec. 3 *— Law of Succession applicable to a stateless Jew not being a registered member of the Jewish Community, C. A.* 195/43 & *C. A.* 122/44 *— Succession Ord., secs.* 8(2), 9.

Appeals from the judgment of the District Court of Haifa dated 25th March, 1946, in Probate Case No. 9/46; partly allowed:—

1. A birth certificate is not sufficient evidence of illegitimacy.

2. Section 3 of the Evidence Ordinance deals only with the competence of witnesses — it does not deal with the kind of evidence they can give.

3. The English common law rule that neither husband or wife is permitted to give evidence of non-access after marriage to bastardize a child born in wedlock applies in Palestine.

4. The law applicable to the distribution of the movable and *mulk* immovable estate of a stateless Jew who is not a member of the Jewish Community is *semble* Jewish law. Effect should, however, be given, to a prayer by an interested person to apply the Ottoman Law instead.

(*A. M. A.*)

REFERRED TO: Russell *v.* Russell, 1924, A. C. 687, 93 L. J. (P.) 97, 131 L. T. 482, 40 T. L. R. 713; C. A. 195/43 (10, P. L. R. 405; 1943, A. L. R. 395); C. A. 122/44 (11, P. L. R. 522; 1945, A. L. R. 75).

ANNOTATIONS:

1. On the first point *cf.* Halsbury, Vol. 2, p. 560, para. 769; *vide* also *Re* Hamer's Estate, 1937, 1 All E. R. 130, 53 T. L. R. 275.

Note, however, that in a divorce case a mother's entry in a birth certificate may be received as confession of adultery: Brierley *v.* Brierley & an., 1918, P. 257, 87 L. J. (P.) 153, 119 L. T. 343, 34 T. L R. 458.

2. The ruling on the second point confirms that given in C. D. C. Ha. 33/44 (1945, S. C. D. C. 360).

3. For the effect of the rule in Russell *v.* Russell (*supra*) see Halsbury, Vol. 10, p. 663, para. 976; *vide* also Glenister *v.* Glenister, 1945, 1 All E. R. 513.

4. On the last point see the cases cited and the notes thereto in A. L. R.

Note, however, that the *mulk* estate of a *Palestinian* member of a religious community will, subject to testamentary dispositions, *in a civil court* always be distributed according to the Ottoman law, and not according to religious law: Succession Ord., sec. 11(d).

(*H. K.*)

C. A. 128/46:—

FOR APPELLANTS: Perlmutter (by delegation from J. Segal).

FOR RESPONDENT: S. Stern.

C. A. 206/46:—

FOR APPELLANT: S. Stern.

FOR RESPONDENTS: Perlmutter (by delegation from J. Segal).

JUDGMENT.

Shaw, J.: The hearing of these two appeals has been consolidated the parties not objecting.

Both appeals are against the judgment dated 25.5.46 of the District Court of Haifa in Motion No. 461/45 which was an application by the widow (Ilse Lindheimer) for an Order of Succession to Wilhelm Lindheimer. That application was opposed by the father and mother of the deceased who are now the Appellants in C. A. 206/46.

Before the lower Court there was no dispute in regard to the following points:—

1. That Wilhelm Lindheimer died in May, 1945.

2. That he was a Jew and a stateless person who came to Palestine and had been deprived of his German nationality; and

3. That Ilse Lindheimer and the deceased were married in Prague on 22.3.37, and that the marriage was valid under the law of Germany of which country both parties had been nationals.

Dr. Stern who appears for the widow has submitted in this Court that there is a possibility that, as a result of the repeal of the German law of 15.9.35 the deceased had become once more a German national, but this has not been proved and we must proceed on the assumption that the deceased was stateless.

The lower Court observed that the real points of dispute were the following:—

1. Is the child Aviva born to Petitioner the legitimate child of the deceased?

2. What law is to be applied in making the order of succession to the movable property of the deceased?

With regard to the question of legitimacy I find that the learned Judge properly held that the birth certificate was not sufficient evidence of illegitimacy. He further held that there was no clear evidence that the deceased had left Palestine on a definite ascertained date, and he ruled that the widow could not be allowed to give evidence of non-access. Mr. Segal who appeared for the widow at the hearing in the lower Court submitted that the common law rule that neither a husband or wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock (see Russell *v.* Russell, 1924, A. C. 687) does not apply in Palestine, and he relied on section 3 of the Evidence Ordinance (Cap. 64) for the admission of such evidence. Section 3, however, deals only with the competence of witnesses — it does not deal with the kind of evidence they can give. For example this section does not sanction the admission of hearsay evidence. In the absence of any specific provision in the law of Palestine I am of the opinion that the English common law rule must be held to apply by virtue of Art. 46 of the Palestine Order-in-Council, 1922. (Vol. 3, Laws of Palestine p. 2580). If the evidence given by the widow that she had last seen her husband at the end of January, 1941, be excluded — as it must be — I agree with the learned judge that non-access had not been proved. It may be observed that the widow is not in fact asking for a declaration that the child is illegitimate.

There remains the question what law is to be applied in deciding the succession to the movable property of the deceased. The learned Judge held that as the husband and wife were stateless Jews the Rabbinical law applied, and he further held that the Applicant (widow) had failed to prove that law.

The deceased was a stateless person and a Jew by religion. Section 4(3) of the Succession Ordinance (Cap. 135) provides that where the deceased was either a foreigner or, not being a foreigner, was neither a Palestinian citizen nor a member of one of the religious communities, his *mulk* land and movables shall be distributed in accordance with the national law of the deceased.

In the present case the deceased was not a Palestinian citizen, and there is no evidence that he was a member of the Jewish Religious Community.

Dr. Perlmutter for the Appellants in C. A. 128/46 (who are the father and mother of the deceased) has referred to C. A. 195/43 (10, P. L. R. 405). In that case the Court said:—

"But there is no uniform law in Palestine relating to personal status.

> The Courts of this country being faced with a matter of personal status of persons who have no nationality have therefore to apply the religious or communal law of the parties and both of them being Jews the law applicable is Jewish law."

Dr. Perlmutter has also referred to C. A. 122/44 (11, P. L. R. 522). In that case the Appellant was ordered to contribute the sum of LP. 5 *per mensem* towards the maintenance of an illegitimate daughter of the Respondent, of which child the Applicant was reported to be the father. The following passage appears in the judgment, at page 525:—

> "I do not think that this case can be distinguished from Civil Appeal 195/43 because in the case now before me the parties had also gone before the Rabbinical Court in connection with this child but, in any event, I have no doubt that the statement in the penultimate paragraph of page 406 of Volume 10 P. L. R. was intended to apply to all Jews in Palestine, whether or not they have registered themselves as members under the Jewish Community Rules. To hold otherwise would be in effect to decide that a stateless Jew, who comes to Palestine and refrains from registering under the Jewish Community Rules, would have no personal status which could be recognised by the Civil Courts of Palestine. It is not necessary to interpret the law so as to lead to such an absurd and unsatisfactory results."

It would at first sight appear from these cases that the law to be applied is Rabbinical Law. But if a matter of succession comes before a Court of one of the religious communities the proviso to section 8(2) of the Succession Ordinance will apply. That proviso reads as follows:—

> "Provided that the Court of the community may, upon being invited so to do by any person beneficially interested in such estate, regulate its distribution in accordance with the provisions of the Ottoman Law subject, nevertheless, to any testamentary disposition made by the deceased, so far as such disposition is permitted."

It is true that the word used is "may". But if the Court of the community refused to regulate the distribution in accordance with the Ottoman Law the interested party would doubtless apply, under the proviso of section 9 of the Succession Ordinance, for a transfer to the Civil Court.

In the present case Dr. Stern, who represents the widow, asks that the estate be distributed in accordance with German law, and alternatively that it be distributed in accordance with Ottoman law.

It would be both illogical and unjust for a stateless person to be placed in this respect in a worse position than a Palestinian citizen, and we read the judgment in C. A. 195/43 where it lays down the rule that where both parties are Jews the law applicable is Jewish Law to mean that it is so applicable to the extent of its application to Palestine Jews. I therefore find that effect must be given to Dr. Stern's alter-

native prayer, namely that the deceased's estate must be distributed in accordance with Ottoman Law.

The result is that the parents of the deceased (Eli Lindheimer and Betty Babette Lindheimer) will get a 4/24ths share between them, the widow (Ilse Lindheimer) will get 6/24ths, and the child (Aviva) will get a 14/24ths share of the *mulk* and movable property of the deceased Wilhelm Lindheimer, and a Certificate of Succession will issue accordingly.

It was submitted by Dr. Stern that Dr. Perlmutter's clients had no standing in this appeal because they were not Applicants in the lower Court and had also not obtained leave to appeal. The point appears to me to be academic because Dr. Perlmutter's clients were opposers in the lower Court, and they are in any event Respondents to the widow's appeal in this Court. They are interested parties, and are clearly entitled to be heard.

As each party has been partially successful I would make no order for costs.

Delivered this 11th day of October, 1946, in the presence of Dr. Perlmutter.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

HIGH COURT No. 71/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPLICATION OF:—

Joseph Forer. PETITIONER.

v.

The Chief Execution Officer, Tel-Aviv and 7 ors. RESPONDENTS.

Court of Appeal refusing stay of execution but ordering decree holder to furnish security before proceeding to execution — Amount of security imposed by Court of Appeal on Applicants for leave to appeal reduced by Privy Council — Effect of orders of Privy Council upon those of Court of Appeal.

Application for an order *nisi* to issue directed to the 1st Respondent, calling upon him to show cause why his order, dated 17th June, 1946, in Execution file No. 18—81/45 and in files 120/45 and 122—25/45, consolidated, should not be set aside and why he should not proceed with the execution of the judgment of the Land Court, Tel-Aviv, in consolidated case No. 16/44, should not proceed against each of the Respondents Nos. 2, 3, 4, 5, 6, 7 and 8; order *nisi* refused:—

1. Leave granted by Privy Council to unsuccessful party in Court of Appeal should not be construed as rescinding any order or condition imposed by latter Court except in so far as such order or condition is inconsistent with the Privy Council order.

2. Chief Execution Officer cannot ignore an order made by a Court and not expressly rescinded.

(*M. L.*)

REFERRED TO: Bentwich: The Practice of the Privy Council 2nd Edition, pages 148—149; H. C. 65 & 66/46 (*post*, p. 603).

ANNOTATIONS:

1. For previous proceedings between the parties see P. C. L. A. 46 & 50/45 (1946, A. L. R. 502), see also H. C. 65 & 66/46 (*supra*).

2. On point No. 2 see case referred to see also H. C. 139/44 (1945, A. L. R. 469) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONER: Goitein.

FOR RESPONDENT: *Ex parte.*

ORDER.

This petition is presented on behalf of Mr. Forer who was the successful party in 9 cases decided by the Land Court of Tel-Aviv in December, 1944. These cases were taken to the Supreme Court on appeal, and a decision applying to all the cases was given on the 26th September, 1945, again in Mr. Forer's favour. On the 4th December, 1945, after hearing an application for provisional leave to appeal to His Majesty in Council, the Supreme Court granted provisional leave on condition that the Appellant in each of the 9 cases would furnish security in the sum of LP. 200. At the same time, the Court refused to grant stay of execution pending the determination of the appeals to the Privy Council, but the Court ordered that Mr. Forer (the Respondent) would have to furnish security in the sum of LP. 500 in each case before proceeding to execution.

Since the 4.12.45 there have been numerous applications and petitions to this Court in connection with these 9 cases. One unusual feature is that the Appellants applied to His Majesty in Council for leave to proceed with the appeals on furnishing security for a smaller amount than fixed by the Palestine Court. This application was successful

and on the 20.3.46 an order was made by His Majesty in Council granting leave to the Appellants to enter and prosecute their consolidated appeals upon depositing in the Registry of the Privy Council the sum of LP. 300 as security for costs.

The present petition is based on the contention that the provisional order made by the Supreme Court on the 4.12.45 has ceased to be effective by reason of the fact that the Appellants applied for special leave to His Majesty in Council and obtained it.

It should be mentioned that when the Appellants applied to this Court on the 17.4.46 for final leave to appeal, this Court stated their view that the order of His Majesty in Council amounted to a grant of final leave to appeal and that the application was therefore superfluous. The Court added that the Judicial Committee were now seized with the matter and that any application to modify the conditions attached to the grant of leave would have to be made to the Privy Council; in May, 1946, Appellants again applied to this Court for a stay of execution pending the determination of the appeals by the Privy Council. This application was refused on the 28.5.46 and the Court pointed out that a similar application had already been refused in December, 1945, and that when the Appellants approached the Privy Council to obtain a reduction of the security fixed by the Palestine Court, they made no mention of stay of execution.

We are not in presence of all the facts and arguments which were taken into account by the Judicial Committee of the Privy Council when making the recommendation for the reduction of security, but we notice the following passage in the order dated the 20th March, 1946:—

> "As the value of the property in dispute in the case of each of the Petitioners was more than LP. 500 they were entitled as of right to be granted leave to appeal to Your Majesty in Council and the Supreme Court so held."

This strengthens our view that the leave granted by the Privy Council to the Appellants should not be construed as rescinding any order or condition imposed by the Palestine Supreme Court except in so far as such order or condition is inconsistent with the Privy Council order. We would call attention to the paragraph intituled "Discretion of the Court below as to security"at pages 148—149 of the Practice of the Privy Council (Bentwich) 2nd edition where it is stated that the Privy Council does not interfere in any matter which has been left to the discretion of the local Court, but, on the other hand, it will review its arbitrary exercise. The paragraph refers to one or two cases where the question of security was reviewed by the Privy Council.

In view of the foregoing, we do not accept the submission made on

behalf of the Petitioner that the Chief Execution Officer of Tel-Aviv should have considered the order made by this Court on the 4.12.45 (with regard to the furnishing of security prior to execution) to have been impliedly rescinded. We have recently in High Court 65—66/946 expressed our views as to the extent of the Chief Execution Officer's powers in such connection, and we do not see how the said Officer could be expected to ignore an order made by this Court and not expressly rescinded.

No useful purpose would be served by issuing an order *nisi* and the petition is therefore refused.

Given this 1st day of August, 1946.

British Puisne Judge.

HIGH COURT Nos. 65 & 66/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPLICATION OF :—

H. C. No. 65/46:—

Reuven Lev. PETITIONER.

v.

Chief Execution Officer, District Court, Tel-Aviv & an. RESPONDENTS.

H. C. No. 66/46:—

Dov Guterman & an. PETITIONERS.

v.

Chief Execution Officer, District Court, Tel-Aviv & an. RESPONDENTS.

Application for stay of execution pending decision by Privy Council — Scope of Chief Execution Officer's discretionary powers.

Return to an order *nisi*, directed to the first Respondent, calling upon him to show cause why he should not consider on its merits the application made to him and why he should not suspend the execution of the judgment of the Land Court, Tel-Aviv, in Land Case No. 20/44 (and in H. C. 66, No. 23/44) (consolidated with Land Case No. 16/44 and others) and filed for execution under file No. 213/45, (and in H. C. 66, No. 121/45) District Court, Tel-Aviv, pending the

decision of the Privy Council on the application to suspend execution or until the expiration of 42 days from service of order *nisi* whichever is the earlier, order *nisi* discharged:—

> While Chief Execution Officer may in appropriate circumstances exercise discretion vested in him by Law of Execution and grant a temporary stay to meet an emergency, he has no discretionary power to stay execution of a judgment under appeal before Privy Council in order to enable judgment debtor to seek a stay from that Council, such matter being within ambit of Supreme Court not of Chief Execution Officer.
>
> (*M. L.*)

ANNOTATIONS:

1. For previous proceedings between the parties see P. C. L. A. 46 & 50/45 (1946, A. L. R. 502) and annotations.

2. On Chief Execution Officer's power to stay execution see H. C. 20/44 (1944, A. L. R. 272; 11, P. L. R. 77).

(*A. G.*)

FOR PETITIONERS: Eliash.

FOR RESPONDENT: A. S. Moyal.

ORDER.

The Petitioners in the two High Court cases Nos. 65/46 and 66/46 were Defendants in Land Case No. 23/44 Tel-Aviv, in which the second Respondent, Mr. Forer applied for a declaration to the effect that he was the sole person having right in or over the land and house known as 24, Hashoftim Street, Tel-Aviv. The Land Court decided in favour of the second Respondent in December, 1944, and the Supreme Court sitting as a Court of Appeal confirmed that decision. The present Petitioners then applied and obtained from the Supreme Court conditional leave to appeal to His Majesty in Council and a stay of execution was refused, but the judgment creditor, Mr. Forer, was ordered to furnish security before proceeding to execution, (that is evicting the present Petitioners from the flats occupied by them at 24, Hashoftim Street).

In May, 1946, the present Petitioners applied to the Supreme Court for a stay of execution pending the decision of His Majesty in Council (application for leave to appeal thereto having been granted) and on the 28th of May, 1946, the Supreme Court again refused to grant a stay and pointed out that the previous refusal could not be reviewed. The Supreme Court added that it was open to the Appellants to take the matter to the Privy Council. On the 30th May, 1946, the judgment creditor obtained an order for execution from Dr. Mani in his capacity as Chief Execution Officer. This order was made *ex parte* on the production of the aforementioned order of the Supreme Court dated the 28th May, 1946. The judgment debtors on their side took steps to apply to His Majesty in Council for a stay of execution and

they also applied to the Chief Execution Officer to delay execution under Article 7 of the Ottoman Law of Execution for 6 weeks within which period they hoped that the Privy Council would give a decision on the application to stay execution. The Chief Execution Officer heard the matter again on the 17th of June, 1946, but it happened that it was Dr. Heshin who was then Chief Execution Officer. Dr. Heshin decided after hearing the parties that in the light of Dr. Mani's decision of the 30th May, 1946, he did not see that he had the right to postpone execution and he therefore decided to execute the decision.

The Petitioner then came to this Court and an order *nisi* was issued in each case calling upon the 1st Respondent to show cause why he should not consider on its merits the application made to him and why he should not suspend execution pending the decision of the Privy Council on the application to stay execution or until the expiration of 42 days from the service of the order *nisi* whichever happens earlier.

Mr. Eliash who appears for the Petitioners has stressed the fact that Dr. Heshin failed to exercise the discretion vested in him by Article 7 of the Execution Law and simply adopted the decision arrived at by Dr. Mani who had not heard the judgment. Mr. Eliash also submitted that the Chief Execution Officer should at least reconsider the matter.

Mr. Moyal for the Respondent resisted the petition.

We understand Dr. Heshin's decision of the 17th June, 1946, to mean that after hearing the application he did not see any valid reason for upsetting the order of execution given by Dr. Mani on the 30th May, 1946, and we cannot subscribe to the view that Dr. Heshin did not take into account the arguments urged before him. This in our opinion disposes of the submission that Dr. Heshin failed to direct his mind to the problem placed before him. We would add that in the circumstances of the case we do not disagree with the decision to proceed with execution.

We deem it necessary to allude to an aspect of the case which was discussed in the course of the hearing of this petition, namely, whether an Execution Officer can exercise his discretion for granting a stay of execution of a judgment which is under appeal to His Majesty in Council in order to enable the debtor to seek a stay of execution from the Privy Council. We do not hesitate to answer the question in the negative. The rules for granting a stay in the case of an appeal to the Privy Council are contained in special legislation other than the Ottoman Law of Execution and so far as the judicial machinery in Palestine is concerned such a matter is within the province of the Supreme Court and not of the Chief Execution Officer. This does not mean that in appropriate circumstances the Chief Execution Officer may not exercise

the discretion vested in him by the Law of Execution, but he can do so only on grounds not directly dependent upon the appeal to the Privy Council. For example, he may grant a temporary stay for a few days to meet an emergency.

In the present case we consider that the relief sought by the Petitioners is outside the ambit of the Chief Execution Officer.

The orders *nisi* in both cases are, therefore, discharged with LP. 5.— inclusive costs in each case to be paid to the second Respondent.

Given this 12th day of July, 1946.

British Puisne Judge.

CIVIL APPEAL No. 132/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards, J. and Curry, A/J.

IN THE APPEAL OF :—

Nerco Near East Road Construction Co. Ltd. APPELLANTS.

v.

Ben-Zion Lejwand & an. RESPONDENTS.

Action for accounts — English R. S. C. not applicable — C. P. R. 221—2 — Whether a cause of action in Palestine — Mejelle, Arts. 1669, 1620, 1626 — C. A. 46/23, C. A. 87/26, C. A. 8/31, C. A. 236/37, C. A. 48/42, C. A. 293/44 — Circumstances in which action for accounts may be brought in Palestine — Foley v. Hill — Consideration Mejelle Arts. 833, 861, 862 — C. P. R. 189 sqq. — C. P. R. 2, decree and order.

Appeal from the judgment of the District Court of Haifa dated the 27th day of March, 1946, in Civil Case No. 73/45, dismissed:—

1. It has tacitly been recognised, over a period of twenty three years, that an action for accounts is part of the law of Palestine.

2. It is proper to sue for accounts where the Plaintiff is not in a position to know how much is due to him.

(*A. M. A.*)

REFERRED TO: C. A. 46/23 (1, C. of J. 14); C. A. 87/26 (*ibid.*, p. 16); C. A. 8/31 (1, P. L. R. 592; 1, C. of J. 19); C. A. 236/37 (1938, 1 S. C. J. 29; 3, Ct. L. R.29); C. A. 48/42 (9, P. L. R. 346; 1942, S. C. J. 682; 12, Ct. L. R. 138); C. A. 292—3/44 (1945, A. L. R. 204); Foley v. Hill, 1848, 2 H. L. Cas. 28, 81 Revised Rep. 14.

ANNOTATIONS :

1. The judgment of the District Court is reported in 1946, S. C. D. C. 368; for further proceedings see *ibid.*, p. 370.

2. On the first point see the cases cited and the notes thereto in S. C. J. and A. L. R.

3. On the second point *cf.* Halsbury, Vol. 13, pp. 33—4, para. 30.

(*H. K.*)

FOR APPELLANTS: J. Shapiro and L. D. Komissar.

FOR RESPONDENTS: E. Toister and G. Kaminetzky.

JUDGMENT.

Edwards, J.: This is an appeal from a decision of the District Court of Haifa. I use the word "decision" advisedly because at one time there was some doubt as to whether that decision was a decree within the meaning of that word as defined in Rule 2 of Civil Procedure Rules, 1938. Mr. Shapiro, the Appellants' advocate, took the precaution to file not only an appeal but an application for leave to appeal. When the application for leave to appeal came on for hearing the Respondents' advocate intimated that he was prepared to agree that this particular decision was a decree, whereupon Mr. Shapiro, for the Applicants, withdrew his application for leave to appeal and the Court then proceeded to hear the appeal.

The facts, shortly stated, are that the Respondents were employees of the Appellants and in October, 1943, the Appellants signed a document in the German language, headed "an Agreement" in which they confirmed having made a certain agreement with the Respondents. The Appellants were apparently engaged by the Military as road contractors, the Respondents being two of their employees. By the agreement of 29th October, 1943, the Appellants undertook to pay the Respondents, in addition to their ordinary wages, 15% from all gross amounts exceeding Syrian Pounds 501 which were payable by the Military authorities to the Appellants in respect of work done at a place called Hmeime. The Appellants apparently not receiving payment of the 15% brought the present action in the District Court of Haifa in which they claim:—

> (a) to have a full and true account of all the moneys received by the Defendants from the Military Authorities under the Main Contract (marked DCE/143) and/or any other contract arising therefrom and/or connected therewith;
>
> (b) the payment of the amount found due to the Plaintiffs by the Defendants on taking such account and interest thereon at the legal rate from the date of maturity of such payments till actual payment;
>
> (c) the costs of this action plus advocate's fees.

The learned President of the District Court (Judge Bourke) de-

livered what was headed a "Judgment" in which he said that he was satisfied on the evidence that the agreement to pay the 15% was a binding agreement and that there was no question of the sum claimed being an *ex gratia* payment. He also found that the Appellants had in fact made two payments on the 15% basis. He also held that there was consideration for the payment. He went on to say that the Plaintiffs (Respondents) did not know and were not in a position to know the exact amounts paid by the Military to the Defendants (Appellants) under what is called the "main contract". That being so, he held that this was a fit and proper case in which to order an account. There was apparently some discussion as to what procedure should be followed in the way of obtaining an accurate account. It was realised that the English Rules of Procedure as laid down in the Annual Practice (White Book) do not apply in Palestine. The learned President then held that it was open to him even at that stage to make an order under Rules 221 and 222 of Civil Procedure Rules, 1938. He accordingly ordered the Defendant within fifteen days to render an account vouched as to its accuracy by affidavit. The President saw no sufficient reason at that stage to appoint any person to take the account as it seemed to him that under Rules 221 and 222 it was open to the Court to direct the Defendant to furnish an account vouched by affidavit as to accuracy. He then went on to say:—

> "Should that course for any reason prove unsatisfactory I think that it would still be open to this Court to appoint a person to take the account under the rules and to give special directions. The matter will accordingly now stand adjourned and will come into the list again upon the lapse of the period (fifteen days) allowed to the Defendant to comply with the direction given by this Court."

Against that decision of the 27th March, 1946, of the District Court of Haifa the Appellants now appeal to this Court.

The first ground of appeal argued before us was that an action for an account is not a matter of procedure but is a cause of action and that such cause of action is not recognised by the law of Palestine. The Appellants' advocate relied on the *Mejelle*, Articles 1669, 1620 and 1626. Mr. Toister, for the Respondents, however, cited many cases decided by this Court such as Civil Appeal No. 46/23, Rotenberg p. 14; Civil Appeal No. 87/26, Rotenberg p. 16; Civil Appeal No. 8/31, Rotenberg p. 19; Civil Appeal No. 236/37, Supreme Court Judgments (1938) Vol. I, pp. 29 and 31; Civil Appeal No. 48/42 Vol. 9, P. L. R. p. 347; Civil Appeal No. 292—293/44, A. L. R. (1945) Vol. I, p. 204. To this citation of authorities Mr. Shapiro replies that the matter has really never been sufficiently argued in this Court. We think that it

is too late for us to listen to such an argument because we cannot help feeling that over a period of twenty-three years this Court has tacitly recognised an action for accounts as being part of the law of Palestine. This ground of appeal accordingly fails.

The next ground of appeal is that, even assuming that there is such a remedy or cause of action in Palestine, the circumstances of the present case are not apt for the granting of such a remedy. In support of this argument Mr. Shapiro cited the case of Foley *v.* Hill Vol. 81 Revised Reports, p. 14, and Ashburner's "Principles of Equity" 2nd (1923) edition, p. 322. In short, Mr. Shapiro says that what his clients owe is a debt and that they do not hold money in trust. We think, however, having regard to what the learned President said about the Respondents not knowing and not being in a position to know the exact amounts paid by the Military to the Appellants, there is nothing in this submission. There is a great difference between the position of the Appellants and the position, say, of a bank. A customer of a bank knows, or ought to know, how much he has paid into his bank. This ground of appeal also fails.

The next ground of appeal is that the learned President erred in holding that there was consideration. Mr. Shapiro cited Pollock on Contracts 11th edition, p. 149, and Chitty on Contracts 18th edition, p. 31, and the *Mejelle* Articles 833, 861 and 862. Mr. Shapiro seemed to try to rely on the previous contract between the Appellants and the Respondents; but, on being asked by the Court, he had to admit that the original agreement was never produced before the District Court of Haifa and we were in fact informed by Mr. Toister that the original agreement was a verbal one. Having perused the agreement of 29th October, 1945, we see no reason to differ from the finding of the District Court of Haifa that there was consideration.

Finally, Mr. Shapiro tried to argue that the Respondents should have completed their case under Rules 159 *et seq.* of the Civil Procedure Rules before the District Court gave its judgment of 27th March, 1946. It is difficult to understand this argument because, once it is conceded that there is such a thing in Palestine as an action for accounts, it is obvious that a Court of trial ordering accounts must adjourn the case for accounts to be taken. This seems so obvious as to admit of no argument. In fact, that such cases can arise has been contemplated by the rule-making authority in Rule 2 of Civil Procedure Rules, 1938, where, under the definition of the word "decree", we are told that a decree may be preliminary or final. We are accordingly not prepared to hold that the District Court erred in ordering the Respondents to submit an account. The learned President clearly fore-

saw that, if that course should prove unsatisfactory, it would still be open to him to appoint a person to take an account under Rules 221 and 222. It is of interest to note that Mr. Shapiro, at the bar, admitted that the Appellants had in fact filed an account but denied liability to pay anything.

For all the foregoing reasons the appeal is dismissed. The Appellants must pay one set of costs to the Respondents, to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 18th day of October, 1946, in the presence of Mr. El Hanan for Appellants and Mr. Olshan for Respondents.

British Puisne Judge.

CIVIL APPEAL No. 97/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF :—

Abraham Kirshenbaum. APPELLANT.

v.

Haim Kirshenbaum. RESPONDENT.

Application to appoint an arbitrator — Previous similar application by opposite party dismissed — Res judicata — Application not supported by evidence showing compulsory submission.

Appeal from the order of the District Court of Jerusalem dated 10th May, 1945, in motion No. 102/45, allowed:—

1. Once an application for the appointment of an arbitrator has been dismissed, the matter is *res judicata* and no application by the other party for the appointment of an arbitrator can be entertained — even though the former application was coupled with a prayer for extension of time and dismissed on the ground only that no extension should be granted.

2. An application for the appointment of an arbitrator must be supported by the contract or any other material showing compulsory submission.

(*A. M. A.*)

ANNOTATIONS:

1. On appointment of arbitrators by the Court see Annotated Laws of Palestine, Vol. 2, pp. 93 *et seq.;* for later authorities *vide* Mo. D. C. Jm. 454/45 (1946, S. C. D. C. 355) and note 1.

2. On the second point see *o. c.*, p. 97 and pp. 102—3, headings *"Evidence";*

vide also C. D. C. T. A. 162/44 (1945, S. C. D. C. 755) — a case under sec. 5 of the Ordinance.

(*H. K.*)

FOR APPELLANT: S. Hiller.

FOR RESPONDENT: A. Shaony.

JUDGMENT.

Frumkin, J.: This is an appeal from an order of the District Court, Jerusalem, dated 10.5.45, allowing an application by the Respondent to appoint an arbitrator on behalf of the Appellant. This order was preceded by another order of the same Court dated 28.6.44 refusing, at least in terms, a similar application by the Respondent.

The history of the case dates back as early as 1927 when a contract of partnership was entered into between the parties which contract according to Respondent included an arbitration clause. In 1930 litigation started between the parties and in an action before the District Court Respondent wished to act upon the arbitration clause and asked that an arbitrator be appointed on the Appellant's part and an arbitrator was so appointed. But the arbitrator did not act nor did the parties take any further steps in this matter for about 13 years, when the Respondent in 1944 in Motion No. 165/44 made his application to the District Court which resulted in the order of 28.6.44 mentioned above.

In that application the Appellant asked "to enlarge the time of the arbitration, to summon Respondent to appoint an arbitrator on his part and if he refused that the Court may appoint an arbitrator."

In refusing the order the District Court held "that Applicant has been very late in submitting this application which delay is unjustified, accordingly we refuse the application."

The Respondent thereupon applied again by motion this time not asking for an extension of time but only for the appointment of an arbitrator. In allowing this application, the District Court took the view that in the first order they only meant to deal with the application for the extension of time and not with the application for the appointment of an arbitrator. Against this order the Appellant appeals on mainly two grounds.

Firstly, that the matter is *res judicata* by the fact that a previous application for the appointment of an arbitrator was dismissed by the very same Court and secondly that the District Court had no material to act upon as neither the contract of 1927 nor any other material showing compulsory submission to arbitration was submitted.

We take the view that the Appellant is right on both these propositions and is entitled to succeed on the first ground. Whatever might have been in the mind of the learned judges dealing with the first motion they obviously had before them a clear application for the appointment of an arbitrator and if for one reason or another they thought that notwithstanding the fact that they could not grant the application for extension of time they still could deal with the application for appointment of an arbitrator, it was for the Court to deal with this second part of the application than and there and dispose of the matter. Not having done so and there being no appeal from this first order it is final.

For this reason alone the appeal must be allowed and the decision of the District Court set aside with costs here and below to include an inclusive sum of LP. 10 for the hearing of this appeal.

Delivered this 8th day of October, 1946, in the presence of Mr. Hiller for Appellant. No appearance for Respondent.

Puisne Judge.

De Comarmond, J.: I agree.

British Puisne Judge.

CIVIL APPEALS Nos. 249—253/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw, J. and Curry, A/J.

IN THE APPEALS OF :—

Hussein Hassan Ibrahim Issa and ors. as shown in the Statements of Appeal. APPELLANTS.

v.

Keren Kayemeth Leisrael Ltd. and ors. as shown in the Statements of Appeal. RESPONDENTS.

Claim in settlement for individual parcels of land based on individual possession — Change of claim to one based on joint possession in musha — Election.

Appeals from the decisions of the Settlement Officer, Haifa Settlement Area, dated the 30th April, 1945, in Cases Nos. 128, 130, 133, 134 and 135/Jidru, dismissed:—

The Appellants having failed in their individual claims for specific parcels of land on the basis of individual prescriptive possession of each parcel,

they could not bring forward a new cause of action by claiming the land jointly on the strength of possession in *musha* of the land as a whole.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 106/43 (1943, A. L. R. 188) and note 2; see also C. A. 303/43 (1944, A. L. R. 486) and note 1.

(*H. K.*)

FOR APPELLANTS: (In all appeals) Cattan and S. Khadra.

FOR RESPONDENTS: Nos. 1 and 2 — Wittkowsky and J. Salomon (in all appeals).

Other Respondents not served (in all appeals).

JUDGMENT.

Shaw, J.: By consent of the parties these five appeals have been consolidated.

Mr. Catan for the Appellants does not contest the fact that the Respondents have a registered title to the parcels in dispute. The land is *miri* and the Appellants' case is that they have had possession without dispute for a period exceeding ten years which, by virtue of Article 20 of the Ottoman Land Code, gives them the right to continue in possession. The Respondents bought the land from certain absentee landlords in 1925, and Mr. Cattan admits that between 1926 and 1935 there were disputes between the Karabisa section of the Arab El Chawarna (to whom the Appellants belong) and the Respondents. In 1935 the Settlement Officer made an order giving temporary possession to the Respondents.

Mr. Cattan states that for the purpose of settlement proceedings the Karabisa agreed among themselves that various members of that section should claim various specific parcels. That is to say, the Appellants did not, when filing the memorandum of claim, aver that the Respondents' title was barred by the possession in *musha'a* of the Karabisa section as a whole.

Possession was claimed by succession from predecessors who had had possession. Mr. Cattan says that it was a question both of cultivation and of grazing, and he states that the possession has existed from a date forty years prior to 1935. He submits that under Article 20 of the Ottoman Land Code it is not necessary to prove exclusive possession by one person. Mr. Cattan has also drawn our attention to section 16(4) of the Land (Settlement of Title) Ordinance (Cap. 80). He complains that the Settlement Officer did not make up his mind whether or not the Karabisa section had been in possession, and he asks that the case be remitted in order that the Settlement Officer may

make a definite finding on that point and give judgment accordingly.

Now, in the first place, the Appellants did not come forward in a body with the other members of the Karabisa section and claim prescriptive possession. They elected to prove possession of specific parcels. They had the benefit of legal advice, and it must be assumed that they made their election because they thought that it was to their advantage to proceed in that way. Having failed they now want to try another method. Having made their election I do not think that the Appellants can reasonably ask to be allowed, at this stage, to raise what is really a new cause of action. If this were allowed litigation would be endless. If they fail again the Appellants might think of some fresh cause of action.

In the second place I find that the Settlement Officer did in fact consider whether there was evidence to support a finding that the Karabisa section had collectively been in possession of these parcels in such a way as to defeat the Respondents' registered title, and he held that there was no such evidence. This is shown by para. 6 of the judgments in cases Nos. 130, 133 and 134, and para. 8 of the judgment in case No. 135. It is true that in case No. 128 (C. A. 249/45) the Settlement Officer did not, in para. 7 of his judgment, refer in terms to the Karabisa section. But there can be no doubt that he had them in mind when he spoke of "any particular persons".

We have been referred to the evidence led in these cases and in the present case No. 122/Jidru, but this Court is not a Court of trial, and we are unable to find that the Settlement Officer's findings upon the evidence were manifestly wrong.

The only other point to be considered is the question of costs. It was submitted that the Settlement Officer did not assess the value of the parcels, and that he allowed more costs than the rules allow. It appears, however, that the Settlement Officer did take the value of the parcels into consideration in assessing costs. The litigation has lasted some ten years, and I cannot say that in the circumstances the costs are excessive. The appeals must therefore be dismissed with fixed costs in the sum of LP. 4 in each case.

Delivered the 4th day of April, 1946, in the presence of Mr. Moghannam by delegation from Mr. Cattan for Appellants and Mr. Salomon for Respondents.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 237/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Shaw, J.

IN THE APPEAL OF:—

Victor Khayat & an. — APPLICANTS.

v.

Susette Khayat & 2 ors. — RESPONDENTS.

Striking out statement of claim, when it may be ordered — C. P. R. 21.

Application for leave to appeal from the order of the District Court, Haifa, dated 28th May, 1945, in Motion No. 141/45 (Civil Case No. 18/45), refused:—

A statement of claim should not be struck out under Rule 21, C. P. R., unless it is apparent on the face of the statement of claim that no cause of action is disclosed.

(*A. M. A.*)

ANNOTATIONS: For similar decisions see C. A. 154/45 (1945, A. L. R. 520) and Mo. D. C. Jm. 6 & 7/46 (1946, S. C. D. C. 94) and cases cited in note 2 to the last mentioned case.

(*H. K.*)

FOR APPLICANTS: Eliash.

FOR RESPONDENTS: Cattan.

ORDER.

This is an application for leave to appeal against an order dated 28.5.45 given by the District Court, Haifa, in Motion No. 141/45 arising out of Civil Case 18/45.

That motion was an application under Rule 21 of the Civil Procedure Rules, 1938, to strike out the statement of claim on the ground that it did not disclose a cause of action.

In the statement of claim the Respondents (original Plaintiffs) asked for an order for accounts to be made against the Appellants (original Defendants) and for a further order for payment by the Appellants jointly and severally of the amount found due.

We have listened to lengthy arguments from Mr. Eliash for the Appellants and Mr. Cattan for the Respondents.

The mere fact that we should have had to listen to arguments lasting for two or three hours would appear to show that it is not immediately apparent on the face of the statement of claim that no cause of action is disclosed.

Rule 21 of the Civil Procedure Rules is not designed to enable a

party to strangle a case. It may be possible from a perusal of a statement of claim to form the view that the Plaintiff is not likely to succeed, but if there is a substantial matter to be decided it cannot be said that the statement of claim discloses no cause of action.

It is not for us to decide whether or not an order for accounts can properly be made against the Appellants, but we certainly cannot find that it is apparent on the face of the statement of claim that such an order cannot be made. That is a matter which the Court of trial will have to decide when the case is heard.

In the circumstances, we refuse leave to appeal. The Respondents will have fixed costs in the sum of LP. 15.

Given this 27th day of May, 1946.

Chief Justice.

CIVIL APPEAL No. 151/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw, J. and Curry, A/J.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

David Levy. RESPONDENT.

Interpretation of bond — Bond to produce person for deportation — "Whenever", natural and proper meaning of word in context — Extension of time without reference to guarantor.

Appeal from the judgment of the District Court of Jerusalem sitting in its appellate capacity, dated the 1st March, 1946, in Civil Appeal No. 76/45 from the judgment of the Magistrate's Court Jerusalem in Civil Case No. 634/45, dismissed:—

> Although the dictionary meaning of "whenever" includes more than once, a bond to produce a person "whenever called upon" must be read in the light of attendant circumstances and the word "whenever" in the context of the bond may mean only once.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment under appeal is reported in 1946, S. C. D. C. 177; leave to appeal was refused by the lower Court in Mo. D. C. Jm. 129/46 (*ibid.*, p. 179).

2. On the double meaning of the word "whenever" see the cases cited in Stroud's Judicial Dictionary, 2nd ed., Vol. I, p. 2234 and Suppl., p. 1013.

(*H. K.*)

FOR APPELLANT: Legal Assistant — (Weston).

FOR RESPONDENT: Gorali.

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 1st March, 1946, of the District Court, Jerusalem, in Civil Appeal No. 76/45.

The question for determination is the meaning of the word "whenever" in a guarantee given by the Respondent for the appearance of one Georgi Khadouri Tsemah before the Palestine Police or before any other Government Department. Tsemah was awaiting an order for deportation. We have been referred to the Shorter Oxford English Dictionary (1933 edition) page 2413, and it is clear that the word "whenever" can either mean once or more than once.

Certain cases have been cited, but I do not think it necessary to refer to them because in no case was it a question of deciding the meaning of the word "whenever" in a bond such as this.

The question to be decided is what is the natural and proper meaning to be assigned to this word in this particular bond.

If there is a doubt as to the meaning of the word I would resolve that doubt in favour of the Respondent.

But, in my judgment the meaning given by both of the lower Courts was the true and proper meaning without any doubt.

The evidence showed that Tsemah was produced by the Respondent on one occasion, and having regard to the fact that Tsemah was only awaiting an order of deportation there is no reason at all why the Respondent, when he signed the bond, should have ever considered the possibility that he might be required to produce Tsemah more than once. On the occasion when Tsemah was produced the Respondent was not present, so it cannot be said that he had even by conduct agreed to produce him again. The evidence shows that the Police Officer before whom Tsemah appeared gave the latter three days' time to arrange his affairs. To that extension of time the Respondent was not a party.

In the result I find myself in complete agreement with the interpretation given to the term "whenever" by the lower Courts. The appeal must be dismissed with inclusive costs in the sum of LP. 10.— (ten pounds).

Delivered this 2nd day of October, 1946, in the presence of Col. L. Weston for Appellant and Mr. A. Gorali for Respondent.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CRIMINAL APPEAL No. 105/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, J., Curry, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Khamis Abdul Qader Abu Seif. APPELLANT.

v.

The Attorney General. RESPONDENT

Sentence — Elements to be taken into account — Plea of guilty, compensation, previous convictions.

Appeal from the judgment of the District Court of Jaffa, dated 10th September, 1946, in Criminal Case No. 195/46, whereby Appellant was convicted of burglary, contrary to section 295(A) of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment; sentence reduced:—

The fact that the Accused pleads guilty and that he has compensated the complainant should be taken into account in imposing sentence.

(*A. M. A.*)

ANNOTATIONS:

1. On reasons for a lenient sentence see note 3 in S. C. J. to CR. A. 24/41 (8, P. L. R. 125; 1940, S. C. J. 95; 9, Ct. L. R. 104).

2. Compare CR. A. 49/42 (1942, S. C. J. 228; 11, Ct. L. R. 138) where a heavier sentence was held to be justified as a number of previous "small sentences had not had sufficient deterrent effect."

(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: A/Crown Counsel — (Salant).

JUDGMENT.

The Appellant, who pleaded guilty in the District Court of Jaffa, to burglary, appeals against a sentence of five years on the ground that it is too severe. The learned trial Judge was obviously influenced in passing this sentence by the previous convictions which the Appellant admitted.

We have carefully examined the list of previous convictions and it transpires that between the years 1940 and 1945 the Appellant was convicted on six occasions of theft and possession of stolen property, once of criminal trespass, and once of threats with violence, and once of possession of dangerous drugs. The first sentence was one of nine months' imprisonment for theft in 1942. It may well be that most of those sentences were unduly lenient and had the earlier sentences been really adequate the Appellant might never have committed an offence

again; but in this Court we must assume that the offences for which he was convicted in the past were not very serious. This Court is always most reluctant to interfere with sentences; but the learned trial Judge does not seem to have paid sufficient attention to the fact that on all the previous occasions the sentences were not very severe. There are also two other matters to which we are not sure that he paid sufficient attention, one being the fact that the Appellant pleaded guilty, and the other, that he had recompensed the complainant in full. Now, this is a criminal prosecution instituted in the public interest and we, of course, are not concerned with the pecuniary loss caused to an individual. At the same time the fact that he has made reparation to the full extent (namely to the amount of LP. 300 by transferring immovable property in the Land Registry to the complainant) shows that he has really not benefited by the crime and also that he has done his best to make amends. For these acts he should be given some credit.

In the circumstances we think that the sentence of five years' imprisonment is too severe, and we reduce it to three years to run from the 10th September, 1946, being the date of conviction.

Delivered this 9th day of October, 1946.

British Puisne Judge.

CIVIL APPEAL No. 2/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. (in chambers).

IN THE APPLICATION OF :—

The Attorney General. APPLICANT.

v.

Khalil Khalaf El Id and 119 others as stated in the application. RESPONDENTS.

Land settlement — Leave to appeal granted by Chief Justice after refusal by L. S. Officer — L. S. Ord., secs. 33, 63 — Appeal by Government.

Application for leave to appeal from the decision of the Settlement Officer, Safad Settlement Area, dated 15.11.45 in case No. 2/Jub Yousef, granted:—

Leave to appeal granted by the Chief Justice from a refusal by the Land Settlement Officer to exercise his discretionary powers under sec. 33 of the Ordinance.

(*A. M. A.*)

ANNOTATIONS: On the question whether the appeal may be entertained see C. A. 173/40 (7, P. L. R. 471; 1940, S. C. J. 311; 8, Ct. L. R. 74) and annotations thereto in S. C. J.

(*H. K.*)

FOR APPLICANT: Solicitor General — Griffin and N. Toukan.

FOR RESPONDENTS: Eliash.

ORDER.

This application has induced a considerable amount of argument, one of the questions being whether in fact I have the power to grant leave to appeal. Having studied the file, the facts seem to be these:—

There was an application for leave to appeal made to the Settlement Officer. The Settlement Officer refused and the application was then made to me. I presume under the only section by virtue of which I function which is section 63 of the Land Settlement Ordinance. The Land Settlement Officer's refusal was conveyed in a written order dated the 7th December, 1945. He based his refusal on his opinion that refusal to exercise the discretional powers under section 33 was not a decision about any right to land. This may well be so, and the Court of appeal can decide the issue. As far as I am concerned this is an application by the Attorney General representing the Government of the country, and whatever may be the merits of the case I do not feel inclined to refuse it particularly in view of the fact that the only appeal from a Settlement Officer to a Court of law is either by leave of the Settlement Officer himself or if he refuses, as he has done in this case, by leave of the Chief Justice. I therefore grant this application.

Given this 30th day of October, 1946.

Chief Justice.

CRIMINAL APPEAL No. 96/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Ahmad Abdallah Abu 'Aker of Arab Abu Aker. RESPONDENT.

Criminal procedure — Summons not signed by judge — Failure to

object, Dixon v. Wells, CR. A. 27/46 — Trial of felonies by District Court otherwise than on information — Summary trials — M. C. J. O. sec. 6(2) "in first instance" — CR. A. 18/38, "prosecute" — Law of Procedure (A.) Ord., secs. 4(1), 3, 5.

Appeal from the judgment of the District Court of Jaffa, dated 12.6.46 in Criminal Case No. 85/46 whereby the above accused was discharged, dismissed on other grounds:—

1. If the Accused fails to object to summons not signed by a judge, the subsequent proceedings are not vitiated.

2. The word "prosecute" in sec. 4(1) of the Law of Procedure (Amendment) Ordinance does not include the institution of proceedings.

3. A felony made triable summarily by statute cannot be tried in the Magistrate's Court and there is no provision in the law entitling the Attorney General or his representative to initiate summary proceedings before the District Court.

(*A. M. A.*)

REFERRED TO: CR. A. 27/46 (13, P. L. R. 131; *ante*, p. 259).

DISTINGUISHED: Dixon *v.* Wells, 1890, 25 Q. B. D. 249, 59 L. J. (M. C.) 116, 62 L. T. 812, 6 T. L. R. 322.

NOT FOLLOWED: CR. A. 18/38 (5, P. L. R. 183; 1938, 1 S. C. J. 156; 3, Ct. L. R. 137).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C. at p. 350.

2. On the first point see the case referred to and *cf.* Halsbury, Vol. 21, pp. 603—4, para. 1049.

3. On the meaning of the word "prosecute" see Stroud's Judicial Dictionary, 2nd ed., Vol. I, p. 1591.

4. The position has since been remedied by the enactment of the Defence (Emergency) (Amendment No. 4) Regulations, 1946, Palestine *Gazette* No. 1530 of 31.10.1946, Sppl. 2, p. 1303, which are "intended primarily to fill the gap pointed out by the Court of Criminal Appeal in its judgment in Criminal Appeal No. 96/46." (Memorandum appended to the above Regulations).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Hooton).

FOR RESPONDENT: S. Salameh & Elia.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Jaffa, whereby the Respondent was found not guilty of the offence of possession of property belonging to His Majesty's Forces contrary to section 143(1)(a) Defence (Emergency) Regulations, 1945. Having found him not guilty the learned Acting Relieving President said "I order his discharge." The facts leading up to the

Prosecution are that a Police Charge Sheet in Arabic was filed direct in the District Court by a Palestinian Arab Police Inspector of the Divisional Crime Branch, Palestine Police, Ramleh, named Samri Khamis. Mr. Hooton, Crown Counsel, at the Bar, admitted that this inspector was not a "representative" of the Attorney General for purposes of section 4(1) Law of Procedure (Amendment) Ordinance, 1934. We were informed at the Bar that the Respondent was actually arrested by the Police before this Charge Sheet was filed and that, after he had been arrested, the Police filed this Charge Sheet in the District Court. It would seem that the Accused was released on bail, although this is not certain and is indeed rather obscure. The Charge Sheet apparently was never submitted to the Relieving President or, in fact, to any judge of the District Court. It would seem that the Charge Sheet was accepted by the Registry of the District Court and that a case file was thereupon opened. A summons was then issued by the District Court. This summons was not signed by any Relieving President or Judge but seems to have been merely initialled by a clerk. The duplicate copy of the summons which is in the file, at any rate, merely bears the initials of some person. The duplicate copy is in pencil. We have not seen the original which is, presumably, with the Respondent if he has not by this time thrown it away. The summons called upon the Respondent to appear before the District Court on 6th May, 1946. He duly appeared on that date and apparently raised no objection to the summons or to anything else and the case was adjourned by Judge Toukan for hearing on the 28th May, 1946. The record is silent as to what happened on the 28th of May; but it seems that the Respondent appeared before the learned Acting Relieving President (Judge Rogers) in the District Court of Jaffa on the 12th June, 1946. He was represented by an advocate and pleaded not guilty whereupon one witness for the prosecution, namely a British Sgt. of the Special Investigation Bureau Military Police, Sarafand, gave certain evidence. It then seems that, after hearing a certain amount of the examination in chief of this witness, the learned Relieving President of his own motion stopped the case and delivered judgment in the following terms:—

> "The document by which the Defendant was brought before me was in fact, though called a summons, not a summons at all. It was applied for no doubt by the Attorney General or his representative, and was then issued by this Registry over the signature of one of the clerks. I refer to the case of Dixon *v.* Wells 1890 Q. B. D. 254 and commend the language used therein to those responsible for the institution of Criminal Proceedings here.
>
> A man can only be brought before this Court on a summons signed

> by one of the Judges of this Court, in the same way that the only way to bring him before the Magistrate's Court, is by a summons signed by a Magistrate.
>
> This being so, this case is not properly before me and I find the Defendant not guilty, and order his discharge unless required for some other reason."

From that judgment the Attorney General now appeals to this Court. As the Respondent appeared twice in the Court below and raised no objection to the summons we think that this point is covered by Criminal Appeal 27/46 Annotated Law Reports (1946) page 259. The case of Dixon *v.* Wells is distinguishable because the Defendant did object to the summons before being ordered to plead.

Had this been the only point raised we would have allowed the appeal and ordered a new trial under section 72(1)(c) Criminal Procedure (Trial Upon Information) Ordinance.

Some difficult questions have however arisen during the hearing. The first is whether there is any provision in law for bringing a person before a District Court for trial summarily for a felony without first taking him before a Magistrate and, if there is not, what is the effect in law? We agree with learned Crown Counsel (Mr. Hooton) that the offence created by Regulation 143 is a felony and we also agree that the District Court is empowered to try such a case summarily. We further agree that a summary trial in Palestine is merely a trial which is not on information. Parenthetically, we may say that there is absolutely no other difference between the conduct of a trial on information and the conduct of a summary trial. This is apparent from a perusal of the District Courts (Summary Trial Rules), 1938, which are almost an exact replica of those portions of the Criminal Procedure (Trial Upon Information) Ordinance dealing with procedure at a trial upon information. We also agree with Mr. Hooton when he says that, if the prosecution wish the Accused to be tried by a District Court summarily for a felony under Regulation 143 of the Defence (Emergency) Regulations, 1945, the provisions of the Magistrates' Courts Jurisdiction Ordinance 1939 cannot be resorted to. Mr. Hooton points to the words "in the first instance" in section 6(2) of that Ordinance and contends that those words do not need to appear when we are dealing with a felony. What then is the provision of law for bringing a person before a District Court for trial summarily under Regulation 143? Mr. Hooton has referred to Criminal Appeal No. 18/38, Vol. 5, P. L. R. p. 183 at p. 186 where it is stated that "the word 'prosecute' necessarily includes the filing of a charge since such filing is the first step in a prosecution."

If this interpretation of section 4(1) of the Law of Procedure (Amendment) Ordinance, 1934, is sound, it would follow that any person authorised in writing by the Attorney General (*i. e.* his representative) may sign a complaint or charge sheet initiating summary proceedings before the District Court.

We find it impossible, however, to construe the aforementioned section 4(1) in the manner set out in Criminal Appeal No. 18/38. We would point out that in that decision the interpretation of the word "prosecute" was more in the nature of an *obiter dictum*, and it does not seem that the point was specially considered.

Although the word "prosecute" may include the "instituting" of criminal proceedings, it is quite obvious that in section 4(1) the word "prosecute" refers only to the conduct of proceedings before Court. Even the marginal note to the section bears out this interpretation, and the wording of section 3 and of section 5 makes it abundantly clear that the legislator deliberately differentiated between "instituting" proceedings and "prosecuting".

We therefore hold that section 4(1) is not a provision conferring upon the Attorney General or his representative a general power to institute all criminal proceedings. We have been unable to trace any enactment entitling the Attorney General or his representative to initiate summary proceedings before the District Court. Section 6(2) of the Magistrates' Courts Jurisdiction Ordinance, 1939, is silent on the point, and the District Courts (Summary Trials) Rules, 1938, afford no help. It seems that there is a *lacuna* in the law, and the explanation may be that the legislator lost sight of the fact that when cases are not remitted from the Magistrate's Court for summary trial by the District Court it was necessary to make provision for the making of the necessary complaint or charge. The matter is, of course, of importance specially where, as in the present case, a felony is made triable summarily by the District Court.

Although we do not agree with the reason given by the learned Relieving President for dismissing the case, we cannot allow this appeal in view of our decision that the proceedings were not properly instituted. The appeal stands dismissed.

Delivered this 22nd day of October, 1946, in the presence of Mr. Hooton for Appellant and Mr. Elia for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 181/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw, J. and Curry, A/J.

IN THE APPEAL OF:—

Moshe Mitzmacher. APPELLANT.

v.

Arieh Weinberg & an. RESPONDENTS.

Workmen's compensation — Effect on consent award of 1943 *Amendment — Estoppel.*

Appeal from the judgment of the District Court of Tel-Aviv, dated 5th April, 1946, in Civil Case No. 330/44, allowed and case remitted:—

A consent award made otherwise than by way of *ex gratia* payments by the employer, may be varied by arbitration under the Ordinance.

(*A. M. A.*)

ANNOTATIONS: *Vide* C. A. 65/46 (*ante*, p. 423 at p. 427).

(*H. K.*)

FOR APPELLANT: Bar-Shira.

FOR RESPONDENTS: Sussmann.

JUDGMENT.

Curry, A/J.: The Appellant suffered an accident resulting in the amputation of his right arm. He instituted proceedings against the Respondents for compensation, and as a result of those proceedings, on 6.2.42 an Award was made in the following terms:—

> "With the consent of the parties it was decided to adjudge the Defendants Arieh Weinberg and Tama Weinberg, jointly, and severally and in their capacity as owners of the *'Gamish'* Factory to pay LP. 1 per week, as from 18.12.41 onward, as long as this decision is not legally varied, whether by consent of the parties or in any other way whatsoever."

In 1943 the Appellant, relying on the Workmen's Compensation (Amendment) Ordinance, 1943, instituted an action claiming an increase of the weekly compensation from LP. 1 per week to LP. 1.500. The learned Magistrate dismissed that application on the ground that as the Award was by consent of the parties it could only be altered by their mutual agreement. The Magistrate appears to have based his decision on the argument that the Workmen's Compensation (Amendment) Ordinance could only be invoked where the claimant had already proved his right to the payment of compensation and not where the

employer merely agreed to the payment without the employee producing any evidence in Court to establish that right.

On appeal to the District Court the Judge upheld the decision of the Magistrate on the ground that both parties were estopped from rescinding a consent award.

I am afraid I am unable to agree with the decisions of the Magistrate or Judge, or to comprehend their reasoning.

I see no reason why if an employer does not contest the employee's right to compensation, that employee should be in a worse position than if his employer had contested his right. There was some argument that the employer had contested the employee's right to compensation in this case, but the only conclusion that can be drawn from the wording of the award is that in agreeing to pay compensation the employer admitted the right of the employee thereto. If that was not the case the employer should have safeguarded himself with a provision to the effect that he agreed to the payment of the compensation as an *ex gratia* payment without admitting any liability. As regards estoppel, it may be, that in certain circumstances a consent agreement is meant as a final agreement not subject to variation under any circumstances, but that is clearly not the case here, for the award has gone out of its way to state that the award was to stand, "as long as this decision is not legally varied, whether by consent of the parties or in any way whatsoever." I find it difficult to conceive any wording which could more definitely provide for the possibility of subsequent variation of the award.

For these reasons the appeal must be allowed and the case is remitted to the Magistrate to deal with the application under the Workmen's Compensation (Amendment) Ordinance in the same manner as if the award has been the result of a contested case.

The Appellant will have inclusive costs for this appeal in the sum of LP. 15.

Delivered this 18th day of October, 1946.

A/British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

1.11.46.

FOR APPELLANT: Krongold.

FOR RESPONDENTS: No appearance — served.

Mr. *Krongold*: Mr. El Hanani raised the question of costs in Court of Appeal and District Court when judgment was delivered. *Re* costs in Supreme Court — there were 6 hearings:—

11.7.46.
19.7.46.
26. 7.46 — LP. 5 costs were allowed to Appellant.
9. 9.46 — case not reached.
4.10.46 — case heard.
18.10.46 — judgment delivered.

ORDER.

We allow costs of LP. 35 (thirty five pounds) for attendance in the Supreme Court — (this is in place of the order for LP. 15), and also we allow actual court fees paid.

British Puisne Judge.

Mr. *Krongold*: I ask for the District Court inclusive costs of LP. 25. That would include the disbursements which were LP. 9.256.

ORDER.

We allow LP. 20 (twenty pounds) fixed costs, in the District Court — this includes the disbursements.

British Puisne Judge.

CRIMINAL APPEAL No. 104/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, J., Curry, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Mohammad Hussein Ali Badawi. APPELLANT.

v.

The Attorney General. RESPONDENT.

Corroboration — Conviction on the evidence of a single witness — Failure to deal with contradictions in evidence — CR. A. 205/46, CR. A. 17/46.

Appeal from the judgment of the District Court of Jaffa, dated 11th September, 1946, in Criminal Case No. 187/46 whereby Appellant was convicted of robbery contrary to section 287 and 288(1) of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment, allowed:—

Conviction based on the evidence of a single witness set aside in the absence of an indication that the trial Court were alive to the fact that

they were convicting on the uncorroborated evidence of a single witness.
(*A. M. A.*)

REFERRED TO: CR. A. 203/45 (13, P. L. R. 13; *ante*, p. 16); CR. A. 17/46 (*ante*, p. 188).

ANNOTATIONS: See the cases cited and the notes thereto in A. L. R.
(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: A/Crown Counsel — (Salant).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, whereby the Appellant was convicted of robbery and sentenced to two years' imprisonment. At the trial one Aron Hirsch gave evidence that he left his motor-car on the 9th February, 1946, at the parking place at Pardess Katz in charge of a watchman named Hassan. When he left the car, it was intact with six tyres and one spare, the spare being attached to a chain rope. The following morning Hassan made a report to Hirsch in consequence of which the latter went to the parking place where he found the spare tyre missing. Hassan gave evidence that at about 2 o'clock in the morning of the 10th February he was preparing tea when he was approached by three persons one of whom pointed a pistol and another of whom pointed a rifle at his head, the third going to the car. The witness said in Court that the present Appellant was the man who had levelled the pistol at him and who had said "Keep quiet, do not raise your voice." The other two took the tyre. The witness went on to say that he told another watchman that he knew one of the robbers. The other watchman, Haj Selim Ibrahim Shaban, gave evidence that at about 3.15 *a. m.* Hassan came to him and told him that there had been a theft but did not mention the name of any thief or assailant. This, of course, was in direct conflict with the evidence of Hassan who had said that he had given this watchman the name of the Appellant. Tawfiq Muhd., the *mukhtar*, gave evidence that, between 9 and 10 *a. m.* on the 9th February, Hassan came to him and reported the theft and told him that one of the robbers was Muhd. Abu Hassan, that is, the present Appellant. On this evidence the learned Acting Relieving President delivered the following very short judgment:—

> "I accept the evidence of the Prosecution and I am satisfied that Defendant is the man who threatened Hassan with a pistol while the other stole the tyre. I convict him of the offence charged."

It is clear that the Appellant was convicted on the evidence of a single witness, namely, Hassan. The learned trial Judge gives no

indication why he believed Hassan nor does he seek to deal with the flat contradiction between the evidence of Hassan and that of the other prosecution witness, Haj Salim Shaban, who definitely swore that Hassan did not name any of the robbers; nor did the learned trial Judge enquire into why (if Shaban's evidence is to be believed) Hassan never mentioned the name of any of the robbers until he visited the *mukhtar* between 9 and 10 in the morning. We think that the words uttered by this Court in Criminal Appeal No. 203/45 Annotated Law Reports (1946) pp. 16, 18 and 19 apply equally to the case now before us. We quote from the report:—

> "We quite agree with Mr. Nakhleh that the Court of Criminal Appeal would need to be satisfied that the lower Court appreciated the fact that the evidence was that of a single witness and was alive to the necessity of weighing that evidence carefully."

We also quote from Criminal Appeal No. 17/46 Annotated Law Reports (1946), pp. 188 and 189:—

> "It is true that this Court desires to be satisfied that the trial Court fully appreciated that the evidence was that of a single witness."

In the present case it is certainly not clear from the judgment that the trial Court was alive to the necessity of weighing the evidence of Hassan carefully and we are far from satisfied that the elements necessary for a conviction are present.

We accordingly allow the appeal, quash the conviction, and order the Appellant to be set at liberty unless he is detained on another charge.

Delivered this 12th day of October, 1946, in the presence of the Appellant in person and Mr. Salant for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 211/46.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J. (in chambers).

IN THE APPLICATION OF :—

Lea Shmukler & an. — APPLICANTS.

v.

Nissan Ruttman. — RESPONDENT.

Eviction from premises for breach of contract — Interpretation of

contracts — Clause prefaced by the word "Remarks" regarded as a condition.

Application for leave to appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 15.4.46 in Civil Appeal No. 32/46, from the judgment of the Magistrate Haifa, dated 28.1.46 in C. C. No. 1472/45, refused:—

1. When interpreting a contract made in a language of which the parties have not a perfect command Court will rely more on an examination of the whole contract to ascertain the true meaning rather than on a rigid interpretation of any particular form of expression used therein.

2. If from an examination of the whole contract of lease it appears that a certain clause therein was intended to form part of the contract, Court will treat it as a condition even if that clause is prefaced by the word "Remarks".

(*M. L.*)

ANNOTATIONS: For recent authorities on interpretation of contracts see: C. A. 2/43 (1943, A. L. R. 71; 10, P. L. R. 81); C. A. 165/43 (1943, A. L. R. 636); C. A. 44/43 (1944, A. L. R. 28); C. A. 287/44 (1944, A. L. R. 749; 11, P. L. R. 589) and C. A. 132/44 (1945, A. L. R. 123).

(*A. G.*)

FOR APPLICANTS: Goitein.

FOR RESPONDENT: Kaiserman.

ORDER.

This is an application for leave to appeal from the District Court of Haifa.

The only issue before the District Court was whether or not the allegation that the hotel was being used for immoral purposes was well founded. The Judge came to the conclusion that it was, and that this was a breach of the contract of tenancy which would entitle the Court to make an order of eviction. Mr. Goitein now raises the point that there was no such condition in the contract of tenancy, and he bases his argument on the fact that this particular condition is prefaced by the word "Remarks". Now in Palestine, where contracts at times are made in a language of which the parties have not a perfect command, the Courts have held that in seeking to interpret such contracts they will rely more on an examination of the whole contract to ascertain what was the true meaning rather than a rigid interpretation of any particular form of expression which may be used. Applying that principle there is no doubt whatsoever in my mind that the undertaking to safeguard the good name of the hotel was intended to form part of the contract, and did in fact form part of the contract. I observe that immediately below this reservation as to preserving the good name of the hotel the document goes on to state: "The undersigned parties

declare that this contract...". From this I infer that the undertaking was intended to be part of the contract.

This being so, I cannot see that any point of novelty or complexity arises, and I must refuse leave to appeal.

Given this 15th day of July, 1946.

Chief Justice.

MISCELLANEOUS APPLICATION No. 41/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw and Frumkin, JJ.

IN THE APPLICATION OF :—

Mordechai Valdman. APPLICANT.

v.

Zeev Zeltner & an. RESPONDENTS.

Application for exemption from Court Fees — Facts stated in affidavit too general to prove inability to pay fees — Applicant asking to be allowed to prove facts by giving evidence.

Application for exemption from Court fees on an appeal from the judgment of the District Court, dated 28.6.46, in File No. 146/46, dismissed:—

Applicant for exemption from Court Fees must state in his affidavit the circumstances upon which he relies, if his affidavit is of a general nature, insufficient for purpose of proving poverty, he will not be allowed to prove facts by giving evidence.

FOLLOWED: Misc. A. 9/42 (1942, S. C. J. 105; 9, P. L. R. 154; 11, Ct. L. R. 98) and Misc. A. 23/45 (1945, A. L. R. 479).

(*M. L.*)

FOR APPLICANT: Matussevitch.

FOR RESPONDENTS: No. 1 — In person.
No. 2 — Summonses not received yet. (Applicant and Respondent No. 1 agree that presence of Respondent No. 2 is not necessary).

ORDER.

The point for decision is whether an applicant for exemption from Court Fees, under the Court Fees (Amendment) Rules No. 2, 1938

(1938 Laws of Palestine, Vol. 3, p. 1402) who has filed an affidavit in support of his application, is entitled to give evidence for the purpose of proving necessary facts which have not been proved in the affidavit.

In Misc. Appl. No. 9/42 (Supreme Court Judgments 1942, Vol. 1, p. 105) the Court indicated what facts should be stated in such an affidavit, and in Misc. Appl. No. 23/45 (Apelbom's Law Reports, 1945, p. 479) the Court laid down that in all requests under Rule 19(2) Court Fees Rules there should be filed with the written request an affidavit sworn to by the person himself on the lines laid down in Misc. Appl. 9/42.

We think that it would be a bad precedent if we were to depart from the decisions in these two cases. An applicant should state in his affidavit the circumstances upon which he relies for the purpose of proving his poverty. The Respondent then has notice of the facts which he will be called on to controvert. If we were now to allow the Applicant to give evidence the Respondent might be taken by surprise. The facts stated in this affidavit are of a general nature and are insufficient for the purpose of proving inability to pay the Court fees.

In the circumstances we must refuse the request for hearing the Applicant. It follows that the application fails and must be dismissed. The 1st Respondent will have inclusive costs in the sum of LP. 3 (three).

Given this 30th day of September, 1946.

British Puisne Judge.

HIGH COURT No. 58/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Edwards, A/C. J. and De Comarmond, J.

IN THE APPLICATION OF:—

Mohammad Ali Issa Abu Speitan. PETITIONER.

v.

The Chief Execution Officer, District Court, Jerusalem & 2 ors. RESPONDENTS.

Third person claiming that property seized in Execution Office in satisfaction of a debt due from J/D belongs to him and not to J/D — Chief

Execution Officer allowing 3rd person time to apply to competent Court to establish his rights — Failure to comply with Chief Execution Officer's order — Non-interference of High Court.

Return to an order *nisi*, issued on the 28th of May, 1946, directed to the first Respondent, calling upon him to show cause why his order, dated 19th March, 1946, in Execution File No. 177/44, Execution Office of the District Court, Jerusalem should not be set aside, and why he should not refrain from selling the property of Petitioner which was seized by the Execution Officer on the 3rd of July, 1945, order *nisi* discharged:—

> High Court will refuse third person's application who, while admitting that he has no registered title to land seized in execution, says it belongs to him and not to judgment debtor and although given by Chief Execution Officer time to go to competent Court to establish his claim, failed to comply with that order.
>
> (*M. L.*)

DISTINGUISHED: H. C. 81/45 (12, P. L. R. 564; 1946, A. L. R. 118).

ANNOTATIONS: See case distinguished (*supra*) and annotations in A. L. R.
(*A. G.*)

FOR PETITIONER: Nazzal.

FOR RESPONDENTS: Nos. 1 & 3 — Absent — served.
No. 2 — Germanus.

ORDER.

This is the return to an order *nisi*, directed to the Chief Execution Officer, District Court, Jerusalem, calling upon him to show cause why he should not be ordered to refrain from selling in execution certain immovable property.

The facts are that the second Respondent is a judgment creditor of the third Respondent. The Petitioner alleges that he is the sole owner of a certain house seized in execution in satisfaction of the judgment debt due to the second Respondent by the third Respondent. The second Respondent contends that it is, in fact, property held in *masha'a* between the heirs of one Mohd. Ali Issa Abu Speitan who are five in number, one of the five being the father of the Petitioner and another of the five being the third Respondent who is the judgment-debtor.

On the 29th September, 1945, the learned President of the District Court, in his capacity as Chief Execution Officer, having heard an objection by the present Petitioner, allowed him a postponement of one month in which to institute proceedings in the appropriate Court, to establish his claim to the property in question. It is not denied by the second Respondent that the Petitioner is in possession of a certain house but not of the one which has been attached. The sole question

is whether the registration in the name of the judgment-debtor applies to the house which was attached. The Petitioner admits that he has no title deed but relies solely on possession. His advocate contends that, because of the decision in High Court No. 81/45, Vol. 12, P. L. R. p. 564, he should not be ordered to become a plaintiff in an action in the Land Court. The difference, however, between the facts of High Court No. 81/45 and the facts of this case is that in High Court No. 81/45 the Petitioner admitted that the property was correctly registered but pleaded adverse possession. In the instant case the question is whether the title deed applies to the house which was attached. We see no reason, therefore, why after the Chief Execution Officer had made his order of 29th September, 1945, the present Petitioner should not have brought an action in the appropriate Court, asking for a declaration that the title deed did not apply to the house which was attached. Had he successfully brought such an action he would doubtless have received his costs. He did not bring an action, but preferred to raise additional objections which the learned Chief Execution Officer later seems to have overruled because on the 19th March, 1946, he ordered the sale to proceed. We think that the present Petitioner was not only guilty of delay in taking action after the 29th of September, but that he should have complied with the order of that date. We are unable, therefore, to hold that the learned President of the District Court, in his capacity as Chief Execution Officer, erred when making the order complained of. It remains to consider whether we should direct the Chief Execution Officer further to postpone the sale in order to give the Petitioner the opportunity, even at this late stage, of bringing an action in the appropriate Court. We see no reason why we should do so.

The order *nisi* is accordingly discharged. The Petitioner must pay the second Respondent fixed costs in the sum of LP. 10.—.

Given this 24th day of September, 1946.

Acting Chief Justice.

CIVIL APPEAL No. 172/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Curry, A/J.

IN THE APPEAL OF:—

Mordechai Rabinovitch. APPELLANT.

v.

New York Ahuza Alef Inc. RESPONDENT.

Interpleader — Civil Procedure Rules, extension of time (rr. 269(1)(4), 361) — Liability and expectation of liability — Appearance by claimants (rr. 270—4).

Appeal from the judgment of the District Court of Tel Aviv dated 31.3.46 in C. C. No. 120/46, dismissed:—

1. Rule 361 gives the Court discretion to extend the time under rule 269(1)(4) (dealing with interpleader).

2. Interpleader proceedings may be initiated in respect of either actual liability or expectation of liability.

3. Claimants may appear in interpleader proceedings.

(*A. M. A.*)

ANNOTATIONS:

1. *Quaere* whether r. 361 of the C. P. R. could be invoked in this case where the period sought to be extended is fixed by law; *cf.* C. A. 149/44 (11, P. L. R. 567; 1946, A. L. R. 795) — a case under the corresponding r. 284 of the M. C. P. R.; for District Court decisions on this question see Mo. D. C. Ha. 34/46 (1946, S. C. D. C. 37) and cases cited in the note thereto.

2. On interpleader generally see Halsbury, Vol. 18, pp. 596 *et seq.*

(*H. K.*)

FOR APPELLANT: B. Goldman.

FOR RESPONDENT: Dvorin.

JUDGMENT.

This is an appeal from a decision of the District Court of Tel-Aviv in certain interpleading proceedings.

The objections to the District Court proceedings fall under three heads, and it seems to us that they can be very briefly disposed of by reference to the Civil Procedure Rules.

The first ground of appeal was that the Court had no authority to do what in fact it did do, that is to extend the time for the filing of the affidavit under Rule 269(1)(4). In our opinion, clear discretion is given to the Court to extend the period under rule 361. The question therefore arises as to whether there is any ground for interfering with that discretion. We can say immediately that this Court will rarely interfere with the discretion of a lower Court in a case where it extends the time for the doing of an act under Rule 361. In this case, no grounds were adduced which would justify us in so interfering.

The second ground of appeal was that the person applying by way of interpleader did not come within the ambit of rule 269. In this connection it must be appreciated that rule 269 deals with two cases. There is the case where there is an actual liability and there is the case where there is an expectation of a liability. Now in paragraph 5 of

the affidavit in support of the interpleader it is averred that the creditor had assigned his rights to other persons, and that the claimant expected to be sued by those other persons. In our opinion that averment is a statement of fact which would clearly be covered by the second part of rule 269 of the Civil Procedure Rules, and the appeal on this point must also fail.

The third ground was that the Court was wrong in allowing the claimants to appear. In the first place we would remark that it is difficult to see how the Appellants could have been prejudiced by this fact. But apart from that, it seems to us that rules 270—274 contemplate that the claimants should appear. Rule 270 places a statutory obligation on the Registrar to summon them, and rule 274 makes provisions as to what the Court is to do if they do not appear. We are also of opinion that there is no substance in this ground.

The appeal must therefore be dismissed with costs at the lower scale to include LP. 10.— advocate's fees.

Delivered this 21st day of October, 1946.

Chief Justice.

CRIMINAL APPEAL No. 101/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: De Comarmond, J., Curry, A/J. and Frumkin, J.

IN THE APPEAL OF:—

The Attorney General. — APPELLANT.

v.

Naim Hussein El Bahnasswi. — RESPONDENT.

Sentence — Appeal by Attorney General — Irregular conviction — Perjury.

Appeal from the judgment of the District Court of Jaffa, dated the 17th day of July, 1946, in Criminal Case No. 205/45 whereby the Accused was convicted of perjury contrary to section 117 of the Criminal Code Ordinance, 1936, and sentenced to six months imprisonment; sentence reduced to a nominal one:—

A sentence reduced to a nominal sentence in an appeal by the Attorney General on the ground of insufficient punishment, the conviction having been irregular, but the Accused having failed to appeal.

(*A. M. A.*)

FOR APPELLANT: Crown Counsel — (Heenan).

FOR RESPONDENT: T. Mogannam.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Jaffa on the ground that the punishment was insufficient. The Accused was convicted on a charge of perjury contrary to section 117 of the Criminal Code Ordinance, 1936, and was sentenced to six months' imprisonment.

In order to decide whether the sentence was inadequate we have taken cognisance of the proceedings before the trial Court in order to ascertain the nature and importance of the false testimony alleged to have been given by the Accused before the Examining Magistrate. After perusing the record we have failed to find the original statement made to the police, and we fail to understand how the Accused was convicted by the District Court of Jaffa. Anyhow the Accused has not appealed against conviction and we therefore cannot intervene in that respect.

With regard, however, to the question of sentence we consider that in the circumstances of this case instead of increasing the sentence, the least we can do is to reduce it to a nominal sentence of one day's imprisonment which means that the Accused will have to be set at liberty unless he is detained for some other offence.

The judgment of the Court below is amended to the extent of reducing the sentence to one day's imprisonment.

Delivered this 30th day of October, 1946.

British Puisne Judge.

HIGH COURT No. 38/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF :—

Mrs. Wadad el Husseini. PETITIONER.

v.

The Chief Execution Officer, District Court, Jaffa & 4 ors. RESPONDENTS.

Attachment of goods found in premises not belonging to J/D — Removal of attachment upon 3rd party establishing his ownership to the goods.

Return to a rule *nisi* issued on the 3rd of April, 1946, directed to the first

Respondent, calling upon him to show cause why his order, dated 7th March, 1946, should not be set aside and why his order, dated 13th November, 1945, should not be restored, the rule discharged:—

1. Chief Execution Officer is right if he removes attachment from goods allegedly belonging to judgment debtor on production by third party of a judgment of a competent Court that they belong to him.

2. Where decree holder alleges that judgment in favour of third person regarding ownership of attached goods was obtained by collusion between latter and judgment debtor it is for him to prove it and have judgment set aside.

(*M. L.*)

FOR PETITIONER: Nakhleh.

FOR RESPONDENTS: Nos. 1—2 — Absent — served.
No. 3 — Elia.
Nos. 4—5 — In person.

ORDER.

This case is in effect an appeal against the decision of the Execution Officer who released an attachment which the second Respondent had obtained against certain movables. The execution proceedings were begun by the Petitioner in his capacity as judgment creditor of the second Respondent. The goods attached consisted of tables, refrigerators, crockery, *etc.* found at the Taj Mahal restaurant which was reputedly the property of the third Respondent who was the licensee thereof. The attachment was obtained on the ground that Respondent No. 2 had brought an action against Respondent No. 3 to establish that he was the real owner of the furniture and that Respondent No. 3 (who is his son) was only his nominee. When the Execution Officer repaired to the Taj Mahal restaurant on the 28.7.45 he was met by another son of the 2nd Respondent's who objected to the attachment on the ground that he was the real owner of the furniture. The objector was treated as third party and was left in charge of the attached property.

The 3rd Respondent won the case brought against him by his father and the very foundation for the attachment obtained by* the father (Respondent No. 2) thus disappeared. A copy of the judgment (Exhibit D) is before us and is dated 16.10.45.

In November, 1945, Respondents 4 and 5 applied to the Chief Execution Officer for release of the attachment and stated that they had bought the property from Respondent No. 3 whose title thereto had been affirmed by the judgment of 16.10.45.

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* *Scil.*: Against.

On the 7th March, 1946, the Chief Execution Officer delivered his decision releasing the property from attachment.

Petitioner's main point is that the judgment of 16.10.45 was the result of collusion between Respondents 2 and 3 and that the Chief Execution Officer was wrong to base his decision on that judgment.

The effect of a plea of collusion in a similar case was dealt with in Civil Appeal 212/45 when the Court of Appeal held that it was for the party alleging collusion to have the judgment set aside.

Mr. Nakhleh for the Petitioner could not satisfy us that the principle laid down in C. A. 212/45 is not applicable to the present case. He urged, however, that C. A. 212/45 was wrongly decided because it was in conflict with Article 56 of the Execution Law and Article 284 of the Ottoman Code of Civil Procedure. We fail to see where the conflict arises. Article 56 provides that the Execution Officer may release an attachment after considering the objections made by a third party or may order the attachment proceedings to be continued, and it is obviously only in the latter eventuality that the third party has to take the matter to a competent Court. In cases where the third party's objection is upheld by the Execution Officer there is no need for the third party to move further. In this connection, Article 57 of the Execution Law is of interest because it provides that in cases where goods are attached at the residence of the judgment debtor or are proved to have been in his possession, the objection of a third party will not be heard by the Execution Officer unless supported by the decree of a competent Court. In the present instance the goods were not found at the debtor's residence or in his possession. With regard to Article 284 of the Ottoman Code of Civil Procedure we do not see what application it has in the present instance where the debtor was not the reputed owner of the goods and the goods were seized only on the strength of a claim made thereto by the judgment debtor, *i. e.* the second Respondent; as soon as the latter lost his claim, the only justification for the attachment disappeared. The Execution Officer cannot be blamed for releasing the attachment when the 3rd Respondent or those in his rights exhibited a final judgment establishing that the second Respondent had failed to substantiate his claim that the goods were his. As already pointed out, it was for the judgment creditor, if he suspected that his debtor (2nd Respondent) had fraudulently failed to press home his claim, to attack the judgment of the Magistrate's Court by proving collusion. This he has not done and we cannot, therefore, find that the Execution Officer was in error when he attached due weight to the judgment of a competent Court.

For these reasons, we are of opinion that the rule must be discharged and we allow LP. 10 (ten) inclusive costs to the third Respondent.

Given this 11th day of July, 1946, in the presence of Najib Eff. Germanus for the Petitioner and Mr. E. George Elia for Respondent No. 3.

Chief Justice.

HIGH COURT No. 43/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE PETITION OF:—

Adel Ibrahim el Farra. PETITIONER.

v.

The Chairman of the Electoral Committee of Khan Younis & 7 ors. RESPONDENTS.

Proceedings of Electoral Committee of Municipal Corporation — Application of sec. 39 Interpretation Ordinance — Rules of interpretation.

Return to an order *nisi*, directed to the Respondents, calling upon them to show cause, if any, why their order of the 3rd of April, 1946, should not be set aside and why the Electoral Committee should not meet in its full constitution of all its members to consider all claims and objections under section 15 of the Municipal Corporations Ordinance to the register of voters; order *nisi* discharged:—

1. An Electoral Committee is not like committees of council of municipal corporation concerned, and rules regulating proceedings of such latter committees are not applicable to Electoral Committee.

2. Municipal Corporation Ord. is silent as to quorum of Electoral Committee, nor does it expressly provide that the Committee cannot function unless all members attend, therefore sec. 39 Interpretation Ord., 1945, applies — although Municipal Corporation Ordinance was passed when this section was not in existence — and majority of members constitutes quorum.

3. While mere inconvenience is not by itself sufficient reason for construing an enactment so as to render its provisions more practical or satisfactory, Court will reject an interpretation likely to create a position which is not logical and satisfactory.

4. (*Per*, Curry, J.): High Court has no power to give effect to an order to all members of a committee to attend the meetings and it would be an improper order for High Court to make.

(*M. L.*)

ANNOTATIONS:

1. On retroactive effect of statutes see: H. C. 105/44 (1944, A. L. R. 557);

C. A. 78/44 (1944, A. L. R. 624); C. A. 390/43 (1944, A. L. R. 415); C. A. 370/43 (1944, A. L. R. 475) and C. A. 264/45 (1946, A. L. R. 50); see also Maxwell on the Interpretation of Statutes, 8th Ed. p. 189 *et seq.*

2. On point 3 see *op. cit.* p. 169 *et seq.*

(*A. G.*)

FOR PETITIONER: Elia.

FOR RESPONDENTS: Nos. 1, 2, 4, 5, 6 and 7 — G. Salah.
No. 5 — Absent — served.
No. 8 — Cattan.

ORDER.

De Comarmond, J.: An order *nisi* directed to the Chairman and members of the Electoral Committee of Khan Yunis was issued on the prayer of the Petitioner Adel Ibrahim el Farra. The said Chairman and members were thereby called upon to show cause, if any, why their order dated the 4th April, 1946, should not be set aside and why all the members constituting the Electoral Committee should not meet to consider all claims and objections as provided by section 15 of the Municipal Corporations Ordinance, 1934.

Five out of seven members of the said Committee headed by Abdul Rahman el Farra, the chairman, oppose the petition and an affidavit sworn to by the chairman was put in their behalf. Mr. George Salah represented these five Respondents, *i. e.* Respondents 2, 3, 4, 6 and 7.

Another Respondent, No. 8, also opposes the petition. He swore an affidavit and was represented by Mr. H. Cattan.

Respondent No. 8 did not file an affidavit and did not appear.

On the return day, Mr. Southworth, Crown Counsel, was in Court and informed the Court that he would be prepared if called upon as *amicus curiae* to make certain submissions on behalf of the Attorney General regarding the interpretation of section 15 of the Municipal Corporations Ordinance, 1934. The Court, after hearing the advocates for the Respondents and Petitioner, did not find it necessary to take advantage of the Crown Counsel's offer.

The gist of the Petitioner's case is that an Electoral Committee appointed by a District Commissioner under section 13 of the Municipal Corporations Ordinance cannot fulfil its duties unless all the members thereof are in attendance.

The Petitioner had presented objections to the insertion of seven names in the register of voters of Khan Younis and states that, in spite of his representations, four members only of the Committee of seven were present at the hearing of the said objections. Petitioner also mentions that the Electoral Committee never met with all members present to consider any of the numerous other claims and objections.

On the 1st April, 1946, the Petitioner applied in writing to the Electoral Committee stating that, being given that all the members of the Committee had not considered the objections submitted by him, the proceedings were null and his objections had never been properly investigated. To this application, a reply was made on the 4th April by the Chairman of the Electoral Committee to the effect that five members had met to consider the application (the two remaining members having failed to attend although summoned) and that the application was refused. The reply conveyed the information that it was considered that the Electoral Committee had no power to compel the attendance of its members and that a meeting attended by a majority of the seven members was lawfully constituted.

It is clear from the affidavit of Respondent No. 8 and from the arguments addressed to us, that the Petitioner decided to writt to the Electoral Committee of the 1st April, 1946, because the learned President of the Jaffa District Court had ruled on the 27th March that an Electoral Committee was not properly constituted to hear claims and objections unless composed of all its members and that its proceedings were null.

Mr. Cattan, on behalf of Respondent No. 8, supported the view that the Electoral Committee could not deal with claims and objections unless all the members are present. To that extent, therefore Mr. Cattan sides with the Petitioner. But Mr. Cattan also submitted that this Court could not intervene in the matter because Petitioner had an alternative remedy and because section 16(5) of the Municipal Ordinance lays down that decisions of an electoral committee (when there is no appeal) or decisions of a District Court on appeal from an electoral committee are final. Mr. Cattan further submitted that, in any event, it would create chaos should this Court hold a different view from that of the Jaffa District Court concerning the proper constitution of an electoral committee when dealing with claims and objections.

It seems to me that chaos is inevitable if there is no certainty as to the constitution of electoral committees. In the present case, for example, the Khan Yunis Committee has maintained its view that all the members need not sit.

I have given consideration to Mr. Cattan's arguments, and it seems to me that if he is right in his contention that an electoral committee cannot exercise its quasi-judicial powers unless all the members are present, the position would be that the Khan Yunis Electoral Committee has never properly functioned. This being so, I fail to see how an appeal to the District Court from a decision which is null and void could alter the fact that there has never been a proper hearing.

If it were correct that the Khan Yunis Electoral Committee has never discharged properly its functions, I would not be prepared to hold that the Petitioner was wrong in coming to this Court, the more so as the said Committee persists in its view that a majority of its seven members does constitute a quorum. I am therefore of opinion that I should examine whether or not the Khan Yunis Committee's attitude is justified.

Mr. Salah who sustained the ruling given by the Electoral Committee on the 4th April, 1946, submitted that an electoral committee is a committee of the council of the corporation concerned. I cannot agree with this view because section 60 of the Municipal Corporations Ordinance makes it clear that committees of a council are appointed by such council and are composed of councillors, whereas an electoral committee is appointed by the District Commissioner and may be composed of persons entitled to vote at municipal elections and of Government officers. It cannot therefore be said that the rules regulating the procedure of committees of a municipal council are applicable to electoral committees.

Mr. Salah was on firmer ground when he relied on section 39 of the Interpretation Ordinance, 1945, which reads as follows:—

> "Save as is otherwise expressly provided by any enactment, whenever any act or thing is required to be done by more than two persons, a majority of them may do it."

That section applies to any Ordinance whether passed before or after the commencement of the Interpretation Ordinance, 1945, and it does not therefore necessarily mean that the section must be disregarded when construing an Ordinance passed at a time when the said section was not in existence. The important point is to ascertain whether there is in the Ordinance under interpretation an express provision contrary to the principle set out in section 39 of the Interpretation Ordinance.

The Municipal Corporations Ordinance does not lay down what is the quorum of electoral committees and neither does it expressly provide that an electoral committee cannot function unless every member thereof is present. I agree with the view that it would seem unreasonable to expect that all the members of a fairly numerous committee would be able to attend every meeting of such committee. I also realise the practical impossibility of a committee discharging speedily its duty of considering and deciding claims and objections if such duty could only be performed by all the members of a committee consisting of a fairly large number of members. I must however add that mere inconvenience is not, by itself, a sufficient reason for construing an enactment so as

to render its provisions more practical or satisfactory.

I have studied sections 13 to 17 of the Municipal Corporations Ordinance, and I cannot bring myself to accept the view that these sections indicate that an electoral committee cannot act unless all its members are present. Assuming for the sake of argument that such a view were correct, is there anything in sub-sections (3) and (4) of section 15 compelling every member to vote? — The answer is in the negative, and we are therefore driven to the position that the law would have made it essential that all the members must attend but would have paid no attention to the more important point that most of the members might not take part in the voting. Such a position does not seem logical and satisfactory.

Another reason for rejecting the interpretation that all the members of a committee must be present for the consideration of every case is that such an interpretation would discount the strong likelihood that one or two members may have to withdraw in cases where the interested parties are related to them or are business partners, *etc.*

I find no reason for not using section 39 of the Interpretation Ordinance when construing section 15 of the Municipal Corporations Ordinance; it seems to me that this is an instance when the usefulness of section 39 is clearly demonstrated. I therefore hold that a decision arrived at by a majority of the members of an electoral committee is a valid decision. The order *nisi* is therefore discharged but, in view of the nature of this case, I consider that each party should bear his own costs.

Given this 5th day of June 1946 in the presence of Mr. G. Salah and Mr. Merguerian for Respondents, Respondent No. 5 not present.

British Puisne Judge.

ORDER.

Curry, A. J.: In effect the prayer of the Petitioner is that in view of the ruling of the learned President of the Jaffa District Court that the Electoral Committee is not properly constituted to hear claims and objections unless all the members attend the meetings, and whereas the Committee does not so meet, an order should issue to the members to attend the meetings. This Court would have no power to give effect to such an order and in my opinion it would be an improper order for this Court to make. I therefore consider that the order *nisi* must be discharged.

Given this 5th day of June, 1946.

A/British Puisne Judge.

CRIMINAL APPEAL No. 99/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: FitzGerald, C. J., De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Tewfiq Abed Ali. APPLICANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Two inquiries on single information — Joinder of trials — Discretion — Amendment or replacement of information, CR. A. 125/45 distinguished — Inferences of fact to be drawn from the evidence — False pretences.

Application for leave to appeal from the judgment of the District Court of Tel-Aviv, dated 22.8.46, in Criminal Case No. 19/46 whereby Appellant was convicted of an offence *contra* section 301 of the Criminal Code Ordinance and sentenced to 9 (nine) months' imprisonment and LP. 200 as costs for the prosecution; appeal dismissed:—

1. A single information may be based on two different preliminary inquiries.
2. The Attorney General's representative may act more than once in amending or replacing an information, if it leads to no confusion as regards charge to which the Accused is called upon to plead.

(*A. M. A.*)

DISTINGUISHED: CR. A. 125/45 (12, P. L. R. 410; 1945, A. L. R. 769).

ANNOTATIONS:

1. *Cf.* CR. A. 57/44 (11, P. L. R. 184; 1944, A. L. R. 440) — preliminary enquiry conducted by two Magistrates.

2. Authorities on amendment of informations are collated in the notes in A. L. R. to CR. A. 16/43 (10, P. L. R. 131; 1943, A. L. R. 115); see also CR. A. 83/44 (11, P. L. R. 376; 1944, A. L. R. 705) and CR. A. 79/44 (*ibid.*, pp. 342 & 750).

3. The offence of false pretences is a continuing one: CR. A. 44/43 (10, P. L. R. 283; 1943, A. L. R. 426) and case quoted in note 3 in A. L. R.

(*H. K.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: A/Crown Counsel — (Salant).

JUDGMENT.

In this appeal the case of the Appellant was advanced and advanced with ability on two grounds. The first dealt with certain points of law and the second with the inference to be drawn from the evidence.

Dealing now with the technical grounds. There were two preliminary enquiries, and it was argued that these two enquiries could not form the subject matter of one information. Although it can be conceded that it is unusual to find one information based on two different preliminary enquiries, we cannot see that there is any legal objection to it. This point must fail.

The second point was that the discretion exercised by the Judge, in joining the trials was wrongly exercised. As to this, we need only say that the Court of Appeal will not lightly interfere with the discretion of a Judge on the question of joint or separate trials and in this case there are no grounds for interference.

The next point was that the Attorney General's representative could only act once in amending or replacing informations. We fail to see how this point has any great relevance to this case. Criminal Appeal 125/45 was cited to us and we need only remark that the facts in that case were different. There the Accused were confronted with confusion as to the charge to which they had to plead.

Turning now to the inference to be drawn from the evidence. There is in fact only one point and we have given it anxious consideration. Mr. Nazzal argues that the false pretence was the production of the woman Sohara Haim Ankari under the pretence that she was Fatmeh, and he goes on to point out that there was no sufficient evidence to connect the Appellant with the actual act of the production of this woman. But this appears to us completely to ignore the sequence of events. The gist of the charge was not one act of false pretence but a continuing act of false pretence, the basis of all the pretences being that the Accused, of whom the Appellant was one, were in a position to negotiate the legal transfer of certain land. It is true that the production of a woman to sign the Power of Attorney was one of the factors in the negotiations, one of the links in the chain necessary for the false pretence, but it was only one. There is evidence that in all the negotiations leading up to this final act of the production of the woman, the Accused took a prominent part. It is only necessary to refer to a few outstanding instances. The production of the *Mukhtar*, which was another essential link in the chain, was accomplished by the joint act of the Accused and Naif. There were various preliminary journeys to Tulkarm and Petah Tiqva in all of which the Accused played a prominent part. Those acts alone would have been sufficient to justify the conviction of the Accused. But apart from this, we consider that there was evidence which fully justified the inference that the Appellant was also instrumental in producing this woman to impersonate Fatmeh. It is true he may not have taken as active a part

in the negotiations with the woman herself as Naif did, but he had accompanied and abetted Naif in his negotiations.

Finally there was the point that it can be inferred from the receipt issued, that what dominated the mind of Ben Zvi when he passed over the money was the fact that the woman was identified by the persons who witnessed the receipt. We think that this point was answered by the Trial Judge and we agree with him that this was nothing more than an ordinary precaution on the part of the lawyer to make assurance doubly sure.

For all these reasons the appeal must be dismissed.

Delivered this 26th day of October, 1946.

Chief Justice.

CRIMINAL APPEAL No. 52/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Fitzgerald, C. J., Curry, A/J. and Frumkin, J.

IN THE APPEAL OF:—

Basil Yousef Abu Yaghi. APPELLANT.

v.

Attorney General. RESPONDENT.

Murder — Premeditation, provocation, resolution, preparation — Evidence — C. C. O. 216 — Mancini v. D. P. P.

Appeal from the judgment of the Court of Criminal Assize sitting at Jaffa, in Assize Case No. 11/46, where Appellant was convicted of murder *contra* sec. 214 of the C. C. O., dismissed:—

1. The principles laid down in England in Mancini *v.* The Director of Public Prosecutions regarding provocation apply in Palestine.
2. Resolution to kill need not, in murder cases, exist prior to the time when the fatal blow is struck.
3. The opening of a clasp knife is in itself an act of preparation for killing and is evidence of the formation of a resolve to kill by stabbing.

(*A. M. A.*)

APPLIED: Mancini *v* Director of Public Prosecutions, 1942, A. C. 1, (1941) 3 All E. R. 272, 111 L. J. (K. B.) 84, 165 L. T. 353, 58 T. L. R. 25, 28 Cr. App. Rep. 65.

ANNOTATIONS: Note that the Court of Criminal Appeal differently constituted (Edwards, de Comarmond and Abdul Hadi, JJ.) have in a later case held that sec. 216 of the C. C. O. "is fundamentally different from the English criminal law and ..... that the utmost circumspection should be exercised when referring to

English case law for (its) interpretation.": CR. A. 95/46 (*ante*, p. 559). See annotations to that case and authorities therein quoted.

(*H. K.*)

FOR APPELLANT: F. Ghussein.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

The only point advanced in favour of this Appellant is that there was not premeditation so as to bring the crime within the ambit of section 214 of the Criminal Code Ordinance. It is admitted by Fawzi Bey Ghussein, counsel for the Appellant, that the Accused did cause the death of the deceased and that he caused it by inflicting wounds with a clasp knife. It would, indeed, have been difficult to argue otherwise, in the light of the very clear evidence which was adduced before the trial Court.

The question as to whether there was or was not premeditation involves a consideration of section 216 of the Criminal Code. It will be convenient if we take the second paragraph (b) first — whether he killed in cold blood without immediate provocation.

Now, the Court found as a fact that the Accused was in cold blood when he went, as it is clear from the evidence that he did go, with two other persons (the original second and third Accused) to assault the deceased. That finding was, in our opinion, an eminently reasonable one from the evidence adduced, and we see no reason for interfering with it. Counsel does not quarrel with that finding, but he argues that an incident occurred between the setting out with intent to assault and the actual killing, the effect of which incident was to change cold blood into hot blood. That incident was the pushing of the Accused from the lorry by someone on the lorry. The Court held that this did not amount to provocation sufficient to satisfy the requirements of section 216(b). Fawzi Bey has argued that the legal interpretation of what amounts to provocation in Palestine is not as circumscribed as it is in England. That may be so, but at all events the principles laid down in the case quoted (Mancini *v.* Director of Public Prosecutions) apply in Palestine. Relying on those principles the Court came to the conclusion that the push out of the lorry was not provocation. We are of opinion that the principles were correctly applied by the trial Court, and that the conclusion that the incident did not amount to provocation within the meaning of section 216(b) of the Criminal Code Ordinance was well founded. We therefore agree with the Court that the element of cold blood was present, and that there was no provocation.

Turning now to (a) and (c) of section 216 which deal with the resolu-

tion to kill and the preparation to kill. In this connection the last paragraph of section 216, which reads as follows, must be borne in mind:—

> "In order to prove premeditation it shall not be necessary to show that an accused person was in any state of mind for any particular period or within any particular period before the actual commission of the crime or that the instrument, if any, with which the crime was committed was prepared at any particular time before the actual commission of the crime."

The Court found that the Accused had gone to the place for the purpose, at least, of assaulting Saliba; in fact one member of the Court was of the opinion that he had formed the resolution to kill at that particular period — but all the members of the Court were satisfied that he had formed the resolution to kill a few seconds before he actually struck the blow. We see no reason to differ from this finding, which was in our opinion a justifiable inference from the evidence adduced. The judgment goes on to point out that it was not necessary to show that the accused person was in this particular state of mind for any particular period of time. We agree with that interpretation of the law, and in our opinion the test applied by the Court was the correct test — that was whether or not resolution existed at the moment when the blow was struck. The evidence was that this man had a clasp knife in his pocket. He took that clasp knife out and he opened the blade. We are of opinion that in the circumstances of this case the very act of opening the blade was in itself an act of preparing the knife for the purpose of stabbing. It was an act of preparation for killing, and it also was evidence of the formation of the resolve to kill by stabbing.

For these reasons all the conditions precedent to satisfy the requirements of section 216 of the Criminal Code Ordinance were present, and the Accused was rightly convicted.

The appeal must therefore be dismissed.

Delivered this 8th day of May, 1946.

Chief Justice

CIVIL APPEAL No. 12/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Fitzgerald, C. J. and Curry, A/J.

IN THE APPEAL OF :—

Ahmad Amoura & an. — APPELLANTS.

v.

Raouf Kawar & 2 ors. — RESPONDENTS.

Forfeiture of deposit — Agreement to sell coupled with possession — Breach of contract — C. A. 11/43, C. A. 353/43 — Rent and mesne profits — Interest on deposit — "Arabon" — Howe v. Smith, Palmer v. Temple — Purchaser as trespasser as from date of entry.

Appeal from the judgment of the District Court of Haifa in Civil Case No. 146/44, allowed:—

1. Unless a contrary intention can be read in the contract taken as a whole, a deposit is forfeited if the purchaser commits a breach of the contract.

2. If the purchaser repudiates the agreement he is considered a trespasser from the date of his entry on the property.

(*A. M. A.*)

FOLLOWED: Palmer *v.* Temple, 1839, 8 L. J. (Q. B.) 179.

DISTINGUISHED: Howe *v.* Smith, 1884, 27 Ch. D. 89, 53 L. J. (Ch.) 1055, 50 L. T. 573.

ANNOTATIONS:

1. See the previous proceedings between the parties; C. A. 11/43 (10, P. L. R. 54; 1943, A. L. R. 377).

2. On forfeiture of deposit see C. A. 261/40 (8, P. L. R. 71; 1941, S. C. J. 36; 9, Ct. L. R. 61), C. A. 11/43 (*supra*), C. A. 57/43 (1944, A. L. R. 24) and C. A. D. C. T. A. 60/45 (1946, S. C. D. C. 224) and notes. *Cf.* Halsbury, Vol. 29, pp. 375 *et seq.*, sec. 2.

3. On the second point *cf.* C. A. D. C. Ha. 63/45 (1946, S. C. D. C. 734).

(*H. K.*)

FOR APPELLANTS: Eliash.

FOR RESPONDENTS: A. Atalla.

JUDGMENT.

Curry, A/J.: This is an appeal from Haifa Civil Case No. 146/44. For the sake of clarity, however, I think it advisable to set out shortly the previous litigation which has taken place between the parties.

The present Respondents agreed to sell to the Appellants a house by an agreement dated 13th January, 1941. The Appellants paid the sum of LP. 350 in respect of the purchase price, but failed to pay the balance.

In Haifa Civil Case No. 141/44 the Respondents claimed LP. 465 as damages for the breach. The Judges disagreed in that case but finally gave a judgment in the sum of LP. 69. On appeal, Civil Appeal No. 11/43 * the judgment of the District Court was set aside on the

* 10, P. L. R. 54.

ground that the Plaintiffs could not claim damages until the amount exceeded the LP. 350 which they still held. The Respondents then filed a further action in the Magistrate's Court claiming possession and rent for the sum of LP. 40.500 mils. The Magistrate dismissed the claim for rent but held that the Plaintiffs were entitled to possession on condition that they repaid the sum of LP. 350. This was appealed to the District Court in Haifa Civil Appeal No. 83/43. That Court confirmed the order for possession but set aside the conditional repayment of LP. 350 and dismissed the claim of LP. 40.500 mils for rent. On appeal to the Supreme Court Civil Appeal No. 353/43, that judgment was confirmed.

In the case before us, Appellants filed an action in the Haifa Court, Civil Case No. 146/44 for the sum of LP. 497.350 mils made up as follows:—

LP. 350.000 the advance payment,

LP. 110.250 mils interest.

LP. 37.100 mils for repairs.

The Defendants counter-claimed for LP. 457.100 mils for equivalent rent for the period the Plaintiffs occupied the house. The learned Judge held that the Plaintiffs were not entitled to the return of the LP. 350 as it was a deposit to ensure the fulfilment of the contract. He also found that the Plaintiffs were trespassers and he assessed the equivalent rent for the period of occupation as LP. 351. He therefore dismissed Plaintiffs' claim and entered judgment for the LP. 351 in favour of the Defendants' counterclaim.

The first point to be decided in this appeal is whether the LP. 350 is a deposit which the purchaser forfeits as a result of his breach of the agreement. It appears that in the Court below there was considerable argument as to the meaning of the Arabic word "arabon" as to whether it is a deposit or not. I do not, however, think this is of great importance. I am quite prepared to accept the translation as meaning "deposit", but that does not decide the matter. It is true that in a contract which provides for the payment of a deposit the vendor is entitled to retain it as forfeited if the contract is broken by the purchaser, unless the contract taken as a whole shows an intention to exclude the forfeiture (Hailsham Vol. XXIX, p. 375). It is to be noted that there is no specific provision for forfeiture in this case. However, as I have already indicated, that is not essential, the presumption being that a deposit shall be forfeited unless the contract as a whole shows a contrary intention. The important clause in this contract in this respect is clause 7. That clause provides that both parties agree to a

fine to be assessed at LP. 300 to be paid by the party committing the breach to the other party without proving loss and damage and without official notice.

In Howe *v.* Smith, 27 Ch. D. p. 89, there was a similar contract and the payment of a deposit. The contract contained a clause to the effect that if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell the premises and the deficiency of such second sale with all expenses should be made good by the defaulter and be recoverable as liquidated damages. It was held in that case that this clause giving the vendor the right to resell and recover any deficiency in price as liquidated damages did not show an intention to exclude forfeiture of the deposit. This case was distinguished from Palmer *v.* Temple (E. & E. Digest Vol. 40 — 228). In Palmer *v.* Temple there was a damage clause providing that in the event of breach by either party the party defaulting would pay LP. 1,000 damages. In that case it was held that this provision showed an intention against forfeiture of the deposit of the LP. 300. It was there said that the question of forfeiture depended on the intention of the parties, to be collected from the whole instrument. It appears to me that our case is very different from that of Howe *v.* Smith which made no general provision for a lump sum to be paid by either party on breach of the contract. It merely gave the vendor the right to resell and recover any deficiency there might be. Our case appears to me to be on all fours with Palmer *v.* Temple, and I am of the opinion that the intention of the parties as evidenced by this contract must be construed as being against forfeiture of the deposit.

The second point to be considered in this case is what amount of damages by way of rent the Appellants must pay to the Respondents. The counter-claim was for rent from 13.1.41 to 1.8.43.

There was some argument as to whether the Respondents were entitled to rent only from the date of action as prior thereto Appellants were in possession with the consent of the Respondents. It appears to me however that Appellants were only in possession by virtue of the sale agreement and when they broke that agreement they were there as trespassers which act of trespass dated back to their original entry. We therefore hold that the period for payment of rent should be from 13.1.41 to 23.2.43, the date the property was resold. The rent has been fixed at LP. 13 *p. m.* so that Respondents are entitled to a sum of LP. 329 which if deducted from the deposit of LP. 350 leaves a balance of LP. 21 as due to the Appellants.

The appeal is accordingly allowed, the judgment of the District Court set aside and judgment given to Appellants in the sum of LP. 21. Ap-

pellants are entitled to Court costs (on the lower scale) and an inclusive advocate's instruction and hearing fee of LP. 10.—.

Delivered this 8th day of May, 1946.

A/British Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

CIVIL APPEAL No. 268/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPEAL OF:—

Custodian of Enemy Property. APPELLANT.

v.

Nir Ltd. RESPONDENTS.

Agency — Tests applicable.

Appeal from the judgment of the District Court of Tel-Aviv in Civil Case No. 445/43, allowed:—

Circumstances analyzed in which agency relations may be said to exist. (*A. M. A.*)

ANNOTATIONS:

1. On the nature of the principal and agent relationship *cf.* Halsbury, Vol. 1, pp. 193—5, para. 345; *vide* also C. A. 306/45 (*ante*, p. 152).

2. Agency may be proved by oral evidence: C. A. 89/42 (9, P. L. R. 439; 1942, S. C. J. 444; 12, Ct. L. R. 53); *cf.* C. A. 481/44 (1945, A. L. R. 300). (*H. K.*)

FOR APPELLANT: A/Crown Counsel — (Salant).

FOR RESPONDENTS: Smoira.

JUDGMENT.

This is an appeal from a decision of the learned Relieving President of the District Court of Tel-Aviv, in Civil Case No. 445/43, dismissing with costs a claim made by the Custodian of Enemy Property (Appellant) against Nir Ltd. (Respondents) for the payment of a sum of LP. 252.729 mils together with interest at 9% from the date of filing of the statement of claim. The Custodian of Enemy Property was vested with the rights of the Tovarna Paper Factory Ltd., Slavosovce,

Czechoslovakia, and it was in that capacity that he entered the claim against Nir Ltd. alleging that the latter had collected the money as agents of Tovarna, and were still holding it.

The Defendants' defence, put shortly, was that they had not acted as agents of Tovarna. The Defendants did not deny having received, in Palestine, money from Messrs. David Roth in respect of goods consigned to them by Tovarna. The averment made by the Defendants in paragraph 2 of their statement of defence was that the money was received by them "for their own account", and that there was an agreement by which they were "to compensate Tovarna by instructing their banker at Prague to put the counter-value in Czech currency at the disposal of the Tovarna." The Respondents' advocate, when addressing us, described the agreement as being a sale of Palestine currency by Tovarna to Nir Ltd. in consideration of payment to Tovarna in Prague of the equivalent sum in krones. It seems to us that to describe the alleged agreement as an exchange would perhaps be more accurate, but ... sufficient, for the purposes of this appeal, to decide whether the ...ent company were acting as agents or not.

... of Respondents' contention is that there was no agency and ...ently the sole cause of action against Respondents would ... respect of Respondents' failure to fulfil their part of the ... placing krones in Prague at the disposal of Tovarna.

... Relieving President took the view, not without some ...t the Respondents-Defendants were not acting as agents ...nd that the real cause of action would have been a claim for breach of contract.

...se in the Court below was decided on documentary evidence ...n by the Plaintiff. The Defendants called one witness, Mr. Jacobson, whose evidence taken together with Exhibits 1 and 2 throws light on the background of the case, but does not affect the point in issue, which is whether Nir Ltd. acted as agents of Tovarna.

The background of this case is the difficulty of transferring funds from Czechoslovakia to Palestine. It results from Exhibits 1 and 2 and from Mr. Jacobson's evidence that the difficulty existed as early as 1936. In that year the respondent company, which is registered in Palestine, obtained permission to raise capital in Czechoslovakia by the issue of debentures; Exhibits 2 and 3 show that the Department of Foreign Currency of the National Bank of Prague allowed subscriptions to be collected on condition that the amount subscribed would be used for financing export of merchandise from Czechoslovakia. The arrangement was that the money collected in Czechoslovakia would be kept in an approved bank and would only be released for payment of

goods exported from Czechoslovakia and on permission granted by the Ministry of Trade. It is obvious that it was important for Nir Ltd., whose business is to finance agricultural operations in Palestine, to have in Palestine the equivalent of the capital raised in Czechoslovakia. The device resorted to was for Nir Ltd. to act as intermediary between Czechoslovakian exporters and Palestinian importers by collecting sums due by importers in Palestine and using the funds in Prague to pay the exporters in Czech money.

The case now under consideration is a typical example of this system. Difficulties arose when transfer of funds from Nir's account to Tovarna's credit was refused by the Czech authorities because Tovarna is a Slovakian firm, and Slovakia had at the beginning of 1939 been separated from the rest of the country. Tovarna did not therefore receive payment for the goods forwarded by them to David Roth in Palestine.

The most important data in the case are to be found in Exhibits 4, 5, 9 and 15. Exhibit 4 is an invoice dated 19th January, 1939, and is addressed to Messrs. David Roth. The invoiced price was £ 248.5.7 after deduction of a certain discount. One clause of this invoice is of importance, and the translation before us reads as follows:—

> "Payable: net cash against bills of lading in free Czech krones converted from ℔ according to quotation of the day through Nir Ltd. of Tel-Aviv."

Exhibit 5 is a letter from Tovarna to Nir Ltd. dated 21.1.39. In that letter Tovarna announces the despatch of certain goods consigned to the firm of David Roth of Ramat Gan, and requests Nir Ltd. to deliver the consignment against payment of £ 248.5.7 out of which a sum of £ 6.17.6 was to be paid to the local agent of Tovarna. Tovarna asked that the balance of £ 241.8.1 be "put to account with "Landerbank" Prague which will transfer to us the counter-value of free kronen converted at the daily quotation of £."

We were told in Court by the advocates that a more satisfactory translation of the words quoted above would be — "We ask you to account with Landerbank, *etc.* ....."

On the strength of the aforementioned invoice and letter, counsel for the Appellant contends that the part played by Nir Ltd. (Respondents) was clearly that of an agent, and that if circumstances made it impossible for Nir Ltd. to transfer funds from their account in Prague to the account of Tovarna, it did not preclude the latter from giving further instructions to their agent regarding the disposal of the money or its payment to Tovarna (in fact Tovarna did at a subsequent stage direct transfer by cheques on London).

Nir Ltd. acted as requested by Tovarna and obtained payment from David Roth. On the 28th February, 1939, Nir Ltd. wrote to the Landerbank at Prague (Exhibit 9) asking them to transmit to Tovarna the counter-value of £ 241.8.1 in Czech krones calculated under the official medium rate of the stock exchange in Prague. The concluding paragraph of that letter is of importance. It runs as follows:—

> "This amount serves for settling the enclosed invoice for the firm David Roth, Ramat Gan, of the 19.1.39 for £ 248.5.7, from which amount an amount of £ 6.17.6 for commission had to be deducted and to be paid to the local representative, S. Balaban, in accordance with the letter of the said firm dated 21.1.39, copy of which is enclosed."

At first sight it seems difficult to construe Exhibits 4 and 5 otherwise than as establishing that Nir Ltd. and Tovarna were in the position of agent and principal respectively. Exhibit 9 confirms this view. Furthermore, there is Exhibit 15 which is a letter dated 30.6.39 addressed to Nir Ltd. by Tovarna in which the latter, in view of the difficulty which had arisen, requested Nir Ltd. to transmit by cheques on London the sums collected in Palestine from Tovarna's customers. The learned advocate for the Respondents could not dispute that Nir. Ltd. were acting as agents for the purpose of collecting the amounts due to Tovarna. He did not, however, abandon the contention that after that preliminary stage Nir Ltd. were entitled to retain the sums thus collected and were only under the obligation to pay in Prague the equivalent value in krones. The learned advocate relied on the fact that Nir Ltd., when collecting the amounts due to Tovarna, used to grant on their own account a rebate to the customers. The argument derived from this fact was that it was inconsistent with the theory that Nir Ltd. were acting purely as agents. The learned advocate also mentioned that Nir Ltd. were not paid for their services.

Our opinion is that the points mentioned by the learned advocate for the Respondents do not detract from the value of the documentary evidence supplied by the exhibits above referred to. We cannot construe those documents otherwise than as establishing the relationship of principal and agent.

We therefore hold that the learned Relieving President erred when he arrived at the conclusion that the Plaintiff in the Court below chose the wrong cause of action. His decision must therefore be set aside and judgment entered for the Custodian of Enemy Property. The total amount claimed in the statement of claim is £ 252.14.7, which is equivalent to LP. 252.729 mils. The said total is made up of two amounts of £ 248.5.7 and £ 4.9.0. It was not disputed before us that the sum of £ 6.17.6 should be deducted from £ 248.5.7 as mentioned in

Exhibit 5. With regard to the small amount of £ 4.9.0, we would point out that it relates to another transaction; being given, however, that it was due by Messrs. David Roth to Tovarna and was received by Nir Ltd. and that no objection was raised against the inclusion of the said claim, we consider that judgment should be entered for the Plaintiff in the sum of £ 245.17.1, *i. e.* LP. 245.854 mils, with interest at the rate of 6% *per annum* from the 22nd December, 1943, until the date of delivery of the present decision, and at the rate of 9% *per annum* thereafter and until payment.

Respondents shall pay the costs of this appeal to be taxed on the lower scale and to include LP. 10 advocate's attendance fee.

Delivered this 13th day of May, 1946.

British Puisne Judge.

CIVIL APPEALS Nos. 171 & 236/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Curry, A/J. and Frumkin, J.

IN THE APPEALS OF :—

Haim (Hans) Ambor. — APPLICANT.

v.

Hanna Kantor & 3 ors. — RESPONDENTS.

Arbitration — Arbitrator as witness in the arbitration proceedings — Misconduct need not imply mala fides — Failure to insert all the facts in the special case.

Application for leave to appeal from the decisions of the District Court of Haifa, dated the 29th March and 7th May, 1946, in Motions Nos. 147/46 and 458/45, refused:—

1. An arbitrator will not be disqualified when one of the parties requires him as a witness, if the party knew, before the proceedings, that the facts on which he desires the arbitrator to testify were within the latter's knowledge.

2. An arbitrator may be guilty of misconduct without showing a *mala fides*.

3. It is no misconduct if, when stating a case, an arbitrator omits to give facts which are not essential for the determination of the case.

(*A. M. A.*)

ANNOTATIONS:

1. The decision of the District Court on the first point is reported in 1946, S. C. D. C. at p. 528.

2. On removal of arbitrators for misconduct see Annotated Laws of Palestine, Vol. 2, pp. 113—4.

3. In C. D. C. T. A. 155/44 (1944, S. C. D. C. 321) arbitrators were removed for misconduct although "at no stage of the proceedings was there any shadow of a doubt as to their good faith and honesty" (*ibid.*, p. 332).

4. On misconduct generally see *o. c.*, pp. 123 *et seq.*

(*H. K.*)

FOR APPLICANT: Schaal.

FOR RESPONDENTS: Nos. 2 & 3 — Gratch.
Nos. 1 & 4 — Absent — served.

ORDER.

This is the Order in Civil Appeal 236/46 and 171/46.

Civil Appeal 236/46 is an application for leave to appeal under section 15(3) of the Arbitration Ordinance against the decision of the District Court, Haifa, in Motion 458/45. Motion 458/45 was a special case for the opinion of the Court. The point to be decided was whether or not the Arbitrator was disqualified from continuing to act as arbitrator because the Defendant desired to call him as a witness. The District Court decided that as the evidence which the Defendant desired to adduce from the Arbitrator was within the knowledge of the Arbitrator prior to the proceedings and that that fact was within the knowledge of the Defendant, and that the Defendant after being warned by the Arbitrator that it might be inadvisable for him to act nevertheless agreed to his appointment, the Defendant, the present Appellant, could not now insist on his being called upon as a witness. We see no reason for disagreeing with the learned Judges, and the application for leave is refused.

The Applicant continued to argue on his application for leave to appeal, application 171/46.

The ground of this application is that the Arbitrator in the special case did not set out all the relevant facts and that the District Court erred in refusing the application for his removal on the ground that no *mala fides* was shown on the part of the Arbitrator.

Whilst we are in agreement with Mr. Schaal that it is not essential to prove *mala fides* in order to obtain the removal of an arbitrator, we are satisfied that the omission of certain facts by the Arbitrator in the special case did not constitute misconduct, because we are satisfied that these facts would not have affected the decision in the special case. In these circumstances we are not prepared to grant the application, which is refused.

Costs for the Respondent fixed at LP. 15 in respect of both applications and the previous hearing.

Given this 12th day of November, 1946.

A/British Puisne Judge.

CRIMINAL APPEAL No. 93/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: FitzGerald, C. J., De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ida Levin-Feingold. APPELLANT.

v.

The Attorney General. RESPONDENT.

Administrator General Ord. — Offence against sec. 34 — "Inter-meddling with the estate of a deceased person" — Failure to deliver property to Administrator General — Dismissal of alternative charges — Sec. 3, property of a non Palestinian.

Appeal and cross appeal from the judgment of the District Court of Tel-Aviv, dated the 18th July, 1946, in Criminal Case No. 55/46, whereby Appellant was convicted on two charges under section 34(1) of the Administrator General Ordinance, 1944, and sentenced to pay LP. 20 and LP. 40 fine or one month's imprisonment in default; appeal allowed and cross-appeal dismissed:—

Sec. 34 of the Administrator General Ordinance makes it an offence to inter-meddle with property of an estate to which the Ordinance applies. Under sec. 3 it only applies to deceased Palestinians who were not Moslems or members of a Religious Community or to stateless persons who were not members of a Religious Community.

(*A. M. A.*)

ANNOTATIONS:

1. For other proceedings in connection with the same estate see Adm. Appl. D. C. Jm. 216/44 (1945, S. C. D. C. 721).

2. On the strict interpretation of penal statutes see CR. A. 50/46 (13, P. L. R. 313; *ante*, p. 498) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANT: Lande.

FOR RESPONDENT: Eliash and Sharf.

JUDGMENT.

Mrs. Ida Levin-Feingold was prosecuted on four charges before the District Court of Tel-Aviv, and was convicted and sentenced by the

learned Relieving President on the first and third charges. She has appealed against conviction and sentence.

The four charges were framed under section 34 of the Administrator General Ordinance, 1944, which creates a number of offences generally designated as "inter-meddling with the property of a deceased person."

The particulars of the first and third charges show that the alleged inter-meddling consisted in refusing to deliver to the Administrator General property belonging to a certain Mr. Osheris (Asher) Uliamperlis, which property the Administrator General had been directed by a Court order made under section 35 of the aforementioned Ordinance to collect and take possession of after the death of the aforesaid Uliamperlis.

The second and fourth charges relate to the same property, and it would seem that they were designed to be respectively alternative to the first charge and to the third charge. The Relieving President pointed out in his judgment that the alleged offences covered by the second and fourth charges consisted in retaining property which is not an offence specifically mentioned in section 34. The learned Judge went on to say that refusing to deliver and retaining possession of property meant much the same thing, and he decided to treat the second and fourth charges as so much surplusage.

The Attorney General has cross appealed against the decision of the trial Judge to disregard the second and fourth charges. We consider that the trial Judge was justified in the view he took of those two charges, but it seems to us that he should have dismissed them. As the record stands, there has been no dismissal although issues had been joined. In view of our decision in the main appeal, the fate of those two counts is unimportant.

The cross appeal stands dismissed.

We will now deal with the appeal against conviction and sentence. The only point that arises is whether section 34(1) is limited, as submitted by Dr. Lande, by the provisions of section 3.

Dr. Lande, for the Appellant, has pointed out that it is expressly laid down in section 34 that the property regarding which an offence can be committed under section 34 must be property to which "the provisions of the Ordinance apply", and that by virtue of section 3 property of a non-Palestinian or of a person who is not stateless is not property to which the provisions of the Ordinance apply.

Section 3 reads as follows:—

> "Save as is otherwise provided in this Ordinance, the provisions of this Ordinance shall apply only to the administration of the estate of a deceased Palestinian citizen who was not at the time of his

death a Moslem or a member of a Religious Community, or of a deceased stateless person who was not at the time of his death a member of a Religious Community."

The application section of an Ordinance is a most important one. If it is unambiguous, a Court will not extend it merely on the ground that it unduly restricts the purview of the Ordinance. In the present instance, section 3 renders section 34 inoperative against persons who inter-meddle with the estate of deceased persons who are not Palestinians or stateless persons as described in section 3. However, such a curtailment of the ambit of section 34 is no argument against construing the section as suggested by Dr. Lande.

We have reached the conclusion that the offences created by section 34 must relate to property left in Palestine by a deceased Palestinian citizen or a stateless person described in section 3. In other words, we find it impossible to ignore the intention clearly expressed in section 34 that the property to which the provisions of the Ordinance apply is laid down by section 3.

We find it impossible to accept the submission that the object of section 3 was simply to provide that administration orders would not be made in respect of the estate of a deceased Palestinian who is a Moslem or a member of a Religious Community, or in respect of the estate of a stateless person who is a member of a Religious Community. Had such been the intention, the section would have been worded differently. Furthermore, the said object would have been achieved by adding a sub-section or a proviso to section 10, and not by a separate section intituled "Application of Ordinance".

We also wish to point out that this is not a case where the Ordinance or parts thereof would become meaningless unless the ordinary meaning of section 3 were discarded. As already pointed out, section 34 is not rendered inoperative by the interpretation which we have held to be correct, and on the contrary, the proper view is that it would not be justifiable to try and widen the scope of a penal section by trying to alter its simple and clear meaning.

The appeal of Mrs. Feingold is therefore allowed, and the convictions on counts one and three of the information are set aside.

Delivered this 13th day of November, 1946.

Chief Justice.

HIGH COURT No. 117/45.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPLICATION OF:—

Ali Mohammad Mustafa. PETITIONER.

v.

The Assistant District Commissioner, Jerusalem District, & 7 ors. RESPONDENTS.

Judgment for recovery of possession of undivided shares — Proper course for decree holder — District Commissioner's powers under sec. 2 Land Disputes (Possession) Ord. — Alternative remedy.

Return to an order *nisi*, issued on the 23rd of January, 1946, directed to the first Respondent, calling upon him to show cause why his order in Case No. 115/45 of 13th December, 1945, made under the Land Dispute (Possession) Ordinance, should not be cancelled, order *nisi* discharged:—

1. Proper course for holder of decree for recovery of possession of undivided share in land is, failing agreement with the remaining co-owners, either to sue them for his share of the produce of the land or to ask for partition.

2. Even if the District Commissioner applying sec. 2 of Land Disputes (Possession) Ordinance is satisfied that dispossession took place within the two months preceding his order, he is not bound to treat Petitioner, as being in possession at the date of the order; sec. 2 only provides that he "may" do so, *i. e.* he has a discretion which of course he must exercise judicially and not arbitrarily.

3. High Court will not interfere when Petitioner has other remedies open to him.

(*M. L.*)

ANNOTATIONS:

1. On rights of co-owner see: C. A. 250/43 (1944, A. L. R. 133; 11, P. L. R. 99); C. A. 329/43 (1944, A. L. R. 809; 11, P. L. R. 414); C. A. 360—361/44 (1945, A. L. R. 101; 12, P. L. R. 112); C. A. 337/44 (1945, A. L. R. 98).

2. On non interference of High Court when other remedy available see H. C. 75/45 (1945, A. L. R. 767) and annotation in A. L. R.

(*A. G.*)

FOR PETITIONER: Hamoudeh.

FOR RESPONDENTS: No. 1 — A/Crown Counsel — (Salant) & Asst. Government Advocate — (Hazou).
Nos. 2—8 — Barkav Elian.

ORDER.

Shaw, J.: This is a return to an order *nisi* calling upon the first Respondent to show cause why his order, dated 13.12.45 in Case No. 115/45, made under the Land Disputes (Possession) Ordinance, should not be cancelled. That order (Exhibit 7) directed that Respondents Nos. 2 to 8 should remain in possession of the eight named areas of land until dispossessed in due course of law.

The Petitioner claims to have purchased 24/192 shares in the first seven areas of land referred to in para. 1 of his petition, and on 21.11.44 he obtained a judgment (Exhibit 2) for possession of those shares in Civil Case 827/44 of the Magistrate's Court Jerusalem. Subsequently to that judgment an order for possession and delivery was carried out by an execution clerk (see Execution File No. 331/45) on 22.7.45. The execution clerk's report shows that he went with the judgment-creditor and other persons to each area in turn, after giving notice to the judgment-debtors who refused to sign the notice, and (to quote his own words) — "after standing on this land I delivered it to the judgment-creditor, personally, and made him to understand that he has the right to take possession of 24 out of 192 shares by virtue of the judgment of the Court".

It appears that at some later date the Petitioner tried to take possession of a certain area in one of the seven named areas, but he was resisted and as a result criminal charges were brought against Respondents Nos. 2 to 8 in Criminal Case 10160/45. Those proceedings ended on 11.10.45 in the acquittal of the seven accused persons. The judgment, which as it happens was delivered by the same Magistrate who had given the judgment in Civil Case 827/44, is Exhibit R/1 and it reads as follows:—

> "From the evidence adduced by the prosecution I find nothing which justifies calling upon Accused to answer the charge brought against them. The share of the complainant in the plots which he purchased is established in accordance with the judgment given in his favour and not upset on appeal. Now let us suppose that the complainant himself cultivated all the seven plots and did not allow his co-owners to cultivate them, can he be considered a criminal to whom sections 96 and 97 of the Criminal Code Ordinance apply? The answer is no, unless there exists a partitioned land delivered to the complainant with the knowledge of the Execution Office and the Accused oppose him. It may be considered an unlawful act but so long as the land is *musha'a* not partitioned, and no one cultivated it up till now as testified by the complainant himself, and the complainant came upon the Accused while they were working in cleaning the plot of Mares Ibquei as testified by the second witness of the prosecution, and this cannot be considered an unlawful act and nothing remains

> but to claim the share by partition that is to say by lifting the *musha'a*.
> Therefore there does not exist a charge which demands calling upon the Accused to reply, and therefore, I order their acquittal."

The Petitioner thereafter approached the first Respondent who on 22.11.45 made an order under section 2 of the Land Disputes (Possession) Ordinance (Cap. 76) requiring the parties — that is to say the Petitioner and Respondents Nos. 2 to 8 — to attend before him for a hearing as to the fact of actual possession.

There was a hearing on 1.12.45, and on that date the first Respondent recorded the following note (see Exhibit R/6):—

> "The Plaintiff Ali Muhammad Mustafa claims that he was forcibly dispossessed within the two months next preceding the date of my order. The *Mukhtar* Ali Muhammad also complained to the Magistrate's Court.
> Ali Muhammad has established his claim in Court to 24 out of 192; he also claims 72 out of 192 of which he was in actual possession until he was forcibly dispossessed. Second party denies the 72/192 both ownership and possession, of both this and all the land altogether."

On 8.12.45 the Petitioner was represented by Yahya Eff. Hamoudeh, who has represented him at the hearing in this Court, and he submitted that with regard to the 24/192 shares in the seven plots the matter of possession was *res judicata* and could not be raised again after an order of a competent Court for possession in common had been given. Mr. Hamoudeh informed the first Respondent that that order had been appealed against and the appeal dismissed, and that possession had been delivered to his client by the execution officer. He submitted that in the circumstances the first Respondent had no jurisdiction to entertain the proceedings. With regard to the 72/192 shares in the same plots he said that his client had been in actual possession until he was recently and forcibly dispossessed, and he added that he was prepared to prove his possession by the evidence of witnesses.

It is admitted that the first Respondent did not hear any oral evidence as to actual possession.

It must be observed that two claims were put forward before the first Respondent. That is to say the claim of right to the possession of 24/192 shares in seven areas of land, and another claim of right to the possession of 72/192 shares in those seven and an additional eighth area called Ard Umm el Mawaker. It must also be observed that on 1.12.45 the Petitioner was alleging that he had been dispossessed of both lots of shares. It would have been more correct to say that he had never succeeded in getting physical possession of the 24/192 shares

and so far as those shares are concerned I will say at once that in my judgment the first Respondent was right in ordering that Respondents Nos. 2 to 8 should remain in possession until dispossessed in due course of law. It is clear that the execution clerk did not give actual physical possession in any specific piece of land. All that he did was to inform the Petitioner that he had the right to take possession of 24/192 undivided shares in each parcel. As the Petitioner could not come to an agreement with Respondents Nos. 2 to 8 the proper course for him to follow was either to sue Respondents Nos. 2 to 8 for his share of the produce of the land, or to ask for partition of the parcels. It has been suggested that he might in the alternative have prosecuted Respondents Nos. 2 to 8 for contempt of court. As to that suggestion I do not wish to express any opinion except to say that there seem to me to be obvious difficulties in the way.

There remains the question whether the first Respondent's order, so far as it affected the 72/192 shares, was one with which this Court ought to interfere. There is no doubt that on 1/12/45 the Petitioner was not in possession of those shares, and there is no evidence to show exactly when he had been dispossessed. The case for Respondents Nos. 2 to 8 was and is that the Petitioner had never been in possession of those 72/192 shares, and the first Respondent stated in evidence before us that he did not believe the allegation of the Petitioner that he had been dispossessed during the two months preceding the date of his order (*i. e.* between 22.9.45 and 22.11.45). But it must be observed again that the first Respondent had not heard any evidence on that point.

When Mr. Hamoudeh was asked by me on what date the dispossession had taken place he first said that it was on 1.12.45, and then he said that it took place immediately after the Petitioner had been served with the first Respondent's order of 22.11.45. But as shown above the Petitioner had alleged that he had been dispossessed within the two months preceding the date of the order. It is difficult to believe that if the Petitioner had really been dispossessed after the order dated 22.11.45 this fact would not have been brought clearly onto the record. That alleged dispossession would have been as a circumstance quite distinct from the Petitioner's failure to obtain possession of the 24/192 shares, and obviously it would have afforded a valid ground for fresh and separate proceedings. I think that it is, to say the least of it, extremely doubtful whether the Petitioner was dispossessed after 22.11.45.

I would also observe that the Petitioner's petition did not disclose the important fact that a criminal case had been brought against Re-

spondents Nos. 2 to 8 and had ended in their acquittal. It was also a misstatement of fact to say, as he did in para. 12(e) of his petition, that the 72/192 shares were actually not in dispute, in view of the fact that Respondents Nos. 2 to 8 had from the very beginning denied both his ownership and his possession of those shares. It may be observed that if it were true, and I entertain the gravest doubts to the contrary, that the Petitioner was dispossessed immediately after 22.11.45, he has been out of possession now for over four months. I would also observe that even if the first Respondent had been satisfied that dispossession had taken place within the two months preceding the date of his order he was not bound to treat the Petitioner as being in possession at the date of the order. Section 2 provides that the District Commissioner may treat the party so dispossessed as if he had been in possession at such date. The word used is not "must", and it is clear that the District Commissioner has a discretion in the matter, although of course he must exercise that discretion judicially and not arbitrarily.

In my judgment this is not a case in which this Court ought to interfere. The Petitioner has other remedies open to him, and he is at liberty to pursue one or more of them in the appropriate Court. I find that the petition fails, and I therefore discharge the order *nisi*. Respondents Nos. 2 to 8 will have fixed costs in the sum of LP. 10 (ten pounds).

Given this 11th day of April, 1946, in the presence of Wittkowsky for Petitioner and Mr. Salant & Elian for Respondents.

British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 19/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards, J. and Curry, A/J.

IN THE APPEAL OF:—

Eliahu Itzhaki. APPELLANT.

v.

Zvi Aminoff. RESPONDENT.

Land and District Courts — Application to strike out action under

C. P. R. 21A — *Court must be Court before which action pending.*

Appeal from the judgment of the Land Court of Jerusalem, dated the 31st day of December, 1945, in Land Case No. 51/44, allowed:—

The District Court cannot strike out, under rule 21A, an action filed in the Land Court.

(*A. M. A.*)

ANNOTATIONS:

1. The order of the District Court is reported in 1945, S. C. D. C. at p. 600.
2. *Cf.* note 1 in A. L. R. to C. A. 201/44 (11, P. L. R. 556; 1944, A. L. R. 682).

(*H. K.*)

FOR APPELLANT: Goitein & A. S. Moyal.

FOR RESPONDENT: E. Gavison.

JUDGMENT.

This is an appeal from what is headed an "order" of the District Court of Jerusalem in Motion No. 438/45 Land Case No. 51/44. The circumstances are peculiar and unfortunate. The successful Applicant in Motion No. 438/45 of the District Court, Jerusalem, was the Defendant in an action brought in the Land Court, Jerusalem in Land Case No. 51/44. He applied to the District Court under Rule 21(A) of the Civil Procedure Rules, 1938, for the dismissal of the Land Court action on the ground that the Land Court had no jurisdiction. This is clear from the wording of his own advocate's application which was headed "application to decide the question whether this Court has jurisdiction to hear and decide Land Case No. 51/44". He headed this motion "In the District Court of Jerusalem" so it is obvious that he meant to apply to the District Court. The District Court having heard the arguments of parties' advocates allowed the application and went on to say "I dismiss the action filed in Land Case No. 51/44". It is abundantly clear that the Court which should act under Rule 21(A) must be the Court before which the action has been brought. In other words, the only Court which could have dismissed the Land Court action under Rule 21(A) was the Land Court itself. Unfortunately the learned Relieving President when he made his order of the 31st December, 1945, was sitting in the District Court and had no jurisdiction to dismiss the Land Court action. The position is unfortunate because the personnel of the District Court and the Land Court and the procedure there followed are practically identical. Nevertheless, in law the two Courts are separate. The order of 31st December, 1945, having been made by the District Court cannot stand and must be set aside with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 5.—.

Delivered this 7th day of November, 1946.

British Puisne Judge.

CIVIL APPEAL No. 27/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPEAL OF:—

Arthur Deutsch. APPELLANT.

v.

Moshe Henfling. RESPONDENT.

Corroboration, when not required — Damages, M. C. P. R. 73—4 — Joinder of parties.

Appeal from the judgment of the District Court of Tel-Aviv, dated 16.10.45, in C. A. 28/45 from the judgment of the Chief Magistrate's Court of Tel-Aviv, dated 12.1.45, in case No. 1440/42, allowed:—

No corroboration is required on a question which is not challenged in cross-examination (there being no written defence), even if it relates to damages.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. at p. 492.

2. On the effect of sec. 6 of the Evidence Ordinance in civil proceedings *cf.* C. A. 401/45 (*ante*, p. 323) and note; see also C. A. D. C. Jm. 58/45 (1946, S. C. D. C. 400) and note 2.

(*H. K.*)

FOR APPELLANT: Elkes.

FOR RESPONDENT: Sussman.

JUDGMENT.

This is an appeal from a judgment given by the District Court of Tel-Aviv in its appellate capacity. The present Appellant was Plaintiff before the Magistrate's Court and judgment was given in his favour. On appeal to the District Court the learned Relieving President of the District Court upheld the decision of the learned Magistrate except on one point which was that the Plaintiff's evidence had not been corroborated and on that ground he set aside the judgment of the Magistrate's Court. We have given full consideration to paragraph 4 of the President's decision in which he deals with the question of corroboration. The Plaintiff had sued the Defendant claiming damages for breach of contract. There was no written statement of defence and at the trial Plaintiff gave evidence in support of his claim and was cross-examined simply on the question as to whether he was a good drummer

or not. We do not consider that corroboration was necessary in such a case. It is true that Rule 74 of the Magistrates' Rules lays down that the amount of damages claimed shall be deemed to be put in issue in all cases unless expressly admitted but this Rule cannot be interpreted as nullifying the last preceding Rule, *i. e.* Rule 73. We are of the opinion that in the circumstances of this case, there having been no defence and no challenge or contradiction of the Plaintiff's evidence or of the contract, corroboration was not necessary. On the hearing of this appeal, mention has been made to the question of joinder of parties. The facts are that the Defendant had contracted with the Plaintiff and two other persons and had agreed to pay them a salary of LP. 36.— per month. The learned Relieving President touched upon the question and upheld the Magistrate's finding that the action could be heard and decided without the joinder of the two other persons employed by the Defendant. We find no reason for criticising the last mentioned finding and we therefore decide this appeal on the main point with which we have already dealt, that is the question of corroboration. The decision of the District Court is reversed, and the Magistrate's judgment confirmed. The Appellant will therefore have the costs of the Courts below and we allow him LP. 10.— (inclusively) as costs of this appeal.

Delivered this 4th day of November, 1946.

Chief Justice.

CIVIL APPEAL No. 176/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Moshe David. APPLICANT.

v.

Theodor Bocksch. RESPONDENT.

Companies — Preliminary contract — Ratification by company — Submission to arbitration — Submission supersedes agreement to refer.

Application for leave to appeal from the judgment of the District Court, Jerusalem, dated 12.3.46, in Civil Case No. 17/44, refused:—

1. A company may adopt a preliminary agreement if it submits to arbitration a dispute arising under the agreement.

2. A submission signed pursuant to an arbitration clause in a contract supersedes the arbitration clause, so far as the dispute referred is concerned.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C. at p. 330.

2. Note that a "company cannot, after incorporation, ratify or adopt any such (preliminary) contract .....". (Halsbury, Vol. 5, p. 418, para. 690). "In order that the company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement. This new contract may, however, be inferred from the acts of the company when incorporated ....." (*ibid.*, p. 419, para. 691).

See also Annotated Laws of Palestine, Vol. 5, p. 59 and local cases there cited.

3. On the second point see notes 1 & 2 to the District Court judgment (*supra*).

(*H. K.*)

FOR APPLICANT: Gorali.

FOR RESPONDENT: Frank.

JUDGMENT.

This is an application for leave to appeal from the District Court. It arises out of a contract made between Moshe David and Theodor Bocksch in December, 1942. The contract contemplated the formation of a Company to be known as "Inrop".

The first point that was taken was that this was a purely private contract between individuals and that it could not bind the firm "Inrop". In regard to this, it is quite clear that the contract would have no meaning at all had it not contemplated that the state of affairs which it purported to regulate should only arise after the formation of the Company "Inrop". In our opinion the Company, by signing a Deed of Submission to arbitration after its formation, accepted this contract as a contract of the Company; consequently it is sufficient to bind the Company for the purposes of the submission.

The next ground was that this submission could not revoke clause 11. It may be that future disputes which may arise could again be subject to arbitration under clause 11, but where the subject-matter of a dispute once submitted under clause 11 is later submitted to arbitration under a Deed of Submission signed by each of the parties, that later submission would, in our opinion, supersede the submission under clause 11. It was on this assumption that the District Court's judgment was based, and in our opinion the learned Judge correctly appreciated the law.

For this reason leave to appeal is refused, with LP. 10.— inclusive costs.

Delivered this 29th day of October, 1946.

Chief Justice.

CRIMINAL APPEAL No. 107/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, J., Curry, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Mrs. Tamar Nussbaum. APPELLANT.

v.

The Attorney General. RESPONDENT.

Amendment of charge — Town planning offence — Whether appeal by A. G. lies from refusal to allow amendment of the charge — M. C. J. Ord., sec. 11 and Town Planning Ord., sec. 35, CR. A. 127/41 "any order" — CR. A. 31/38, CR. A. 16/44, CR. A. 27/46, CR. A. 23/41, CR. A. 104/37 — Discretion of Magistrate to refuse amendment of the charge, CR. A. 18/45.

Appeal from the judgment of the District Court, Jerusalem, sitting as a Court of appeal, dated 2nd July, 1946, in Criminal Appeal No. 52/46, from the judgment of the Magistrate's Court of Jerusalem, dated 14th May, 1946, in Criminal Case No. 2818/46, whereby Appellant was acquitted of a charge contrary to section 35(1)(a) of the Town Planning Ordinance; appeal allowed and Magistrate's judgment restored:—

1. Appeals in Town Planning prosecutions are regulated by that Ordinance and not by the more general Magistrates' Courts Jurisdiction Ordinance. Such appeals lie, at the instance of the Attorney General, from "any order".

2. A Magistrate is entitled to refuse an amendment of the charge sheet after plea.

(A. M. A.)

REFERRED TO: CR. A. 127/41 (8, P. L. R. 488; 1941, S. C. J. 635); CR. A. 31/38 (5, P. L. R. 206; 1938, 1 S. C. J. 177; 3, Ct. L. R. 131); CR. A. 16/44 (11, P .L. R. 79; 1944, A. L. R. 125); CR. A. 27/46 (13, P. L. R. 131; 1946, A. L. R. 259); CR. A. 23/41 (8, P. L. R. 122; 1941, S. C. J. 99; 10, Ct. L. R. 69); CR. A. 104/37 (4, P. L. R. 293; 1937, S. C. J. (N. S.) 537; 2, Ct. L. R. 103).

DISTINGUISHED: CR. A. 18/45 (12, P. L. R. 158; 1945, A. L. R. 395).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C. at p. 426.

2. The question of the A. G.'s right to appeal from orders under the Town Planning Ordinance has recently been discussed several times in the District Courts; see, *e. g.*, CR. A. D. C. Ha. 45/45 (1945, S. C. D. C. 333), CR. A. D. C. Ha. 134/45 (*ibid.*, p. 555), the judgment under appeal (*supra*) and CR. A. D. C. Ha. 70/46 (1946, S. C. D. C. 522) and notes to these cases.

3. On clerical errors in charge sheets see note 2 in A. L. R. to CR. A. 18/45 (*supra*) and for later authorities *vide* CR. A. 98/46 (*ante*, p. 582) and note. (*H. K.*)

FOR APPELLANT: T. Rubinstein.

FOR RESPONDENT: S. Said.

JUDGMENT.

This is an appeal from a judgment of the District Court, Jerusalem, in its appellate capacity, allowing an appeal from a judgment of one of the Magistrates of Jerusalem, who had refused to allow an amendment to a charge sheet and in consequence dismissed the charge and acquitted the present Appellant. The District Court remitted the case to the Magistrate for trial with directions to allow the charge sheet to be amended under rule 273 of the Magistrates' Courts Procedure Rules, 1940. From this judgment of the District Court the Appellant now appeals, by leave, to this Court. The appeal has been ably argued by Mrs. Rubinstein for the Appellant and Saba Eff. Said for the Respondent respectively.

The first ground of appeal argued is that no appeal lies from a Magistrate's Court to the District Court inasmuch as the matter does not come within either paragraphs (a) (b) or (c) of sub-section 3 of section 11 of the Magistrates' Courts Jurisdiction Ordinance, 1939. The Appellant was charged with carrying out work within a Town Planning Area for which a permit is required under section 11(b) Town Planning Ordinance 1936—1941, and with non-conformity with such permit thus committing an offence contrary to section 35(1)(a) of the Town Planning Ordinance. In our view, section 35(8) gives the Attorney General power to appeal. We refer to Criminal Appeal 127/41 P. L. R. Vol. 8, p. 488. We also refer to the words in line 3 of section 35(8) "by any order under this section". The words "any order" are all embracing and must include an order dismissing a charge and acquitting an accused. We reject the contention of the Appellant that section 11 of the Magistrates' Courts Jurisdiction Ordinance, 1939, has any application to proceedings under the Town Planning Ordinance. We feel certain that in 1936 when the original Town Planning Ordinance came into force, section 35(8) was substantially the same as the Town Planning (Amendment) Ordinance, 1941, and we also feel certain that

no one would then have doubted that appeals under the Town Planning Ordinance of 1936 were then (that is, in 1936) governed by the Town Planning Ordinance and not by the Magistrates' Courts Jurisdiction Ordinance, 1936. It must be remembered that the Magistrates' Courts Jurisdiction Ordinance, 1939, was not entirely new statute law, but was merely a replacement of the Magistrates' Courts Jurisdiction Ordinance, 1935. In our view, therefore, the Town Planning Ordinance is a law *sui generis*.

We accordingly hold that an appeal by the Attorney General did lie under section 35(8) to the District Court from the order of the Magistrate of 14th May, 1946. It is therefore not necessary for us to discuss the interesting argument of Mrs. Rubinstein regarding Criminal Appeal 31/38, Vol. 5, P. L. R. p. 206 and Criminal Appeal 16/44, Vol. 11, P. L. R. p. 79 and Criminal Appeal 27/46, Vol. 13 P. L. R., p. 131 and Criminal Appeal 23/41, Vol. 8 P. L. R., p. 122 and Criminal Appeal 104/37 Levanon's Current Law Reports, Vol. 2, p. 103.

The only other matter to be decided is whether the District Court erred in interfering with the discretion of the Magistrate who had refused to allow the amendment. The facts are that in the charge sheet the number of the licence or permit was given as 5623/231 whereas this was wrong and it was sought to amend it to 5623/731. The question for an appellate Court seems to us to be whether the refusal of the Magistrate to allow the amendment at the particular stage at which the trial had reached was so unreasonable and unjudicial as to warrant interference by an appellate Court. After the Appellant had had the charge read over to her and after she had pleaded not guilty the prosecutor asked that the name of the Accused be changed from "Tovah" to "Tamar". The Defence did not oppose this application which was granted. Thereupon, the prosecutor asked the Magistrate to amend the number of the licence as we have set out. The Accused's advocate objected to the amendment and asked for an adjournment which was granted. At the adjourned hearing parties' advocates argued the matter at length and thereafter the Magistrate delivered judgment in the following terms:—

> "After the charge has been read to Accused, and after she pleaded Not Guilty to the charge, in my opinion it will be of no benefit to amend the number, and I am not entitled to re-read the charge to the Accused as amended, in order that she may plead, guilty or not-guilty to it.
>
> In my opinion Prosecution should produce a correct charge sheet, and if there are amendments of this kind, it should state them before the charge is read to the Accused.
>
> I therefore dismiss the charge and acquit the Accused, this 14th day

of May, 1946, in presence of A. G.'s representative and Mrs. Rubinstein and Accused."

Even although it can be said that the error in the number was a clerical error, this was a clerical error of a very serious nature. A party who launches a prosecution should be careful to check the numbers of documents such as permits if an infringement of a permit is alleged. A charge sheet is a most important document and should not contain errors of this nature. It might well be that the Appellant had two permits with different numbers. The charge sheet should have been carefully checked before it was filed, and we are inclined to agree with the Magistrate when he said that the prosecution should produce a correct charge sheet and, if there are to be requests for amendments of this kind the prosecution should make them before the charge is read to the Accused. We think that this case can be distinguished from Criminal Appeal 18/45, P. L. R. Vol. 12, p. 158. In our view, the exercise of the discretion by the Magistrate was not so unreasonable or unjudicial as to warrant interference by an appellate Court, even although some of us (had we been in the Magistrate's place) might have allowed the amendment.

For these reasons we allow the appeal, set aside the judgment of the District Court and restore the judgment of the Magistrate of 14th May, 1946.

Delivered this 24th day of October, 1946, in the presence of Mrs. T. Rubinstein for Appellant and Mr. Saba Said for Respondent.

British Puisne Judge.

CRIMINAL APPEAL No. 100/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: De Comarmond, J., Curry, A/J. and Frumkin, J.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Hamad Muhsin Mahmud & 7 ors. RESPONDENTS.

Statement by accused — Reduced to writing by Police Officer not authorised under sec. 2 of the Criminal Procedure (Evidence) Ordinance — Admissible in evidence — CR. A. 186/45 — Remittal under sec. 72(1)(c) T. U. I. Ord.

Appeal from the judgment of the District Court of Haifa, dated the 20th of July, 1946, in Criminal Case No. 149/46 whereby the above accused persons were acquitted of charges contrary to section 4(1)(2)(3) of the Banderolle Ordinance and section 23 of the Criminal Code Ordinance, 1936, and sections 203(a), 210(1)(b) and 216 of the Customs Ordinance, allowed and case remitted:—

A statement made to any police officer and reduced by him to writing is admissible (subject to all just exceptions) in evidence, whether or not the police officer comes under sec. 2(1) of the Criminal Procedure (Evidence) Ordinance.

(*A. M. A.*)

DISTINGUISHED: CR. A. 186/45 (12, P. L. R. 528; *ante*, p. 42).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Heenan).

RESPONDENTS: Absent — served.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Haifa. The only ground of appeal is that evidence was wrongly excluded.

The eight Respondents although duly served did not appear and were not represented by advocate.

The eight Respondents and two other persons were charged before the District Court on an information containing two counts. For the purposes of this appeal we need not consider the first count. The second count charged all the Accused with having been found in possession of four bags of smuggled coffee. It was established at the trial that the coffee was found in a shop owned by the two Defendants, who have not been cited as Respondents to the present appeal; these two Defendants were convicted and sentenced and have not appealed.

The prosecution sought to produce statements made to police officers by the Respondents and reduced into writing. Objection was raised against such production on the ground that the police officers who had taken down the statements were not duly authorised in writing by the Chief Secretary to hold enquiries into the commission of offences and to take down statements. It appears from the record that a document signed by the Inspector General of Police was produced. That document was to the effect that the police officers named therein had been authorised by the Chief Secretary to take down statements, but on the strength of the ruling in Criminal Appeal 186/45, 12 P. L. R. p. 528 the learned trial judge held that the document did not satisfy the requirements of the law and refused to admit the statements. As a consequence, the charge against the sight Respondents collapsed and they were acquitted.

The gist of this appeal lies in the interpretation of the Criminal Procedure Evidence Ordinance — Cap. 34. Section 2(1) of that Ordinance lays down that an officer of police of or above the rank of inspector or any other officer or class of officers generally or specially authorised in writing by the Chief Secretary may hold enquiries and take statements. The question is whether this subsection means that an officer who is not authorised as mentioned therein cannot take down a statement made by a person who is supposed to be acquainted with the facts and circumstances of an offence into which such officer is enquiring. We do not consider that such is the meaning to be placed on the sub-section. The object of the Ordinance is to empower specified officers to ask for a statement from a person who has knowledge of the facts of a case; if such person refuses to answer a question put to him, he is liable to punishment unless the question tends to expose him to a criminal charge. Furthermore, when a statement has been reduced into writing by a duly empowered officer and the person making it subsequently gives a different version when giving evidence on oath before Court, such person is liable to be punished if the contradictory statement made before the Court is material to the issue and if it is established that there was an intention to deceive.

In the present case, it appears that the statements were taken down in writing after the persons making them had been cautioned, and we hold that the learned trial Judge should not have refused production of these statements solely on the ground that they were taken down by police officers not empowered under the Criminal Procedure Evidence Ordinance to make enquiries *etc.*

The learned Judge in the Court below relied on Criminal Appeal 186/45 which in our view does not decide the question which arose in the present case. The decision in Criminal Appeal 186/45 was given in a case where a person had been prosecuted under section 4 of the Criminal Procedure Evidence Ordinance, and we agree that such a prosecution cannot succeed unless the original statement was taken down by an officer duly empowered under section 2(1) of the Ordinance. In the present case the statements taken down by the Police were to be used not to contradict evidence given before the Court, but were to be used against the persons who had given the statements to prove that they were guilty of the offence of being in possession of smuggled goods. It may be that the production of any such statement was open to objection on some other ground, but their rejection on the ground relied upon by the learned trial Judge was not justified. We therefore allow the appeal and set aside the judgment acquitting the eight Respondents.

The learned Crown Counsel has requested us, in case we agree with his submission, to remit the case for completion to the Court below with such directions as we may deem fit to make. Under the powers vested in this Court by section 72(1)(c) of the Criminal Procedure (Trial Upon Information) Ordinance, we remit the case to the Court below for a new trial on the second count of the information and we direct that the evidence for the prosecution be heard anew and that the Defendants be at liberty to raise such objections or to call such witnesses as they may deem fit subject of course to the decision hereby given regarding the statements sought to be produced by the prosecution.

Delivered this 19th day of November, 1946, in presence of Mr. Hazou for Appellant and in absence of Respondents.

British Puisne Judge.

CIVIL APPEAL No. 108/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Salem Salman Abu Daiyeh. APPELLANT.

v.

Barrawi Lutfi el Akkawi. RESPONDENT.

Setting a judgment aside, M. C. P. R. 139 — Arbitration — "Enforcement" and "confirmation" of awards — Application to set aside made after order for enforcement — Estoppel, res judicata — Motion to set judgment aside on the ground of forgery — C. A. 448/44, C. A. 94/39, Flower v. Lloyd — M. C. P. R. 2, 5, "action", C. A. 22/42 — Filing amended defence after remittal.

Appeal from the judgment of the Magistrate's Court of Beersheba sitting as a Land Court, dated 6.3.46 in Motion No. 31/45 in Land Case No. 44/44, allowed:—

Proceedings may be taken to set aside a judgment obtained by fraud. If fraud was not alleged in the original action, the matter is not *res judicata*. (*A. M. A.*)

REFERRED TO: C. A. 448/44 (12, P. L. R. 116; 1945, A. L. R. 97); C. A. 94/39 (6, P. L. R. 493; 1939, S. C. J. 446); C. A. 22/42 (9, P. L. R. 328; 1942, S. C. J. 259; 12, Ct. L. R. 3); Flower *v.* Lloyd, 1877, 6 Ch. D. 279, 46 L. J. (Ch.) 828, 37 L. T. 419.

ANNOTATIONS:

1. See the previous proceedings in this case: C. A. 300/44 (12, P. L. R. 49; 1945, A. L. R. 11) and notes in A. L. R.

2. *Cf.* Mo. D. C. Jm. 114/46 (1946, S. C. D. C. 474) and notes 1 & 2 on the proper way of commencing proceedings of this nature.

3. On setting aside of judgments on account of fraud *vide* C. A. 143—5/43 (10, P. L. R. 407; 1943, A. L. R. 492) and note 3 in A. L. R.; see also C. A. D. C. Ha. 56/46 (1946, S. C. D. C. 561).

4. On the *res judicata* point compare C. A. 97/46 (*ante*, p. 610).

(*H. K.*)

FOR APPELLANT: T. Sacca.

FOR RESPONDENT: S. Bisseiso.

JUDGMENT.

This is an appeal from a decision of the Magistrate's Court of Beersheba sitting as a Land Court in Land Case No. 44/44 Motion No. 31/45.

It is necessary to set out briefly the history of previous litigation between the two parties.

The first stage was a submission to arbitration of a dispute concerning boundaries. The arbitrator went to inspect the land early in 1944 but during the inspection, a quarrel broke out between the parties and the arbitrator was wounded. Sometime later, the present Respondent applied to the Beersheba Land Court for the confirmation of the award made by the arbitrator, and the application was granted on the 21st June, 1944. I would point out that rule 3 of the Arbitration Rules, 1939, deals with the enforcement of awards and that the expression "confirmation of an award" is therefore not quite correct although more convenient.

An appeal was then lodged but was dismissed by the Supreme Court sitting as a Court of Appeal. It is important to mention that at that stage, no attempt had been made by the then Appellant, who is also the Appellant in the present case, to have the award set aside. In fact, the award was "confirmed" mainly because no opposition had been made.

The next stage was an application by way of motion to set aside the award on the ground, *inter alia*, "that the arbitrator did not give an award himself but the Respondent obtained it by fraud and deception". That first application by the Appellant was dismissed on the 16.5.45 on the ground that the Applicant was estopped because he had not opposed the confirmation of the award and also because the matter was, by then, *res judicata*. The Court also found that it was not disputed that an award had been given on the 29th of *Shawal* 1362. No appeal was lodged against that dismissal.

After the failure of the first application, the present Appellant again came forward with a motion to set aside the judgment of the 21.6.44. The notice of motion was accompanied by a statement of facts which set out, *inter alia,* that the award was forged and there was also an affidavit by the arbitrator to the effect that he neither gave nor signed the award.

On this second occasion the Defendant filed a statement of defence and the procedure thus became a hybrid one. Anyhow, no one objected and, on the contrary, the Defendant in his defence referred to the Plaintiff's pleading as a statement of claim. The case was dismissed by the learned Magistrate on the ground that the matter was *res judicata.* To put it shortly, the Magistrate's view was that in the previous application the same issue had already been raised and had been decided against the present Appellant.

The grounds of appeal are that the Magistrate was wrong in preventing the Appellant to lead evidence to prove that the award was a forgery and in holding that there was *res judicata.* The Appellant's main submission is that, on the authority of rule 139 of the Magistrates' Courts Procedure Rules and of C. A. 448/44, 1945, A. L. R., p. 97, the Magistrate could not dispose of the case without trying all the issues. This submission was countered by the Respondent's advocate who urged that rule 139 held good at the trial of an original action and not in a case where successive applications are made by way of motion in the principal case.

It is quite clear, in my opinion, that rule 139 does not apply where a Court is repeatedly approached by way of motions which all relate to the same case and to the same matter. In the present case, however, the circumstances are special because the so-called motion did in fact develop into an ordinary action. For the reasons stated below, it is unnecessary for me to give any decision on this first ground of appeal.

At this stage, I must mention that the Appellant's advocate pointed out that the 2nd application was to set aside the judgment by which the award had been confirmed. He quoted C. A. 94/39, 1939, A. L. R.* p. 446 in which it was held that a judgment obtained by fraud is a nullity and may be set aside. That proposition was stated to be based on the principles of English jurisprudence and the case of Flower *v.* Lloyd was mentioned in this connection. It appears from Flower *v.* Lloyd which is mentioned in the Empire Digest, Vol. 35, p. 84, para. 805, that the proper course to set aside a judgment obtained

* Should be "S. C. J."

(*Ed.*)

by fraud is to commence an original action. In view of rule 5 of the Magistrates' Courts Procedure Rules, 1940, and of the definition of the word "action" in rule 2 of the same Rules, I do not consider that an original action before a Magistrate is properly instituted by motion, unless there is an express provision to that effect (I would mention that I have perused C. A. 22/42, 9 P. L. R. p. 328 which, however, refers to District Court procedure).

As already mentioned, the pleadings in this case indicate that the parties have in fact treated the case as a principal action, and I see no reason why, in the circumstances, I should not consider the case on the same basis.

It now remains to examine whether the learned Magistrate was right in holding that there was *res judicata*. This entails a closer examination of the decision given on the first application for setting aside the award when the learned Magistrate held that the confirmation of the award and the failure of the appeal against such confirmation constituted *res judicata*. That decision was, in my opinion, quite correct, but I must concede that the learned Magistrate did not determine the issue whether the award had been obtained by fraud and deception. It cannot therefore be said that there is *res judicata* on that point. I therefore decide that the Appellant succeeds on the ground raised by him that there was no *res judicata*.

The appeal is allowed and the Magistrate's decision set aside. The case is hereby remitted for trial with liberty for the Respondent/Defendant to file, if he so desires, an amended statement of defence.

The costs of this appeal shall be on the lower scale with LP. 10 advocate's attendance fee, but such costs shall abide the event.

Delivered this 9th day of November, 1946, in the presence of Mr. P. Karmi for Appellant and Mr. S. Bisseiso for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 110/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Shimon Hasdai. APPELLANT.

v.

Zvi Lipkin. RESPONDENT.

Awlawiyeh — Art. 41 Land Code — L. A. 64/32, advertising sale, effect of Land Law (Amend.) Ord. — "Restitution of his share".

Appeal from the judgment of the Magistrate's Court of Tel Aviv, sitting as a Land Court, dated 25.3.46 in Land Case No. 512/46, dismissed:—

1. The rule laid down in L. A. 64/32 applies whether or not the sale has been advertised.

2. No right of *awlawiyeh* accrues to a co-owner to claim prior purchase in respect of a fraction of the other owners' store.

(*A. M. A.*)

FOLLOWED: L. A. 64/32 (1, P. L. R. 784; 3, C. of J. 1098).

ANNOTATIONS: The right of *awlawiyeh* applies only to voluntary transfers: see, in addition to the case cited, C. A. 280/44 (12, P. L. R. 222; 1945, A. L. R. 357).

(*H. K.*)

FOR APPELLANT: B. Zeiger.

FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court of Tel Aviv, sitting as a Land Court, dismissing a claim for *awlawiyeh* under Article 41 of the Ottoman Land Code, to certain land which was being sold by the Execution Office in satisfaction of a mortgage debt.

Mr. Zeiger, who has argued this case with commendable brevity and conciseness, contends that the circumstances of the present case are distinguishable from those in Land Appeal 64/32, Vol. 1, P. L. R. p. 784, in that in the case now before us the sale proceedings were not advertised or, at any rate, not sufficiently advertised and, secondly, because since 1932 the Land Law (Amendment) Ordinance has been in force limiting the period in which a person can claim *awlawiyeh* to one year instead of five years. We do not think that either of those factors affects the matter. With regard to the execution proceedings it has been the practice to dispense with advertisement in cases where interested parties (such as the judgment creditor and judgment debtor) have agreed so to do. As we do not think that the facts mentioned by Mr. Zeiger affect the matter and as we are bound by Land Appeal 64/32, we think that the Magistrate was right in holding that the present Appellant had no right of *awlawiyeh*. We realise that Land Appeal 64/32 was decided as a result of a Cyprus case reported in Volume 11 Cyprus Law Reports at page 29, in which the question of advertisement was specifically referred to. Nevertheless, for the reasons we have given, we do not think that the absence of advertisement in

the case before us affects the matter. This would be sufficient to dispose of the appeal but the learned Magistrate also dealt with another point namely that the Appellant could not succeed inasmuch as he was prepared to claim only one share out of sixteen shares in the property whereas he himself owned four out of sixteen shares, the judgment-debtor having owned 3 shares out of 16. The Magistrate held that no right accrued to the co-owner to claim prior purchase in respect of a fraction of the owner's shares. In thus holding we consider that the Magistrate came to a correct conclusion. We would refer to the translation in Tute's "Ottoman Land Laws" page 46, line 4 of Article 41 where the words "restitution of his share" appear. One of us (Mr. Justice Frumkin) considers that the proper translation should be "restitution of that share." As we hold that the Magistrate was right on both points, the appeal is dismissed with costs fixed or inclusive costs of LP. 10.—.

Delivered this 6th day of November, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 92/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: Edwards, De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF:—

George Salim Kabban. APPELLANT.

v.

The Attorney General. RESPONDENT.

Possession of W. D. property — Reg. 143(1)(d)— When person deemed to be in possession — Onus of proof — Reg. 2(3).

Appeal against the judgment of the District Court, Jerusalem, in Criminal Case No. 94/46, dated 19.7.46 whereby Appellant was convicted of being in possession of chattels being the property of the War Department contrary to Regulation 143(1)(d) of the Defence Emergency Regulations, 1945, and sentenced to one year's imprisonment, allowed:—

An occupier who establishes that he had no reasonable means or opportunity of knowing or finding out that W. D. goods have been brought into his house is entitled to claim that he has rebutted the presumption that he was in possession of the goods.

(*A. M. A.*)

REFERRED TO: CR. A. 96/46 (*ante*, p. 620).

ANNOTATIONS: *Cf.* CR. A. 77/43 (10, P. L. R. 471; 1943, A. L. R. 654) and notes in A. L. R.

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

This is an appeal, by leave, from a judgment of the District Court of Jerusalem, whereby the Applicant was convicted of being in possession of chattels, the property of the War Department, contrary to Regulation 143(1) of the Defence (Emergency) Regulations, 1945, and sentenced to one year's imprisonment. At the trial one of Appellant's sons, who is 16 years old, pleaded guilty and was put on probation, while another son who is 21 years old, was found guilty and was bound over.

The undisputed facts can be very briefly stated. They are that at about 9.30 *a. m.* on 26th April, 1946, a military lorry (or a lorry which appeared to be a military lorry) was seen outside the house occupied by the Appellant at Upper Baka'a, Jerusalem. From this lorry a large quantity of property belonging to the War Department, namely foodstuffs for use as military rations, was unloaded and taken into the Appellant's house, where they were found by a Police inspector and an Army Lieutenant between 10.30 and 10.45 *a. m.* It is common ground that the Appellant was at all material times in his own shop which is about 300 metres away from his house. It seems that some time after the goods had been taken into the house, one of the members of Appellant's family went to his shop to inform him that his house was being searched, whereupon he voluntarily went home to find out what was happening. On reaching home he met his 16 year old son, Yousef, who told him that he himself (Yousef) had bought the goods, whereupon the Appellant became angry and wanted to strike his son but was prevented from doing so by a Police inspector.

The story told by Yousef was that he had met someone driving the lorry along the Bethlehem road on the day in question which happened to be a school holiday. The driver stopped and said to him: "I have goods, will you buy them?" Yousef agreed to do so and asked the driver how much he wanted for the goods, to which the driver replied by asking him how much he had, whereupon Yousef answered: "LP. 10." The driver then agreed to sell the goods for LP. 10. Yousef then got on to the lorry (or truck) and directed the driver to his (Yousef's)

father's house. On arriving there, Yousef, wanting to be sure that nobody was inside, ascertained that his mother was hanging up the washing in the garden.

The learned Relieving President of the District Court, in convicting the Appellant, said in his judgment:—

> "If I am to believe the story of the son Yousef that his father was in complete ignorance of this transaction it follows, of course, that the father had discharged both burdens and I would have to fall back on the prosecution evidence to implicate the father, of which there is none. If I do not believe the story of the boy and the story of his father it does not follow that there is a conviction."

The question to be decided is whether the Appellant was, at any time, in possession of the goods unloaded at his house during his absence and found by the Police before he (the Appellant) had returned to the house.

learned Relieving President stated that there was a double the Appellant, namely, to rebut the presumption that, in of occupier of the premises, he was in possession of the ent goods found therein and that the said goods were lawful authority or reasonable excuse.

int out that the first step is to ascertain whether the n possession of the goods. If he was not, there is no samining whether he discharged the onus placed upon tion 143 of the Defence (Emergency) Regulations.

mption against an occupier is contained in regulation 2(3) resaid Regulations which lays down that the occupier of any s in which any thing is found or is proved to have been found shall be presumed to have or to have had possession of that thing, as the case may be, unless the contrary be proved.

We consider that where an occupier establishes that he had no reasonable means or opportunity of knowing or finding out that certain goods have been brought into his house, he is entitled to claim that he has rebutted the presumption. Specially in cases where a person (not being the occupier) accepts the responsibility for the goods, it does seem to us that the presumption no longer holds good.

We realise the force of the argument that the occupier may have conspired with another person so as to ensure that the latter will accept responsibility, but the correct answer is that in such a case it is for the prosecution to establish the guilty knowledge of the occupier.

There is in the present case a very suspicious fact, namely, that Appellant's young son should have acquired at a very low price a con-

siderable quantity of War Department goods from the driver of an army lorry whom he encountered by chance. One is tempted to deduce that the story is not true and that the young boy was probably acting under his father's instructions. Such reasoning is, however, based almost entirely upon suspicion and surmise and is, to a certain extent, further weakened by the fact that the unloading of the goods from an army lorry in broad daylight and in full view of the road is hardly a method which the Appellant would have approved.

After carefully scrutinizing the evidence, we consider that it is not absolutely impossible that the story told by Appellant's son may be true and we feel that it has not been established beyond doubt that the father was shielding behind his youngest son.

We therefore allow the appeal and quash the conviction. We wish to add that the Appellant's advocate, who was in Court when Criminal Appeal 96/46 was argued, pointed out that in the present case the case was tried summarily by the District Court on a charge sheet signed by a Police Officer authorised by the Attorney General to institute proceedings. It is unnecessary for us to deal with this point in view of our decision on the merits.

Given this 22nd day of October, 1946, in the presence of Mr. Elia for Appellant and Mr. Hooton for Respondent.

British Puisne Judge.

CRIMINAL APPEAL No. 97/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: FitzGerald, C. J., Curry, A/J. and Frumkin, J.

IN THE APPEAL OF:—

Jacob Heller. APPELLANT.

v.

Shlomo Gross Sne. RESPONDENT.

Criminal procedure — Findings of fact based on inferences — Alteration of charge sheet — Statement of particulars — Immediate signature of the judgment, M. C. P. R. 277 — C. C. Ord., sec. 43(1) — Findings of fact — Costs.

Appeal from the judgment of the District Court, Tel-Aviv, datel 1st July, 1946, in Criminal Appeal No. 39/46 from the judgment of the Magistrate's Court of Tel-Aviv, dated 24.3.46 in Criminal Case No. 8360/45, dismissed:—

1. Findings of fact may be based on inferences reasonably drawn from the circumstances.

2. The rules applying to the alteration of a charge do not extend to alterations of the statement of particulars.

3. Evidence may be heard as to the amount of the compensation payable under sec. 43(i) of the Criminal Code Ord. before a finding of guilty is recorded.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* CR. A. 9/44 (1944, A. L. R. 90) and note 3.

2. On the desirability of evidence to be given as to the loss suffered by an offence see CR. A. D. C. T. A. 128/44 (1945, S. C. D. C. 245 at p. 248).

(*H. K.*)

FOR APPELLANT: Dvorin.

FOR RESPONDENT: Meiri.

JUDGMENT.

In this appeal which we may say was argued with considerable ability by Mr. Dvorin, it will be convenient if we deal with the technical legal points first.

It was submitted that the conviction of the Magistrate was bad because under the provisions of section 11(2) of the Magistrates' Courts Jurisdiction Ordinance there was no definite finding of fact by the Magistrate. As to this we need only refer to his judgment where he says: "We definitely find it as a fact". Although it is true that the finding of fact was based on an inference drawn that the second Accused was in league with the first Accused, there is no objection to basing findings of fact on inferences reasonably drawn from the circumstances.

The second legal point was that there was some alteration in the particulars of offence. This alteration was due to the fact that the translation from the Hebrew language into the English language was not correct. While it is true that if a charge is altered the accused must be warned and a certain procedure adhered to, this does not apply to an alteration in the statement of particulars. The object of the statement of particualars of the offence is to give the accused sufficient indication of the type of evidence that is going to be adduced against him. In this case there was indeed no such alteration of the particulars as could possibly have prejudiced the Accused, particularly if we bear in mind that where there are three official languages a translation from one to another will not always be precise and some elucidation may be called for. We think that there is nothing in this point.

The next argument was that there was a violation of the Magistrates' Courts Procedure Rules 277 in that, as it is alleged, the Magistrate did not immediately sign the judgment. It is true that the Magistrates' Courts Procedure Rules provide that the judgment should be signed immediately, but unless we were satisfied that failure to comply with the requirements of the rule resulted in the miscarriage of justice to the accused, we would not, on this point, quash the conviction. In this case it could not possibly be argued that the failure of the Magistrate to sign the judgment until some time after he had pronounced it, could have prejudiced the Accused.

The next point concerned section 43(1) of the Criminal Code Ordinance. It was submitted by Mr. Dvorin that the Magistrate should not have taken evidence as to the amount of compensation which should be awarded before he recorded a finding of guilty. We cannot read any such provision into the section.

We come now to deal with the main ground of appeal. It is obviously the only one which troubled the District Court sitting as an appellate Court. It was whether the evidence adduced was sufficient to connect the Appellant in this case with the unlawful act, the unlawfulness of which on the part of the first Accused was never denied. That evidence was that the second Accused went together with the first Accused to negotiate the lease of the room which, in fact was to be entered. This at least shows that the Appellant was interested that the first Accused should get possession of that room.

The next link was that the second Accused repeatedly opened the door and it was inferred that he opened it on the day and thus enabled the first Accused to effect forcible entry. He did not deny that he opened the door but his explanation was that he did so in order to give ventilation to the flat. The learned Magistrate who had inspected the premises, weighed the evidence and came to the conclusion that it was not a reasonable explanation on the part of the Appellant for the opening of a door which otherwise he had no right to open. This was eminently a question for the trial Judge who saw the witnesses in the box and in the light of his inspection it was not unreasonable on his part to reject the explanation. The next element which, it was suggested, connected the second Accused with the forcible entry was the receipt of LP. 80 immediately after the entry.

The learned Relieving President said that he himself might have hesitated to convict on these facts, but he realised, as every Court of Appeal must realise, the danger of substituting himself for the trial Court. The weight to be attached to each of these facts depended to a large extent on the demeanour of the witnesses and in this the

only person who was in a position to gauge this weight correctly was the Magistrate. We think, therefore, that the learned Relieving President was correct in saying that he was not prepared to interfere with the Magistrate on this finding. This being so we would also dismiss the appeal on this issue.

There remains for consideration the amount of compensation awarded under section 43, Cr. Code Ord. The compensation awarded was LP. 100 and we do not think there is much difficulty in arriving at the assessment of this amount. We accept the assessment of LP. 29 for clothes and LP. 3 damages done to the violin. There remains therefore the amount of LP. 67 which was awarded, as the Magistrate said, for the loss suffered by being deprived of this room. We had evidence that this room was leased for 750 mils per month. We well know that single rooms in Tel-Aviv cost as much as LP. 7 per month and we are not prepared to differ from the Magistrate and the learned Relieving President that LP. 67 was an excessive estimate of that loss.

For these reasons the appeal must be dismissed. We do not feel inclined to give costs in this case.

Delivered this 14th day of November, 1946.

Chief Justice

CIVIL APPEAL No. 194/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Jamil Elias Salem & an. — APPLICANTS.

v.

Antranik Kopalian. — RESPONDENT.

Attachments — Provisional attachments under Art. 271 O. C. C. P. — Application to remove, under C. P. R. 306 — Appeal from decision of Registrar — Registrar's Ord., secs. 6, 8 — Decree or order, C. A. 121/44, C. A. 243/42 — Repeal of repealing provision, Interpretation Ord., sec. 13 — Courts (Amendment) Ord., 1946.

Application for leave to appeal from the order of the District Court Jaffa, dated the 15th April, 1946, in Civil Case No. 31/46, granted and appeal allowed:—

1. A decision to release a provisional attachment before the determination of the main case is an order, not a decree.

2. A provisional attachment granted by a Registrar under Art. 271 of the Ottoman law, can only be attacked by way of application under sec. 8 of the Registrars Ordinance.

3. Such application may only be entertained by a president or by two judges.

(*A. M. A.*)

DISTINGUISHED: C. A. 121/44 (11, P. L. R. 508; 1944, A. L. R. 785).
REFERRED TO: C. A. 243/42 (10, P. L. R. 21; 1943, A. L. R. 254).

ANNOTATIONS:

1. Previous proceedings in this appeal are reported *ante*, at p. 383.

2. For recent authorities on "decrees" and "orders" see the note in A. L. R. to C. A. 243/45 (13, P. L. R. 148; *ante*, p. 330); *cf.* also C. A. 397/45 (*ibid.*, pp. 240 & 390).

3. The ruling on the second point confirms the decisions of the District Court of Tel-Aviv in C. D. C. 217/40 (quoted in C. D. C. T. A. 136/40 (1940, S. C. D. C. 99)), Mo. 220/44 (1945, S. C. D. C. 278) and Mo. 437/45 (*ibid.*, p. 560).

4. A similar conclusion as that reached on the third point was arrived at in C. A. 245/41 (9, P. L. R. 24; 1942, S. C. J. 3; 11, Ct. L. R. 97) in respect of sec. 3(b) of the Magistrates' Courts Jurisdiction Ordinance.

5. Sec. 8(2) of the Registrars Ordinance has meanwhile been amended by the Amendment Ord., No. 65 of 1946.

(*H. K.*)

FOR APPLICANTS: No. 1 — Malak.
No. 2 — Elia.

FOR RESPONDENT: M. Taji.

JUDGMENT.

This is an application for leave to appeal from a decision of one of the learned Judges of the Jaffa District Court (Judge Daoudi) whereby a provisional attachment granted by the Registrar of the said Court was rescinded.

It was agreed by all concerned that the case would be fully argued (as if leave to appeal had been granted) so as to enable the Court to give a decision on the merits should leave be granted.

On the 9th March, 1946, the Registrar of the Jaffa District Court granted on an *ex parte* application made to him by the present Aplicants and dated 28.2.46, a provisional attachment against certain machines alleged to be in the Respondent's possession. The ground put forward to support of the application was that the machines should have been delivered to the second Applicant, who was acting as liquidator of a partnership between the first Applicant and the Respondent, and it was feared that the machines might be disposed of to the prejudice of the first Applicant.

The Registrar stated in his order granting the provisional attachment that he was acting under Article 271 of the Ottoman Code of Civil Procedure, and that the other party had the right to object in accordance with Rule 306 of the Procedure (*sic*)*.

On the same day, *i. e.* the 9th March, the present Applicants filed a statement of claim against Kopelian (*i. e.* the present Respondent) and prayed, *inter alia,* that the provisional attachment be confirmed.

Kopelian filed an application to set aside the order made by the Registrar on the 9.3.46, and subsequently filed a statement of defence in which he asked, *inter alia,* that the provisional attachment be released.

The application to set aside the order of provisional attachment was the subject of Motion 72/46. The parties went first before the Registrar of the District Court who, at the request of Kopelian's advocate referred the matter to the Court. The Court (Judge Daoudi sitting alone) heard the motion and on the 15.4.46 ordered the provisional attachment to be released. The present Applicants applied to Judge Daoudi for leave to appeal to the Supreme Court in its appellate capacity and leave was refused on the ground that the decision to release the attachment was a final decree (*i. e.* appealable as of right) and also on the ground that, even if the decision were an order, there was no reason to allow an appeal in a case where, in the learned Judge's opinion, a provisional attachment should not have been granted against the personal property of a co-partner.

One of the points raised by the present Applicants during the hearing of the motion for setting aside the provisional attachment was that one judge sitting alone had no jurisdiction; their submission was that the matter fell to be dealt with under section 8 of the Registrar's Ordinance, 1936, and had to be entertained either by the President in Chambers or, on his directions, by two or more Judges in Chambers.

I must first decide whether Judge Daoudi's decision is a decree or an order. If it is a decree, the question of leave to appeal does not arise.

C. A. 121/44 (11, P. L. R. 508) was quoted by Respondent's advocate in support of the contention that the decision is a decree. The facts in C. A. 121/44 were that the District Court refused to make an order prohibiting the Religious Court from dealing further with a certain succession. The matter was thus at an end insofar as the District Court was concerned: had the prohibition order been granted

* In the text of the judgment.

(*Ed.*)

it would have meant that the District Court would have gone on entertaining the case and the order would then have been only an interlocutory order and not a final decision determining the matter before the District Court. I do not think, therefore, that C. A. 121/44 does help the Respondent in the present case.

I would refer to C. A. 243/42, 10 P. L. R. 21 in support of my view that a decision releasing a provisional attachment prior to the final determination of the main case cannot be a decree.

The next point is whether leave to appeal should be granted by this Court. I find that there is a good ground for granting leave in this case because rather important questions of jurisdiction and procedure are involved.

I will now examine whether an order of provisional attachment under Article 271 of the Ottoman Civil Procedure Code granted by a Registrar by virtue of section 6(a)(iii) of the Registrars Ordinance, 1936, may be rescinded only under the provisions of section 8 of the Registrars Ordinance, *i. e.* by the President in Chambers or by two or more Judges in Chambers. Mr. Farouki, for the Respondent, has submitted that his application for the release of the provisional attachment was made under the provisions of Title IX of the Ottoman Code of Civil Procedure and not under the Registrars Ordinance. This submission raises the question whether the Registrars Ordinance did not impliedly repeal the rather complicated procedure traced out in Part IX of the Ottoman Civil Procedure Code insofar as objections to provisional attachment are concerned.

I hold the view that the Registrars Ordinance, 1936, did supersede the Ottoman Procedure Code when it empowered Registrars to grant provisional attachments and provided in section 8 the method for setting aside a Registrar's order. In this connection I also wish to draw attention to the fact that Article 272 of Title IX of the aforementioned Code was amended in 1918 by Rule 7 of the Civil and Commercial Procedure Rules. The original Article 272 reads as follows:—

> "Seizure shall be made under the written permission of the Court upon the application of the creditor, who shall first be required to furnish a surety: Provided that if the claim be based upon a judgment, *etc.* .....".

The amendment of 1918 made the Article read as follows:—

> "A conservatory attachment may be granted by the president of the Court on presentation of an application in writing by the creditor, who may be ordered to find a surety, *etc.* ...".

It would seem that the proviso was left untouched by the amendment of 1918, but I have noticed that in the collection of Rules published

by Mr. Zvi Cohen in 1945, the Article is reproduced at page 113 as amended, but without the proviso. This, however, is of no importance in the present case. What is important is that the Civil Procedure Rules, 1938, repealed the Civil and Commercial Procedure Rules of 1918 which had amended Article 272. This repeal cannot, in my opinion, revive Article 272 as it stood prior to 1918 (see Interpretation Ordinance, 1945, section 13, and section 5 of the previous Interpretation Ordinance, Cap. 69; see also the 7th Edition of Maxwell on the Interpretation of Statutes, pages 141—142) but it is not clear whether Article 272 of the Ottoman Code of Civil Procedure has in fact completely disappeared or whether it still stands as amended in 1918. For the purposes of the present judgment, however, I need not make any final pronouncement on this point, which has not been argued before us. I, however, hold that a provisional attachment granted by a Registrar under Article 272 can be attacked and set aside only by way of an application made under section 8 of the Registrars Ordinance.

It now remains to examine one last point. Section 8(2) of the Registrars Ordinance provides that where a person aggrieved applies to set aside a Registrar's order, the application is to be entertained by the President in Chambers or, on his directions, by two or more Judges in Chambers. Had section 8(2) simply provided that such an application would be heard by the District Court, it is clear that subsequent to the coming into force of the Courts (Amendment) Ordinance No. 14 of 1946, one Judge sitting alone could have entertained such an application. The position is, however, different because section 8(2) is quite specific and it is impossible to construe it as being affected by Ordinance No. 14 of 1946. It may be that section 8(2) was overlooked by the legislator, but, if such is the case, it is for the legislature to set matters right.

I therefore hold that the learned District Court Judge had no jurisdiction to entertain the application and to rescind the provisional attachment granted in this case by the Registrar, and I allow the appeal and set aside the order given on the 15th April, 1946, and remit the case back to the District Court to be heard according to section 8(2) of the Registrars Ordinance, 1936.

The Appellants shall have the costs of this appeal which shall be taxed on the lower scale and shall include LP. 15 advocate's fees.

Delivered this 15th day of October, 1946, in the presence of Mr. B. Malak for Applicant No. 1, and Mr. E. G. Elia for Applicant No. 2, and Mr. A. Michaeli for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 221/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J.

IN THE APPEAL OF:—

Muhammad el 'Abd abu el Hatal & 13 ors. — APPELLANTS.

v.

1. Attorney General on behalf of the Government of Palestine,
2. Nazmiya 'Ali el Jarkas & 24 ors. — RESPONDENTS.

Land Settlement — Duty of L. S. Officer to investigate claims — Evidence of possession — Effect of non payment of titles, declaration of land as Sand Drift area and Forest Reserve.

Appeal from the decision of the Land Settlement Officer, Gaza Settlement Area, dated the 14th April, 1945, in Case No. 34/Tuffah, dismissed:—

Although Land Settlement proceedings differ from ordinary civil actions, as it is the duty of the officer to investigate claims, where parties are represented, the Settlement Officer need not conduct the party's claims or strengthen their case.

(*A. M. A.*)

ANNOTATIONS: On the proper procedure to be followed in settlement proceedings see C. A. 185/43 (1943, A. L. R. 538); *cf.* also C. A. 229/45 (13, P. L. R. 175; *ante*, p. 359).

(*H. K.*)

FOR APPELLANTS: Cattan.

FOR RESPONDENTS: No. 1 — Wa'ary.
Nos. 2—26 — Absent — served.

JUDGMENT.

This is an appeal from the decision of the Settlement Officer, Gaza Settlement Area, in Case No. 34/Tuffa, whereby the Appellants' claim to parcel 3 in Block 1743 was dismissed with costs. There are three parcels in the same Block and each parcel was claimed by a different group of plaintiffs. The whole Block was claimed by the Government and also by one group of third parties.

One of the grounds of appeal is that the Settlement Officer should not have treated the Appellants as defendants in the settlement proceedings. All I need say on this point is that the Settlement Officer

was justified in making the Government a defendant in the case inasmuch as the documentary evidence in support of the Government's claim was that the parcel had been declared a Forest Reserve and treated as not being private land since 1926.

The Plaintiffs, now Appellants, rested their claim to parcel 3 on registration and possession. They rely on nine entries covering a total of 17½ old Turkish *dunums* in the names of persons alleged to be their ancestors. The area of parcel No. 3 is about 345 *dunums*, but I do not think that much importance need be attached to this difference in area. What is important is that the Settlement Officer found that some of the entries did not mention the name Hatal at all. Furthermore, he pointed out that the Plaintiffs had made no attempt to connect the aforementioned entries with the land in dispute, and he added that the Government had led evidence to the effect that some of the entries applied to land a long way away from parcel No. 3. On this particular issue, Mr. Cattan for the Appellants has submitted that the Settlement Officer erred when he held that the onus of proving that the *Tabu* extracts applied to the land in dispute rested on the Plaintiffs. His argument was that a Settlement Officer is by law charged with the duty of investigating claims and that he should not consider himself bound by the rules obtaining in ordinary Civil Courts.

I am ready to concede that there is some justification for the argument put forward by Mr. Cattan, but the said argument cannot be carried to the length of saying that it is the duty of the Settlement Officer to conduct the case presented by each party in settlement proceedings. In the present instance there were three rival groups, and each of them was represented by advocate; I therefore cannot subscribe to the view that the Settlement Officer should have made it his business to make out or strengthen the case of each litigant. I might add that the Plaintiffs neglected to establish that the entries which bore their family name referred to ancestors of theirs. I am of the opinion that this particular ground of appeal fails.

— — — — — — — — — — —*

I will now allude to two facts which obviously strengthen the claim made by the Government. The first fact is that a notice was published in the *Gazette* No. 112 of the 1st April, 1924, declaring a certain area, which undoubtedly includes the parcel in dispute, to be a sand-drift area. The other fact is that on the 1st of November, 1926, proclamation No. 174 was published in the *Gazette* declaring a certain area,

* Omitted as dealing with facts only.

(*Ed.*)

which includes the parcel in dispute, to be a forest reserve; this proclamation was made under section 3 of the Forests Ordinance, 1926 (now Cap. 61) which applies in respect of lands which are not private property.

Mr. Cattan called attention to the difference in the Sand Drifts Ordinance (Cap. 131) between registered and unregistered lands. His point was that where the land is registered, a copy of the notice which is published in the *Gazette* must be served upon every person in whose name the land is registered or who has any registered interest therein.

It is quite true that a registered proprietor on whom notice is not served, and who is not requested by Government to co-operate in carrying out the work to stop the sand drift, would not be adversely affected by the provisions of the Sand Drift Ordinance. In the present case, however, we are faced with the situation that the Settlement Officer has found, and rightly found, that the Plaintiffs cannot rely on the fact that they or their ancestors were registered owners of the parcel in dispute. Consequently the Settlement Officer was quite logical in holding that section 10 of the Ordinance would in any case have deprived the plaintiffs of any right they may have had in the land prior to 1924, because they failed to undertake to co-operate with Government in the reclamation of the land.

With regard to the question of forest reserve, the chief importance which I attach to it is that the land was under fairly constant supervision by Government Officers. This made it possible for the Government to adduce evidence to which the Settlement Officer was entitled to attach weight, and I find no reason to disagree with his findings.

This appeal therefore stands dismissed and I allow to the first Respondent, *i. e.* the Government of Palestine, costs on the lower scale with LP. 5.— advocate's attendance fee.

Delivered this 26th day of September, 1946, in presence of Mr. Merquerian (for Henry Eff. Cátan) and Omar Eff. Wa'ary for Resp. No. 1 and in the absence of the remaining Respondents.

British Puisne Judge.

CIVIL APPEAL No. 101/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Curry, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Suleiman Hussein Hassan Silmi. APPELLANT.

v.

Turkieh Isma'il Shaldan. RESPONDENT.

Arbitration — Jurisdiction of Courts to enforce the award — Misconduct — Failure to comply with strict rules of procedure — Arbitrator illiterate — Mejelle 906.

Appeal from the julgment of the Magistrate's Court of Gaza, sitting as a Land Court, 17.3.46 in Land Case No. 264/45, dismissed:

1. Although consent cannot endow a Magistrate's Court with material jurisdiction exceeding LP. 250.—, if no evidence is adduced that the value of the claim does exceed that sum the lack of jurisdiction cannot be pleaded on appeal.

2. It is not necessary for an arbitrator strictly to comply with the rules of procedure so long as this does not lead to a miscarriage of justice.

3. If parties agree upon an illiterate arbitrator they cannot later object to him on that ground.

(*A. M. A.*)

ANNOTATIONS:

1. As there is "only one Land Court" in Palestine the fact that the value of the land exceeded LP. 250.— would not have led to a dismissal of the action, but only to its transfer to a Land Court properly constituted: C. A. 200/43 (10, P. L. R. 497; 1943, A. L. R. 664) and cases therein cited.

2. On the second point *cf.* C. D. C. T. A. 424/45 (1946, S. C. D. C. 183) and C. D. C. T. A. 407/45 (*ibid.*, p. 184) and notes thereto.

3. On the last point *vide* C. A. 462/44 (1945, A. L. R. 170).

(*H. K.*)

FOR APPELLANT: A. Nuseibeh.

FOR RESPONDENT: M. Hawari.

JUDGMENT.

The Respondent to this appeal was the Plaintiff in the Magistrate's Court claiming the ownership of a house and the Appellant, her son, was the Defendant. By agreement of the parties the matter was referred under section six of the Land Courts Ordinance to an agreed arbitrator. The arbitrator made his award, the Plaintiff applied for authentication thereof, and the Defendant applied to have the award set aside.

The learned Magistrate confirmed the award. The Defendant appeals against the order.

The first ground taken by the Appellant is that the Magistrate's Court had no jurisdiction as the value of the house exceeds LP. 250.—. The objection to this effect was raised before the Magistrate in the

original hearing but the Defendant subsequently dropped his objection. The Appellant argues that no agreement between the parties can give a Court jurisdiction when in fact it has not the necessary jurisdiction. With that proposition I am in full agreement but in this case the facts would appear to be as follows:—

The Plaintiff in the action swore that the value of the house was under LP. 250.—. No direct evidence was adduced by the Defendant to the contrary. It is true that a certificate of tax assessment was filed for another purpose by the Plaintiff, which assessment gave the value as exceeding LP. 250.—. This piece of evidence, however, was in no way conclusive evidence before the Magistrate that the value exceeded LP. 250.— and as this point was not pursued by the Defendant the Magistrate was quite entitled to accept the value sworn to by the Plaintiff.

The Applicant's next ground is that the arbitrator committed several acts of misconduct. In the first place he objects that the two *Hejjis* were put in not through any witnesses and therefore they were not properly before the arbitrator. No objection to this method of procedure appears to have been taken before the arbitrator and we think it is too late to raise that objection now. In matters of arbitration it is not essential that the rules of procedure should be strictly complied with so long as it does not appear that there has been any miscarriage of justice as a result thereof. In this case we certainly cannot say that any miscarriage of justice resulted as no objection was taken and had the Defendant wanted to cross-examine the Plaintiff thereon he could have done so.

As regards the next objection that the *Hijjis* only referred to certain shares in the property instead of the whole property, we would merely state that there was other evidence before the arbitrator which if he believed would justify him in concluding that the whole property belonged to the Plaintiff.

His final objection was that the award on the face of it was wrong in law and fact, but we cannot find any reason for so deciding. It was merely a question of the arbitrator assessing the evidence before him, and on that evidence he came to the conclusion that the whole house belonged to the Plaintiff and he considered that the evidence that the Defendant paid wages for the building of the additional rooms and that the issuing of the licence in his name, was insufficient in view of his relation with the Plaintiff to prove that the whole building belonged to him. We can find no evidence to substantiate the belief that the arbitrator showed bias.

Finally it is too late for the Appellant to object to the arbitrator

being illiterate when he agreed to the appointment of this arbitrator. As regards the argument that the arbitrator did not consider the applicability of Article 906 of the *Mejelle* this point does not appear to have been raised, and in any event it would appear to be a matter which could be the subject of another claim.

For the foregoing reasons we are of the opinion that this appeal must fail.

Given this 19th day of October, 1946, in the presence of A. Nuseibeh for Appellant and no appearance for Respondent.

A/British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 30/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Solomon Felman. APPLICANT.

v.

Edward Zwi Felman. RESPONDENT.

Rejection by arbitrator of claim of LP. 1200 — Court of Appeal quashing District Court's judgment to remit case to arbitrator — Application for leave to appeal to Privy Council.

Application for conditional leave to appeal to His Majesty in Council from the judgment of the Supreme Court, sitting as a Court of Civil Appeal, dated 27th March, 1946, in Civil Appeal No. 270/45, granted:—

Appeal to Privy Council lies as of right from a final decision of Court of Appeal not to remit case to arbitrator, who rejected claim of above LP. 500.

(*M. L.*)

ANNOTATIONS :

1. The judgment which it is sought to appeal (C. A. 270/45) is reported *ante*, at p. 191; for further proceedings in this matter see *ante*, p. 586.

2. On Art. 3(a) of Pal. (Appeal to Pr. C.) Order-in-Council see P. C. L. A. 33/45 (1945, A. L. R. 556) and P. C. L. A. 20—28/45 (1945, A. L. R. 760) and annotations in A. L. R.

(*A. G.*)

APPLICANT: In person.

FOR RESPONDENT: Scharf.

ORDER.

De Comarmond, J.: The applicant Solomon Felman has applied by motion for leave to appeal to His Majesty in Council from the judgment given by the Court of Appeal on the 27th March, 1946, in the appeal of Edward Zvi Felman *v.* Shlomo Felman. (I am given to understand that the name Shlomo is the Hebrew equivalent of Solomon).

It appears from the affidavit filed in support of the application that the Applicant and the Respondent submitted to arbitration a claim by the Applicant for payment of an amount of LP. 1200 and immovable property exceeding LP. 1500 in value.

The arbitrator rejected the claims made by the present Applicant (Solomon Felman) and the latter applied to the District Court of Jaffa to set aside or remit the award. The learned District Court Judges were of opinion that the only point to be decided was whether or not there had been misconduct on the part of the arbitrator. The decision arrived at by the District Court was to remit the award to the arbitrator for him to reconsider the case; and it seems that the view taken by the District Court was that the arbitrator had erred in his interpretation of the law. Edward Zvi Felman (who is the Respondent in the present matter) then appealed to the Supreme Court sitting as a Court of Appeal, and the decision of the Court of Appeal was that the District Court had erred in remitting the award. One important reason given in the judgment of the Court of Appeal was that the whole dispute between the parties arose out of the construction of a certain clause in an Agreement and that it was not a case where a question of law was incidentally involved but where it was the whole kernel of the dispute.

I have described the position at some length because it was submitted by Mr. Scharf, who appeared for Edward Zvi Felman, that an appeal to His Majesty in Council does not lie as of right because the Court of Appeal did not deal with a dispute in a matter amounting to or of the value of £ 500 or upwards or involving directly or indirectly some claim or question to or respecting property amounting to or of the said value or upwards. It was not disputed that the judgment of the Court of Appeal is a final judgment and I have no doubt on that point.

The Applicant for leave to appeal did not invoke paragraph (b) of Article 3 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, and I will therefore confine myself to examining Mr. Scharf's contention in the light of paragraph (a) of the said Article. I understand Mr. Scharf's argument to be that the two parties having sub-

mitted to arbitration and agreed that the award would be final and conclusive, the District Court and the Court of Appeal were never concerned with value involved and only dealt with the question whether the award should be remitted back or not on the ground of the arbitrator's error in interpreting or applying the law. Can it be said, however, that the question of not remitting the award to the arbitrator does not involve directly, or indirectly, a claim or question to or respecting property or some civil right amounting to or of the value of £ 500 or upwards? It is true that if the award were remitted to the arbitrator no one could foresee what the ultimate result would be, but the value of the claim does undoubtedly exceed £ 500 and the rule is, in the case of a plaintiff-appellant, to consider the amount for which the Defendant has successfully resisted a decree. Being given that the decision of the Court of Appeal in this case has the effect of refusing to remit the case to the arbitrator it seems to me that, to say the least, the decision indirectly affects the would-be Appellant's claim in the arbitration. As already stated, there is no doubt that such claim is above the value of £ 500.

I therefore decide that conditional leave to appeal may be granted and I direct an order to issue accordingly upon the following conditions:—

(a) that the Appellant do enter, within six weeks from the date of the order into a bank guarantee, to the satisfaction of the Chief Registrar, from one of the banks recognised for the purpose in a sum of LP. 300.— for the due prosecution of the appeal and the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the appeal (as the case may be);

(b) that the Appellant do take within two months of the date of the order the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England.

Costs of this application to follow the event and to be costs in the cause.

Delivered this 29th day of May, 1946, in the presence of Mr. Muganam for Applicant and Mr. Michaeli for Respondent.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

HIGH COURT No. 72/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Edwards, A/C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Ya'aqov Zucker. PETITIONER.

v.

1. His Honour Mr. M. Kantrovitch, A/J. District Court, Tel-Aviv,
2. The Rent Tribunal (Dwelling Houses) at Ramat Gan, Lydda District, of Beit Ha'ezrach, Ramat Gan,
3. Tova Rafalovitz. RESPONDENTS.

Application to District Court for leave to appeal from decision of Rent Tribunal —Refusal of application for leave to appeal — Belated application to High Court.

Return to an order *nisi*, issued on the 26th of July, 1946, directed to the Respondents Nos. 2 and 3 only, calling upon them to show cause why the purported decision of the Rent Tribunal despatched on 18th February, 1946, should not be set aside, order *nisi* discharged:—

Undue delay in petitioning High Court against decision of Rent Tribunal, even if delay caused by Petitioner making use of right given to him by proviso to sec. 5(c) as amended, of Rent Restrictions (Dwelling Houses) Ord., fatal to petition.

(*M. L.*)

ANNOTATIONS:

1. The judgment of the District Court refusing leave to appeal which is referred to in the Order is C. A. D. C. T. A. 49/46 (*"Hamishpat"* 1946, p. 112 — *in Hebrew*).

2. *Cf.* H. C. 56/46 (*ante*, p. 584) and annotations.

3. For District Court decisions to the effect that leave to appeal on a point of law from decisions of Rent Tribunals can be given only in those cases where these decisions were given after 23.2.46 see C. A. D. C. T. A. 42/46 reported in Hebrew in 1946 *Hamishpat* 24, C. A. D. C. T. A. 49/46 (*supra*) and C. A. D. C. T. A. 116/46, *ibid.*, at p. 184.

4. *Quaere* whether in such a case the plea of "alternative remedy" could not be raised against Petitioner and whether High Court would interfere had the application for leave to appeal been submitted when the decision of the Rent Tribunal was given after 23.2.46.

(*A. G.*)

FOR PETITIONER: Buchhalter.

FOR RESPONDENTS: Nos. 1 and 2 — No appearance.
No. 3 — Rand.

ORDER.

This is the return to an order *nisi* calling upon the Rent Tribunal, Ramat Gan, and Mrs. Tova Rafalovitz (a landlady) to show cause why a certain decision of the Rent Tribunal (Dwelling Houses) of Ramat Gan should not be set aside. The decision of the Rent Tribunal was dated 18.2.46. The present Petitioner applied to the District Court of Tel-Aviv for leave to appeal under section 5(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, as amended by section 3 of the Rent Restrictions (Dwelling Houses) (Amendment) Ordinance, 1946, which latter Ordinance came into force on the 23rd February, 1946.

It seems that the District Court held that section 5(c) as amended (giving an aggrieved person the right to apply for leave to appeal on a point of law) applied only to decisions of Rent Tribunals given after 23.2.46 and, holding that view, they refused the application for leave to appeal.

The Petitioner applied to this Court on 12.7.46, that is, nearly five months after the date of decision of the Rent Tribunal. It may be, and probably is, the case that the reason for the delay was the Petitioner's making use of the right given to him by the proviso to section 5(c), sub-section 1, as amended on 23.2.46. He should, of course, have anticipated that his approach to the District Court, for one reason or another, might be unsuccessful. Nevertheless, the facts remain that he did choose to go to the District Court, and that his application to this Court was made nearly five months after the decision of the Rent Tribunal. We think that his delay is fatal, and we do not think that we need deal with the merits of the petition. We would only say that we listened carefully to all the various points of attack made against the decision of the Rent Tribunal, and we think that they are all highly technical and frivolous.

The order *nisi* is accordingly discharged with fixed costs of LP. 5 to third Respondent, Mrs. Rafalovitz.

Given this 24th day of September, 1946.

Acting Chief Justice.

HIGH COURT No. 80/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Edwards, A/C. J. and De Comarmond, J.

In the matter of an *ex parte* application by the Attorney General made under section 13A of the Coroners Ordinance.

Attorney General petitioning High Court for fresh inquest by a Coroner — Practice and procedure in High Court.

1. Sec. 13A(1), Coroners Ord. as amended does not require Petitioner to cite a respondent to the petition as envisaged by rule 5, High Court Rules, 1937.

2. High Court can always, if it thinks fit, before adjudicating on an application order service on any person or persons and for that purpose adjourn the hearing of the application.

ANNOTATIONS: Instances where H. C. ordered service of petition on persons not originally named as Respondents are mentioned in H. C. 111/45 (1946, A. L. R. 292).

FOR ATTORNEY GENERAL: Solicitor General — (Griffin).

ORDER.

This is an application by the Attorney General — the first of its kind — made under section 13(A)(1)(b) of the Coroners Ordinance as enacted by section 3 of the Coroners (Amendment) Ordinance, 1946, for orders that the findings at the inquests held on 3rd August, 1946, on the bodies of the 78 persons whose names are set out in the First Schedule to the application be quashed on the ground of insufficiency of evidence and that this Court do order the holding of fresh inquests touching the deaths of these persons and that such inquests be held by a coroner other than the Coroner who held the previous inquests. The application is supported by an affidavit sworn by the Solicitor General (Mr. Bowes Griffin K. C.). We have perused the application and affidavit in support and we have also heard the learned Solicitor General in person at the Bar in support of the application. We are satisfied that it is both necessary and desirable that we should make the orders sought.

There is only one matter with which we think we ought to deal and that is the applicability of Rule 5 High Court Rules, 1937, to proceedings under section 13(A) as enacted by section 3 of the Coroners

(Amendment) Ordinance, 1946. The Attorney General has complied with Rules 2 and 3 High Court Rules, 1937. He has not mentioned the name of any person as respondent to the petition; but we think that section 13(A)(1) does not require him to do so. In this state of affairs we do not think that Rule 5 High Court Rules comes into play. We would merely add that, if this Court thought fit, we could always, before adjudicating on any application under section 13(A)(1), order service of notice of the application on any person or persons and for that purpose adjourn the hearing of the application. In the present case, however, we think it unnecessary to do so. We accordingly make the orders (a) (b) and (c) prayed for in the last paragraph of the application, that is to say:—

(a) that the findings at the inquest held on the 3rd day of August, 1946, in respect of the bodies of each of the persons named in the First Schedule attached to the application, copies of records whereof are contained in the Second Schedule attached to the application, be quashed;

(b) that a fresh inquest touching the death of each of the persons whose names are specified in the First Schedule attached to the application be held; and

(c) that such fresh inquests as aforesaid be held by a Coroner other than the Coroner who held the previous inquests.

Given this 26th day of August, 1946.

Acting Chief Justice.

HIGH COURT No. 93/45.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPLICATION OF:—

Boulos Debbas. PETITIONER.

v.

Acting Director of Land Settlement, Jerusalem. RESPONDENT.

Agreement with Government re valuation of land — Assessment by Commission under sec. 4(1), Land Law (Amend.) Ordinance.

Return to an order *nisi*, issued on 8.11.45, directed to the Respondent, calling

upon him to show cause why his order for *badl misl* in respect of Parcel 1 in Block 18069 contained in notices (Exhibits 6 and 12), dated 15.6.45 and 21.10.45 respectively should not be set aside and why he should not refrain from selling the said Parcel 1 by public auction in default of such payment and why he should not submit the assessment of the *badl misl* to the competent Court, the order *nisi* made absolute:—

1. If a person, not being entitled to land on payment of *badl misl* (equivalent value), made an agreement with Government to have value of land assessed and parties did not prescribe any particular mode of assessment they must be taken to have intended sec. 4, Land Law Amendment Ordinance to operate.

2. Sec. 4(3), Land Law Amendment Ord. provides for review, not rehearing; it gives Director of Land Settlement power to alter values fixed by Commission, using for so doing the data which guided the Commission, but not to take steps to obtain fresh and additional data.

3. *Badl misl* is to be assessed at the time the occupation of the land was officially reported to Government.

(*M. L.*)

ANNOTATIONS: For previous proceedings in this litigation see C. A. 217/42 (1943, A. L. R. 205) and C. A. 131/43 (11, P. L. R. 344; 1944, A. L. R. 766).

(*A. G.*)

FOR PETITIONER: A. Levin.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

Briefly the past history of this matter is as follows:—

The Petitioner in the year 1933 purchased some 53 shares out of 56 shares in the Ez Ezira lands for the sum of LP. 2946.430. The registered area of the said land was 12 Turkish *dunums* but apparently the actual area owned and occupied by the Petitioner's vendor far exceeded that area. In 1935 Government instituted an action in the Land Court against the Petitioner claiming title to this land on the ground that it was *mewat*. During the course of that action, land settlement proceedings were started and a case came up before the Land Settlement Officer. During those proceedings Government and the Petitioner indicated their willingness to settle the case on the basis that the Petitioner should pay the *tabu* value of the land in excess of the 12 *dunums* and leave it to the Settlement Officer to decide such area in excess thereof. The Land Settlement Officer apparently found that the land was *mewat* and that as the provisions of the Land (*Mewat*) Ordinance had annulled the Petitioner's right to have the land gratis he was unable to give effect to the agreement of the parties.

The Petitioner appealed to the Supreme Court and the case was remitted to the Land Settlement Officer to give effect to the agreement

and to determine the area under cultivation in respect of which *Badl Misl* was to be paid. The Land Settlement Officer then awarded Petitioner Parcel 1 of Block 18069 on the payment of *Badl Misl* together with about 100 *dunums* in Block 18071. Government appealed from that decision and finally by consent of the parties the Court of Appeal awarded the present Petitioner Block 18069 on the payment of *Badl Misl* in regard to any area in excess of 12 Turkish *dunums*. Block 18070 was to be awarded as to 10 out of 24 shares to Petitioner without payment of *Badl Misl* and Government was to get Block 18071 in whole. In 1944 the Director of Land Settlement in accordance with section 4(1) of the Land Law Amendment Ordinance requested the Deputy District Commissioner to appoint a Commission composed of the District Officer and two unofficial members to fix the *tabu* value of Parcel 1 Block 18069. That Commission fixed the *badl misl* at LP.1.250 per *dunum* in respect of the unimproved land and LP. 4 per *dunum* in respect of the improved land. Apparently the Director of Land Settlement was not satisfied with this valuation and he obtained in August 1944 a fresh valuation from two of the members of his department. As a result of their re-assessment the Petitioner was notified that the *tabu* value had been fixed at LP. 20 per *dunum* for the improved area and LP. 15 per *dunum* for the unimproved land. The Petitioner now applies to this Court for an order against the Director of Land Settlement commanding him to set aside that said order for payment of *Badl Misl*. When the parties came before this Court further agreement had been reached by them and three points only were left for our decision.

The first point that arises is whether in the circumstances of this case the Director of Land Settlement was right in adopting the procedure laid down under section 4 of the Land Law Amendment Ordinance. The argument is that the section only applies where there is a right of *tabu* and here there is in fact no legal right of *tabu* in view of the land (*Mewat*) Ordinance. I think the answer to this is perfectly clear. In this case an agreement was come to by the parties that in spite of the Land (*Mewat*) Ordinance a certain part of land should be granted to the Petitioner on payment of *Badl Misl*. That agreement was silent on the question as to how the assessment of *Badl Misl* was to be made. Had Petitioner been legally entitled to the land on payment of *Badl Misl*, apart from the agreement, the assessment would have had to be made in accordance with section 4 of the aforementioned Ordinance. In my opinion the mere fact that the parties did not prescribe any particular mode of assessment indicates that they intended section 4 to operate.

I am, however, fully confirmed in this view by the fact that the Petitioner himself subsequently in more than one letter applied to the Director of Land Settlement to set up the Commission to make the assessment (Exh. A and C).

Section 4(3) of the said Ordinance provides that a valuation made by a Commission established under sub-section (1) shall be subject to review by the Director of Land Settlement whose decision shall be final, and the next question that arises is whether in obtaining a fresh assessment by two members of his department the Director of Land Settlement was reviewing the previous valuation. A review is to be distinguished in my opinion from a re-hearing, and the only logical interpretation which I think one can place upon the words in this section is that it gives the Director of Land Settlement power to alter the values fixed by the Commission, using for so doing the data which guided the Commission. I do not think it gives the Director of Land Settlement power to take steps to obtain fresh and additional data. It may be unfortunate that there are no regulations laying down how the Commission is to carry out its work and it may be that the commission does not provide the Director of Land Settlement with the data upon which they base their decision. However, in my opinion, that does not alter the fact that the Director merely has power to review the Commissioners' decision on the data used by them.

The third and last point that arises is the determination of the date at which the value is to be assessed. It is clear from the Regulations as to Title Deeds (*Tabu Seneds* Article 5) that the equivalent value is to be taken at the time the occupation was officially reported to Government. It appears that in July, 1934, Government inspected the land and Petitioner gave an undertaking to pay *Badl Misl.* In the circumstances of the case we consider that is the relevant date for the assessment.

I must now mention that apparently the parties have come to a further agreement whereby Government has consented to give Petitioner all the land in dispute, except 5 *dunums* which are delineated in red in Exh. 17 at 125 *piastres* per *dunum,* so that this order will only affect those 5 *dunums.*

For the foregoing reasons the order *nisi* is made absolute.

There is no order as to costs.

Delivered this 20th day of May, 1946.

A/British Puisne Judge.

I concur.

British Puisne Judge.

HIGH COURT No. 46/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF:—

Hans Pollak. PETITIONER.

v.

The Chief Execution Officer, Tel Aviv & an. RESPONDENTS.

Divorce before Rabbinical Court between husband and wife of foreign nationality and members of Jewish Community — Agreement between husband and wife concerning child and submission to jurisdiction of Rabbinical Court in all eventual disputes in future — Renewal of marriage tie by resumption of conjugal life after divorce — Husband objecting to jurisdiction of Rabbinical Court.

Return to a rule *nisi* issued on the 17th April, 1946, directed to the 1st Respondent, calling upon him to show cause why his order, dated the 28th February, 1946, in Execution file No. 304/46, Tel Aviv Execution Office, should not be set aside and why he should not refuse the execution in the said file of the provisional judgment of the Rabbinical Court, Tel Aviv, dated 1st January, 1946, given against Petitioner in favour of the 2nd Respondent; order *nisi* made absolute:—

Agreement between Jewish couple regulating matters between them in view of their separation by divorce ceases to subsist upon their resuming conjugal life after divorce; consent in such agreement to jurisdiction of Rabbinical Court does not survive and where consent is necessary, Court has no jurisdiction unless both parties submit to it.

(*M. L.*)

REFERRED TO: Nicol *v.* Nicol (1886), 31 Ch. D. 524.

ANNOTATIONS: On question of consent jurisdiction of Religious Court and its effect on later proceedings see H. C. 32/46 (1946, A. L. R. 517) and annotations.

(*A. G.*)

FOR PETITIONER: Lebenstein.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Hoffman.

JUDGMENT.

The Petitioner and the second Respondent, who were husband and wife, agreed to divorce before the Chief Rabbinate of Jaffa and Tel-Aviv District according to the provisions of the Jewish religious law. They are of Austrian nationality but are both members of the Jewish Community in Palestine. The divorce took place on the 3rd April,

1944, and immediately before, the two parties signed an agreement which contained seven clauses preceded by a preamble reading as follows:—

> "Whereas the parties are husband and wife and have decided to separate by divorce (*get*), and whereas, the parties have a child whose name is Peter Michael and who is now three months old, and whereas the parties are willing to settle all matters between them, therefore the parties have this day agreed *etc.*"

The several clauses of the agreement provided, *inter alia*, for the support of the second Respondent until her re-marriage to another man, for the transfer to her of a business and of the furniture of a flat, and for the upkeep of the child by the Petitioner. The seventh clause provided that all differences which might arise between the parties in connection with matters touching their child would be submitted to the jurisdiction of the Chief Rabbinate at Tel Aviv, and any judgment given by the said Rabbinate would be binding on the parties although they are not Palestinian citizens.

After the divorce, the parties resumed conjugal life for a few months and then drifted apart again at the beginning of 1945. In September, 1945, the second Respondent brought an action against the Petitioner before the Chief Rabbinate of Jaffa and Tel Aviv making certain monetary claims for herself based on the aforementioned agreement and also claiming maintenance for the child.

At the first hearing of the case the Petitioner objected to the jurisdiction of the Rabbinical Court and averred that the agreement had ceased to be in force after the resumption of conjugal life.

According to the petition, the second Respondent thereupon gave up that part of her action which concerned her personal claims, but she pressed her claim for maintenance of the child on the ground that the seventh clause of the agreement was still binding upon the parties and that consequently, there was the consent of both parties to submit to the jurisdiction of the Rabbinical Court.

It is not disputed that the Rabbinical Court cannot exercise jurisdiction in such a matter except with the consent of the parties (Article 53(2) of the Palestine Order-in-Council, 1922).

The question that falls to be decided is whether, in the circumstances of this case, the Rabbinical Court was empowered to entertain the claim for maintenance of the child and to deliver a judgment ordering Petitioner to pay LP. 8.— per month to his wife until the delivery of the final judgment. If the answer is in the affirmative, it would mean that the Chief Execution Officer was quite right to decide that the

judgment should be executed, and the order *nisi* would have to be discharged.

It is important to note that in the judgment of the Rabbinical Court signed on the 29th *Tevet*, 5706, the tribunal referred to the divorce and to the subsequent resumption of conjugal life and stated that the result of the resumption of conjugal life was that the parties were like husband and wife in all the every matter until they separate by divorce (*get*). Although the second Respondent suggests that this statement was only an *obiter dictum*, we do attach importance to it because it is a clear enunciation of the principle that, in Jewish religious law, resumption of conjugal life by divorced persons renews the marriage tie.

We now reach the crux of this case which is whether clause 7 of the agreement survived after the divorce had been obliterated. If the answer is in the negative, there would be nothing to justify the Rabbinical Court exercising jurisdiction, in as much as the Petitioner objected to the jurisdiction at the very start of the proceedings.

The Petitioner's advocate stressed two points in support of his contention that clause 7 of the agreement did not constitute consent to the jurisdiction. His first point is that, even if clause 7 still holds good, it only applies in respect of differences between the parties in connection with the child and such differences do not include questions of maintenance; furthermore, the learned advocate urged that Petitioner's refusal at the trial to submit to the jurisdiction nullified his consent, if any, signified in the agreement.

The second point was that the whole agreement, including clause 7, became of no effect when the parties resumed conjugal life.

We propose to examine the second point first, because if it is sound, there would be no doubt that there was no consent.

We have no difficulty in holding that the resumption of conjugal life, being equivalent to a re-marriage, nullified all those clauses of the agreement which benefited the wife (*i. e.* the 2nd Respondent). In this connection we might refer to the case of Nicol *v.* Nicol (1886) 31 Ch. D. 524.

With regard to clause 7 of the agreement we have reached the conclusion that it lapsed at the same time as the other clauses because it is abundantly clear that all the obligations contained in the agreement were undertaken solely in view of the separation of the parties by divorce and ceased to subsist when the parties resumed the married state.

We therefore find that the Petitioner's contention that there was no

consent on his part to submit to the jurisdiction of the Rabbinical Court is correct. We are of opinion that the Petitioner was justified in asking the Chief Execution Officer of Tel-Aviv (first Respondent) not to execute the judgment. We consider that he is entitled to have the order *nisi* made absolute and we order accordingly.

In the circumstances of this case we do not deem it appropriate to grant costs to Petitioner against his wife.

Delivered this 18th day of July, 1946, in the presence of Mr. Biro for Petitioner and absence of Respondent.

Chief Justice.

CIVIL APPEAL No. 49/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw, J. and Curry, A/J.

IN THE APPEAL OF:—

Aiyouti Yousef Suweilim & ors. APPELLANTS.

v.

Heirs of Ahmad Faraj Zarqa & ors. RESPONDENTS.

Prescription among co-heirs — Effect of the Land Law (Amendment) Ord. — L. A. 36/30, C. A. 220/41, C. A. 197/41.

Appeal from the decision of the Land Settlement Officer, Gaza Settlement Area, in Case No. 145/Jabaliya, partly allowed:—

1. A claim for ownership may be made in Land Settlement on the ground of purchase and in the alternative on the ground of inheritance.
2. A co-heir can claim by adverse possession over a period of ten years even if part of the period elapsed before the enactment of the Land Law (Amend.) Ord., 1933.

(*A. M. A.*)

APPROVED: L. A. 36/30 (1, P. L. R. 630; 3, C. of J. 959); C. A. 197/41 (8, P. L. R. 499; 1941, S. C. J. 458; 10, Ct. L. R. 205); C. A. 220/41 (9, P. L. R. 14; 1942, S. C. J. 11; 11, Ct. L. R. 9).

ANNOTATIONS:

1. On contradictory pleadings see note 1 to C. A. 303/43 (1944, A. L. R. 486).

2. It is to be hoped that this judgment will help to clear the "confusion of thought regarding the effect of the Land Law (Amendment) Ordinance".

This confusion seems to have started with L. A. 11/35 (3, P. L. R. 111; 1937, S. C. J. (N. S.) 495) where the question was held to be solely one of the

retroactivity or otherwise of sec. 2 of the Land Law (Am.) Ordinance, without regard to the decision in L. A. 36/30 (*supra*). L. A. 11/35 was followed in C. A. 8/40 (7, P. L. R. 76; 1940, S. C. J. 84; 8, Ct. L. R. 198) wherein it was held that "in law there cannot be any adverse possession by co-heirs in this case" as ten years had not yet elapsed since the enactment of the Ordinance. Doubts were thrown on the correctness of these decisions in C. A. 197/41 (*supra*) and the view taken in L. A. 36/30 was again adopted, *e. g.*, in C. A. 220/41 (*supra*), C. A. 51/43 (1943, A. L. R. 305), C. A. 370/43 (1944, A. L. R. 474), C. A. 288/44 (11, P. L. R. 615; 1944, A. L. R. 805) and C. A. 278/44 (12, P. L. R. 193; 1945, A. L. R. 496). On the other hand, see C. A. 390/43 (11, P. L. R. 217; 1944, A. L. R. 415) and finally C. A. 172/45 (12, P. L. R. 349; 1945, A. L. R. 754) — the last reported case on the subject — wherein it was held that there must be exclusive and adverse possession "for a period exceeding ten years ..... after the coming into force of the Ordinance".

It is submitted that the law is correctly set out in the instant case and that all decisions conflicting with it should be disregarded.

(*H. K.*)

FOR APPELLANTS: Ancar.

FOR RESPONDENTS: Shawa.

JUDGMENT.

Curry, A/J.: This is an appeal from the Land Settlement Officer, Gaza, whereby the claim of the Appellants was dismissed.

Both Appellants and Respondents claim the land on the ground of inheritance from one Faraj Ez Zarqa who died in 1903. It was admitted that the Respondents were in occupation of the land but the Appellants alleged that that occupation was exercised by the Respondents on behalf of the other co-heirs.

The first objection by the Appellants is that the Respondents when filing their claim in land settlement alleged not only that their claim was based on inheritance from Faraj but that they had bought from their sisters in 1910. At the hearing of the claim the Respondents dropped their plea of purchase. The advocate for the Appellants argues that these two claims are contradictory and not permissible. We know of no law which prohibits a person from claiming by purchase and in the alternative by inheritance and we see no merit in this objection. The main argument in this appeal was to the effect that as the prescriptive period had not elapsed since the passing of the Land Law (Amendment) Ordinance in 1933 and the filing of the claim in land settlement in 1940, the requisite period of prescription had not run. We feel there is some confusion of thought regarding the effect of the Land Law (Amendment) Ordinance and we therefore propose to set out in some detail our view as to the law regarding the possession of one co-heir on behalf of other co-heirs, and to what extent the law

as it existed prior to 1933 has been affected by the Ordinance.

The general principle regarding possession by one heir is that his possession is on behalf of all the heirs and therefore there can be no prescription by lapse of time. It is true of course that that rule has its exceptions and it is possible to prove that possession by one heir is not necessarily possession by all. The position was very clearly set out in Land Appeal 36/30 and I propose to cite from the judgments of the three learned judges in that case. After citing the rule, Corrie, J., says: "This rule is based on the fact that the land of a family is frequently cultivated by one or more of the members of the family to the exclusion of other members who however receive a share of the produce. In such a case the possession by the cultivating members is not adverse to those who do not cultivate and the latter cannot set up a plea of prescription." Jarallah, J., referring to the rule that no prescription runs between the heirs, says: "It was made on the assumption that there is a sort of partnership between the parties in respect of an estate for its distribution. Therefore the possession of one of the heirs to the exclusion of others does not affect the rights of those not in possession. There is an implied agency destined to safeguard the rights of the family. This exceptional rule should not be interpreted widely especially when the reason for which it was intended was lacking." Frumkin, J., referring to the rule in the same judgment, says: "It applies mainly in cases where the elder or major members of the family are cultivating land inherited from a common ancestor. This rule applies where the Plaintiff claims by inheritance against other descendants of a common ancestor. It would also apply in other cases where there is no blood relationship between the co-heirs as for instance when a widow continues to live with the parents or brothers of her deceased husband as a member of the family."

In C. A. 220/41 (9, P. L. R. 14) it was held that "the presumption that amongst co-heirs possession by one is possession by all is only a presumption and may be rebutted as may other presumptions, and when we find for 22 years the person who claims as co-heir had asserted no right and no claim the presumption is definitely rebutted." Again in C. A. 197/41 (8, P. L. R. 499) it was held that in general when co-heirs live together as a family or take the produce of their ancestor's land in common there can be no adverse possession but when one ceases to be a member of the family or to take produce or rents the occupation is in general adverse.

In our opinion the Land Law (Amendment) Ordinance merely enacted the right of a co-heir to claim by adverse possession — a right about which there had been, prior thereto, some doubt, and it further

recognised a prescriptive right after 10 years adverse possession. This does not, however, prevent a co-heir in possession successfully claiming title by adverse possession in respect of a period prior to the coming into force of that Ordinance, although his adverse possession subsequent to the Ordinance does not extend to the 10 years prescriptive period.

According to the findings of the Settlement Officer the Respondents, sons of the common ancestor, have been in exclusive possession. Before deciding whether that possession has been adverse to the Appellants it is necessary to consider the facts in relation to each Appellant.

The first Plaintiff was the widow of a son who died in 1913. She married again and she actually died during the pendency of the land settlement proceedings — her surviving husband claiming on behalf of her estate. The important facts in this case are that a son of the deceased allowed his brothers to have exclusive possession of the land and the produce until his death — a period of some 10 years — and his widow does not appear to have made any claim until the settlement proceedings — a further period of some 27 years. In these circumstances and in the light of the other evidence before the Settlement Officer we think he was right in holding that the Respondents were holding in adverse possession to this Plaintiff.

Plaintiffs 4 to 9 inclusive claim through Fatima, a daughter of the common ancestor. She died as far back as 1903, leaving a husband and two children. The children have apparently withdrawn their claim. Fatima's husband died in 1917 leaving two other wives and 6 daughters, and these are the claimants. In view of the fact that Fatima's husband does not appear to have made a claim to inherit the land after his wife's death in 1903, until his own death in 1917, and thereafter no claim was made until land settlement, we think the Land Settlement Officer was right in rejecting their claim.

Plaintiffs 15 to 19 inclusive are the husband and 4 children of Razina, another daughter of the deceased ancestor. Razina died in 1941. In our opinion where brothers take possession of the land in exclusion of their sisters, very strong evidence is necessary to rebut the presumption that the brothers are holding on behalf of the sisters. In this case, immediately on the death of the sister the husband and 4 children made their claim in land settlement. In respect of these claimants we consider that the Respondents have not rebutted the presumption that they held the land on behalf of their co-heir — their sister Razina.

Another daughter of the common ancestor died in 1913 and her heirs now claim. In view of the evidence before the Land Settlement Officer, and the fact that this daughter's heirs appear to have made

no claim for a period approaching 30 years we consider he was right in rejecting their claim.

Again in respect of Mahuba, another daughter who died in 1929, leaving a husband and 4 children, her husband subsequently dying in 1936, it will be noted that the husband does not appear to have made any claim on his own behalf, or that of his children, from the date of his wife's death in 1929 to his own death in 1936, nor does any claim appear to have been made by the children subsequent to his death in 1936 until these land settlement proceedings. We consider, therefore, that the Land Settlement Officer was right in rejecting their claim and also that of Plaintiff 14, the widow — the second wife of Mahuba's husband.

We agree with the Land Settlement Officer that the claim of Plaintiffs 21 and 22 is misconceived.

In the result this appeal fails in respect of all Appellants except Plaintiffs 15 to 19 inclusive, *i. e.* Appellants 6 to 11 inclusive. The case is remitted to the Land Settlement Officer to allocate to these Appellants the shares to which they are entitled.

Delivered this 27th day of May, 1946.

A/British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

HIGH COURT No. 91/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond, J.

IN THE PETITION OF:—

Lea Sacher. PETITIONER.

v.

The Chief Execution Officer, Magistrate's Court, Tel-Aviv & an. RESPONDENTS.

Magistrate referring at the end of his eviction order to alternative accommodation offered by landlord — Appeal by tenant to District Court and then to Court of Appeal — Alternative accommodation no longer available at time of execution.

Petition for an order, directed to Respondent No. 1 to show cause why his decision to proceed with the execution of the judgment of the Magistrate's Court, Tel-Aviv, given in Civil Case No. 1141/44 on 31.7.44, by Respondent No. 1, in Execution File No. 1565/44, Magistrate's Court Tel-Aviv, be not cancelled and why he should not refrain from executing the judgment given in Civil Case No.

1141/44 until the complying of Respondent No. 2 with the conditions set out therein, the petition is dismissed:—

> Where Magistrate's decision *re* alternative accommodation was not in the nature of a condition to carrying out eviction and owing to tenant having chosen to appeal to District Court and Court of Appeal two years passed since alternative accommodation was offered, eviction order must be executed even if the accommodation offer is no longer available.
>
> (*M. L.*)

REFERRED TO: H. C. 127/44 (1945, A. L. R. 130).

FOLLOWED: H. C. 35/44 (1944, A. L. R. 218; 11, P. L. R. 158) and H. C. 126/44 (1945, A. L. R. 343; 11, P. L. R. 646).

ANNOTATIONS:

1. The appeal to the Supreme Court which "was finally dismissed on a preliminary objection" is C. A. 7/46 (13, P. L. R. 300; *ante*, p. 290).

2. See cases followed and annotations in A. L. R.

(*A. G.*)

FOR PETITIONER: Schifter.

RESPONDENTS: *Ex parte.*

ORDER.

On the 31.7.44, the Magistrate's Court of Tel-Aviv gave judgment against the present Petitioner ordering him to vacate certain premises at 144 Dizengoff Street, Tel-Aviv, and to deliver possession to the second Respondent. The learned Magistrate then added the following final paragraph to his decision:—

> "As Plaintiff puts at the disposal of Defendants his room, Defendants are given the option to move to the said room situated at No. 10, A. D. Gordon Street, Tel-Aviv."

The present Petitioner appealed to the District Court and then to the Supreme Court sitting as a Court of Civil Appeal. His appeal was finally dismissed on a preliminary objection on the 23rd May, 1946, and the original Plaintiff then proceeded to execution.

Before the Execution Officer, the present Petitioner contended that he should not be evicted until and unless he was given the alternative accommodation offered at the trial before the Magistrate. The Execution Officer seems to have given favourable consideration to this contention but he subsequently decided to proceed with execution (on the 29.9.46) but allowed seven days to Petitioner to apply to the competent Court in order to have the eviction proceedings stopped or cancelled.

I have been referred by Petitioner's advocate to H. C. 35/44 (1944) A. L. R. 218; H. C. 126/44 (1945) A. L. R. p. 343 and H. C. 127/44 (1945) A. L. R. 130 and the first two cases confirm my view that in the present case the Execution Officer was quite right in deciding that the last paragraph of the Magistrate's decision could not possibly empower the Execution Officer to refuse to execute the order of evic-

tion on the ground that the alternative accommodation offered more than two years ago was no longer available.

The tenant has chosen to appeal and it would not be equitable to expect the landlord to keep his offer of alternative accommodation open for a long period. The order of eviction was not conditional, and the final paragraph of the Magistrate's decision was only in the nature of a reminder and can have no effect on the order to vacate.

The petition is dismissed.

Given and delivered this 9th day of October, 1946.

British Puisne Judge.

CIVIL APPEAL No. 192/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPLICATION OF :—

Abed Rabbah Abu Hinn. APPLICANT.

v.

Government of Palestine. RESPONDENT.

Extension of time — C. P. R. 324 — Does not apply to Land Settlement appeals — C. A. 380/43.

Application for extension of time to file an appeal from the decision of the Land Settlement Officer, Jaffa Settlement Area, in Case No. 20/Sand Dunes, refused:—

Rule 324 may not be applied to extend the time within which an appeal may be filed in Land Settlement proceedings.

(*A. M. A.*)

FOLLOWED: C. A. 380/43 (11, P. L. R. 49; 1944, A. L. R. 271).

ANNOTATIONS: Note that the decision in C. A. 380/43 (*supra*) is expressed to be based on an interpretation of r. 361 of the C. P. R. which does not seem to have been upheld in C. A. 172/46 (*ante*, p. 634).

(*H. K.*)

FOR APPLICANT: Nusseibeh.

FOR RESPONDENT: Assistant Government Advocate — (Hazou).

ORDER.

We are of opinion that this case is covered by C. A. No. 380/43 (11, P. L. R. 49). Following that decision we have no power to grant the extension, as Rule 324 of the Civil Procedure Rules, 1938, has no application to the present case.

The application for extension is therefore refused.

Delivered this 24th day of June, 1946.

Chief Justice.

CIVIL APPEAL No. 177/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J.

IN THE APPEAL OF:—

Yousef Shukri Fawwaz, for Ibrahim Butros Hasbani, the heirs of Butros Ibrahim Hasbani, and the heirs of Habib Butros Hasbani. APPELLANT.

v.

Michail Isa Abla & 10 ors. RESPONDENTS.

C. P. R. 333 — Objection to power of attorney — Whether seven days' notice required.

Appeal from the decision of Land Settlement Officer, Safad Settlement Area, in Case No. 17/Abil el Qamh; preliminary objection overruled:—

No notice of objection need be given under C. P. R. 333 if the objection is that there is no Appellant, the advocate's power of attorney being defective.

(*A. M. A.*)

ANNOTATIONS: Authorities on r. 333 of the C. P. R. are collated in the annotations to C. A. D. C. T. A. 195/45 (1946, S. C. D. C. at p. 508); see also C. A. D. C. Ha. 65/46 (*ibid.*, p. 563).

As regards the point when a preliminary objection may be raised without prior notice see particularly C A. 183/45 (13, P. L. R. 51; *ante*, p. 72), C. A. 7/46 (*ibid.*, pp. 300 & 290) and C. A. D. C. Ja. 138/44 (1946, S. C. D. C. 144).

(*H. K.*)

FOR APPELLANT: Nakhleh.

FOR RESPONDENTS: Nos. 1—10 — A. Atalla.

RULING.

Mr. Anton Atalla having stated that he had a preliminary objection to raise, Mr. Nakhleh pointed out that no notice had been served under rule 333 of the Civil Procedure Rules, 1938.

I ascertained that Mr. Atalla's objection was that Yousef Shukri Fawwaz does not hold a power of attorney authorizing him to act in this case, and on examining the power of attorney emanating from Ibrahim Butros Hasbani I find that it mentions real property located in Deir Mammas in Syria.

The first question which falls to be decided is whether Mr. Atalla is debarred from raising the preliminary objection by reason of non-compliance with rule 333.

Rule 333(1) lays down that no objection shall be raised on appeal on the ground of an alleged defect in form of the notice of appeal or

the non-fulfilment of any condition precedent to the hearing of the appeal.

I am of opinion that the objection sought to be raised does not fall under either of the grounds specified in rule 333(1) inasmuch as it is an averment that there is no Appellant at all. Were I to hold otherwise it would mean that where a person assumes, without authority, the name of a party to a case and lodges an appeal, no objection could be raised if the manoeuvre is discovered less than seven days prior to the hearing of the appeal.

I must, therefore, proceed to examine whether Mr. Atalla's contention is correct and in so doing I bear in mind that Mr. Atalla has not raised the point that the power of attorney is not specific enough as regards the powers conferred on the attorney.

After hearing both advocates I have reached the conclusion that in the circumstances of this case it would not be justifiable to attach too much importance to the geographical nomenclature. It seems clear that the lands of Deir Mammas are on or near the boundary line between Syria and Palestine and I note that the attorney Yousef Shukri Fawwaz did state before the Settlement Officer that he used at one time to pay tithes and taxes in respect of the land in dispute at Deir Mammas before the tax was transferred to Palestine. I also take in consideration the fact that no one questioned Yousef's right to represent his principal at the Settlement proceedings.

In the circumstances, therefore, I am not prepared to construe the power of attorney as not empowering the said Yousef Shukri Fawwaz from acting on behalf of his principal with regard to the lands in dispute and the preliminary objection is therefore overruled.

Delivered this 4th day of June, 1946.

British Puisne Judge.

HIGH COURT No. 94/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J., Edwards and Shaw, JJ.

IN THE APPEAL OF :—

Petros Dimitrio Varkhalamas. — PETITIONER.

v.

Assistant Inspector General C. I. D. Jerusalem & an. — RESPONDENTS.

Habeas corpus application — Non-interference of High Court.

Petition for a summons in the nature of *Habeas Corpus* to issue, directed to the Assistant Inspector General C. I. D., Jerusalem and the Officer i/c Central Prison, Acre, to show cause why they and each of them should not produce the said Petros Dimitrio Varkhalamas, the Petitioner, before this Court on a date to be fixed for the purpose of his release and to await the further order of this Court, the application is refused:—

> For High Court to issue a writ of *habeas corpus* a *prima facie* case of wrongful deprivation of liberty must be made out. High Court will not interfere where a person is deprived of his liberty by virtue of a warrant of a competent Court.
>
> (*M. L.*)

ANNOTATIONS:

1. For recent cases of *habeas corpus* applications see: H. C. 26/45 (1945, A. L. R. 674); H. C. 23/45 (1946, A. L. R. 581); H. C. 143/44 (1945, A. L. R. 472); H. C. 11/45 (1945, A. L. R. 502; 11, P. L. R. 220) and H. C. 89/45 (1946, A. L. R. 174; 12, P. L. R. 556).

2. On necessity to show a *prima facie* case of wrongful deprivation of liberty in order to obtain a writ of *habeas corpus* see Halsbury, Hailsham Ed., Vol. 9, p. 702, para. 1201, p. 704, para. 1203.

3. On non interference of Court in case of a person deprived of his liberty by virtue of a warrant of a competent Court see *ibid.*, p. 710 and 711 in paras. 1212 and 1213.

(*A. G.*)

FOR PETITIONER: J. Shapiro.

FOR RESPONDENTS: *Ex parte.*

ORDER.

The basis of a *habeas corpus* writ is the right of the King to enquire whether a subject has been deprived of his liberty. If the subject can show that he has been unlawfully deprived, this Court will command the production of the body so as to enable it to enquire into the justification for his detention. We would emphasize that it is only applicable in cases of wrongful deprivation of liberty, and before the Court will grant an order it must be satisfied with the *prima facie* case established by the Petitioner. In this case it is disclosed in the affidavit in support of the petition that the person on whose behalf the application was made is deprived of his liberty by virtue of a warrant, the authenticity of which is not questioned, of the Court of Criminal Appeal. In view of this, we are unable to hold that the Petitioner has made out a *prima facie* case of wrongful deprivation of liberty. The averment that if some point had been made at the appeal, which in fact was not made, the Court of Criminal Appeal might not have convicted, would not in itself induce us to grant this application. The application is therefore refused.

Given this 25th day of October, 1946.

Chief Justice.

CIVIL APPEAL No. 251/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J., Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Haim Molvan. APPELLANT.

v.

The Attorney General. RESPONDENT.

Forfeiture of ship — Reg. 107(b)(3)(iii)(c) — Jurisdiction over territorial waters — Foreign Jurisdiction Act, Mandate, Pal. O.-in-C. — R. v. Keyn — Whether Immigration Ord. inconsistent with Art. 6 of Mandate — Immigration Ord., sec. 12(3)(iii), "owner", whether applies to owner not in Palestine — McLeod v. A. G. for N. S. W. — Force majeure, CR. A. 86/41 — Interpretation Ord. — Burden of proof, R. v. Beadon.

Appeal from the order of the District Court of Haifa, dated 14th day of June, 1946, in Motion No. 262/46, dismissed:—

1. There is no limitation in the Foreign Jurisdiction Act, the Mandate or the Palestine Order-in-Council, of the authority of the High Commissioner to legislate in respect of the territorial waters of Palestine.

2. Art. 6 of the Mandate, which provides for the facilitation of Jewish immigration into Palestine, allows the High Commissioner to exercise his discretion as to the conditions under which immigration should be allowed, and the Court will not usurp that function.

3. A ship may be forfeited under the Immigration Ordinance even if the owner thereof is outside Palestine at the time of forfeiture and was out of Palestine at the time the offence was committed.

4. Sec. 12(3)(i)(b) of the Immigration Ordinance applies whether the ship comes into Palestine voluntarily or is brought in by force.

(*A. M. A.*)

DISTINGUISHED: R. *v.* Keyn, 1876, 2 Ex. D. 63, 46 L. J. (M. C.) 17; R. *v.* Beadon, 1933, 24 CR. A. R. 59; MacLeod *v.* A. G. for New South Wales, 1891, A. C. 455, 60 L. J. (P. C.) 55, 65 L. T. 321, 7 T. L. R. 703.

FOLLOWED: CR. A. 86/41 (8, P. L. R. 333; 1941, S. C. J. 338; 10, Ct. L. R. 157).

ANNOTATIONS:

1. Several of the points raised in this case were also dealt with in Mo. D. C. Ha. 280/46 (1946, S. C. D. C. 583) which was decided on the same day as the case under appeal. *Cf.* note 1 to that case for other authorities on forfeiture under the Immigration Ordinance.

2. On the second point *cf.* H. C. 62/44 (11, P. L. R. 337; 1944, A. L. R. 604) and note 3 in A. L. R.

3. On points 3 and 4 see, in addition to the case cited, CR. A. 119/41 (8, P. L. R. 442; 1941, S. C. J. 559).

4. See CR. A. 14/43 (1943, A. L. R. 371) in connection with the ruling in R. *v.* Beadon (*supra*).

(*H. K.*)

FOR APPELLANT: J. Shapiro.

FOR RESPONDENT: Solicitor General (Griffin) and Crown Counsel (Hooton).

JUDGMENT.

FitzGerald, C. J.: This is an appeal from the decision of the District Court, Haifa, which confirmed the forfeiture of a motor vessel, the "Asya" under Regulation 107(b)(3)(iii)(c).

Mr. Shapiro's first argument was that the District Court had no jurisdiction as (notwithstanding the Interpretation Ordinance and the Palestine Order-in-Council Amendment in 1939) no Court has jurisdiction in any part of the territorial waters of Palestine. He bases his contention on the fact that the Palestine Order-in-Council flows from the jurisdiction conferred by the Foreign Jurisdiction Act of 1890 and the Mandate, and that neither under the Foreign Jurisdiction Act nor the Mandate has the Mandatory been given power to legislate for that part of the high seas not included within the territory. He goes on to say that the only part of the high seas which is included in the territory is that up to low water mark, in other words, what is generally known as the 3 mile limit does not apply to any country in which His Majesty claims jurisdiction under the Foreign Jurisdiction Act. He takes his stand on the decision in the case of the Queen *v.* Keyn Vol. 2, of Exch. Reports, 1876—1877. That case considered the question of the jurisdiction of the Central Criminal Court in the territorial waters of England. It was not denied that the Central Criminal Court claimed jurisdiction solely as the successor of the Court of the Lord High Admiral. It seems to me that the decision of the majority of the judges was based on the fact that it was not established to their satisfaction that the Lord High Admiral ever claimed or ever exercised criminal jurisdiction in the territorial waters, and consequently the Central Criminal Court could not have acquired by succession from the Court of the Lord High Admiral what that Court never had. One principle was never questioned in any of the judgments. That principle has been embodied in the judgment by Lush, J., when he says:—

> "I wish, however, to guard myself from being supposed to adopt any words or expressions which may seem to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usance and the common consent of nations which constitute international law have appropriated these waters to the adjacent state to deal with them as the state may deem expedient for its own interests."

Having come to the conclusion that the Court of the Lord High Admiral was not vested by common law with jurisdiction, and as there was no legislation conferring jurisdiction it followed that the Central Criminal Court had no jurisdiction. Indeed, as a result of this judgment legislation was passed in 1878 to give jurisdiction within the territorial waters. It must be conceded that in the case before us legislation has been passed (Mr. Shapiro would argue purported to have been passed) giving the High Commissioner the power he claims, that legislation being embodied in section 12 of the Immigration Ordinance.

I have therefore now to consider whether the High Commissioner is empowered, as the Parliament of England is in respect of the territorial waters of Great Britain, to enact legislation to control activities within the territorial waters of Palestine. At this point I must emphasise that the High Commissioner exercises jurisdiction in Palestine by virtue of the Order-in-Council. That Order-in-Council gives him full power to legislate subject to restrictions set out in the body of the order. Mr. Shapiro submits that the Order-in-Council could not have included the territorial waters because the Order was limited, *inter alia,* by the Foreign Jurisdiction Act. That the Foreign Jurisdiction Act did not claim to include territorial waters he asserts can be inferred from the fact that section 14 of that Act was considered necessary to confer specific power on Her Majesty to make laws for the government of her subjects in any vessel at a distance of not more than 100 miles from the coast of China and Japan. It seems to me that the object of section 14 was to extend jurisdiction to a distance of 100 miles, a distance far beyond any limit ever claimed as territorial water. I am unable to agree that any reasonable inference could be drawn from section 14 that jurisdiction was not conferred to legislate for the control of water up to one marine league, which had universally come to be recognised as territorial waters. I would observe that when the Foreign Jurisdiction Act was passed in 1890, it had been well established both by international law and by universal usage that sovereignty over a country carried with it the right to legislate for its territorial waters up to the accepted 3 miles limit.

I turn now to examine whether there are any limitations imposed by the Mandate on the right to legislate for the territorial waters.

His Majesty's authority to occupy and administer Palestine is founded on a Mandate given to him by the principal allied powers who negotiated the peace treaties after the 1914—1918 war. The right of His Majesty rests more on an international act of the allied powers, than on conquest, because the fruits of the British conquest had been ceded to the Allied Powers. Now international law for centuries past had recognised the right of nations to legislate for the control of their territorial waters, and I find it impossible to believe that these allied powers were not empowered, when they handed Palestine over to the administration of the King of Great Britain as Mandatory, to include the territorial waters, and further that it was not their clear intention to include these territorial waters. I need only mention that the primary duty of any administration is the defence of the inhabitants, and it would be difficult to conceive that this duty could be carried out in the absence of power to legislate for the territorial waters. Before leaving this issue there is one more point with which I must deal. Mr. Shapiro invites attention to the fact that in 1939 the Order-in-Council was amended by adding to the definition of Palestine the words "including the territorial waters adjacent thereto." As to this, I accept the explanation given by the Solicitor General that the words territorial waters appeared in several ordinances and the object of the amendment was to clear up doubts.

The next ground of appeal was based on Article 17(1)(c) of the Order-in-Council which provides that no Ordinance shall be promulgated which shall be in any way repugnant to or inconsistent with the provisions of the Mandate. He refers to Article 6 of the Mandate which states that the Administration of Palestine while ensuring that the rights and position of other sections of the population are not prejudiced shall facilitate Jewish immigration under suitable conditions, and shall encourage in co-operation with the Jewish Agency referred to in Article 4 close settlement by the Jews on the land including state lands and waste lands not required for public purposes.

His argument is that the provisions of the Immigration Ordinance and the Defence Regulations are so restrictive of Jewish Immigration as to be totally inconsistent with Article 6. Now it is true that the restrictions could be so all-embracing as totally to defeat or suspend the attainment of the original objective. I have therefore to enquire whether Article 6 imposes any legal limit to the restrictions the High Commissioner may from time to time impose. Under Article 6 the facilitation of Jewish immigration is subject to the provision that it shall be under suitable conditions and that it shall be ensured that the rights and positions of other sections of the population are not pre-

judiced. On a legal interpretation of the Article, and it is hardly necessary to remark that that is the only aspect from which this Court can view it, it is not open to doubt that the law vests the authority to decide what the suitable conditions are, and how the rights of other sections of the population shall not be prejudiced, in the Mandatory. I cannot read into the article any limitation on this discretion nor can I say that it has been exercised unreasonably or capriciously. If I am right in holding as I do that the discretion is vested in the Mandatory, this Court will not usurp his functions and itself enquire whether the suitable conditions exist or whether the rights of the other sections of the population are prejudiced.

I come now to deal with that part of Mr. Shapiro's argument relating to section 12(3)(iii) Immigration Ordinance as amended by the Defence (Emergency) Regulations, 1946. The argument is that the word "owner" must mean an owner who is in Palestine at the material time and that the sub-paragraph must be read together with section 12(3)(iii). Mr. Shapiro contends that a vessel can be forfeited only if the circumstances are such that, had the master or agent or owner been tried, he would be deemed to have abetted the offence but not if the owner were out of Palestine. Mr. Shapiro concedes that, if the owner is in Palestine, proof of his knowledge that the ship has illegally entered Palestine is not required, but goes on to argue that, if the owner is not in Palestine when the vessel arrives here, it cannot be forfeited. I think that this contention must fail for various reasons. To begin with, the wording of section 12(3)(iii) is perfectly clear. The word "owner" is unqualified and must be interpreted as meaning "the owner, wherever he may be." Moreover, there is nothing contrary to natural justice nor inherently harsh in rending the ship liable to forfeiture even when the owner was not in Palestine when the illegal entry took place. Numerous instances occur to one in the criminal law of England, the most outstanding example being that of a licensee of a public house in Kent who may be in France for a day during which day his barman permits the sale and consumption of liquor during prohibited hours. In such a case the licensee himself is liable to be convicted. In the case before us there is indeed a very real connection between the owner of the ship and the prohibited act because it is not denied that he was still the owner at the time when the ship entered the territorial waters of Palestine. I also agree with the argument of the learned Solicitor General that the forfeiture provision stands by itself and does not require the conviction of the owner for the offence of aiding and abetting illegal immigration. I agree that the circumstances are different from those in the case of McLeod *v.* Attorney

General for New South Wales (1801) A. C. 455 in which the bigamy alleged to have taken place was actually committed outside the jurisdiction. In this case the illegal entry of the ship took place within the territorial waters of Palestine.

Finally it was contended that the passengers who were on board the vessel were there legally since they were brought in by *force majeure*. As to this I can only say that section 12(3)(i)(b) is unambiguous. It provides that the owner is deemed to have abetted the unlawful immigration, whether the person or vessel came into Palestine or the territorial waters thereof voluntarily or not. Indeed, this point has already been decided in favour of the contention of the prosecution in Criminal Appeal 86/41 (8, P. L. R. 333). It seems to me that the fact that the vessel was brought in by a British naval patrol is immaterial.

For these reasons the appeal must be dismissed.

Delivered this 11th day of November, 1946.

Chief Justice

J.: I agree with the conclusions reached by the learned and with the reasons on which they are based.

British Puisne Judge.

This is an appeal from the judgment dated 14th June, District Court, Haifa, in Motion No. 262/46, confirming e of the motor-vessel "Asya" now in Haifa Port.

mons was issued against the owner of the vessel in question, averred that on 27.3.46, 733 persons were on board the said el within the territorial waters of Palestine, at Haifa, in circumstances in which the master, owner or agent of the said vessel is deemed to have abetted the unlawful immigration of those persons. It was further averred in the summons that the said vessel was accordingly subject to forfeiture under the provisions of section 12 of the Immigration Ordinance, 1941.

Evidence was led in the Court of trial to the effect that a destroyer, H. M.'s Ship "Chequers", on patrol off the Palestine coast, sighted a small motor-vessel which was flying no flag. No reply was received to a signal enquiring to what port the vessel was bound. The vessel was hailed and orderd to a stop, and a Turkish flag was then hoisted. A boarding party was sent from the destroyer, and the Turkish flag was hauled down, and a flag, described as the Zionist flag, was hoisted in its place. The officer in charge of the boarding party found on board the vessel more than 700 passengers. The interception of the

vessel took place about 100 miles southwest of Jaffa, and the vessel was found to be carrying no papers except a set of maps covering the area bounded by the south coast of France and the coast of Palestine. None of the passengers had any passports or travel documents. The ship was escorted to Haifa, where the police and immigration authorities took charge. It is clear from the evidence that the vessel was taken into the port of Haifa.

The learned Judge found that there was no doubt that the 733 persons found on board this freighter as passengers were intending to enter Palestine illegally, that they were in fact prohibited immigrants under the Ordinance, and that they did come into the territorial waters of Palestine. He also found that no good cause had been shown to the Court as to why the vessel should not be forfeited, and he therefore confirmed the forfeiture to the Government of Palestine.

The application for forfeiture was based on section 12(3)(iii) of the Immigration Ordinance, No. 5 of 1941, as amended by the Defence (Emergency) (Amendment) Regulations, 1946. (See Supplement No. 2 of 1946, p. 157).

By sub-section (3)(iii) it is provided that if any vessel, to the knowledge of the master, owner or agent ... is used in any contravention or attempted contravention of this Ordinance, or any order or rule made by virtue thereof, ... or if any person is proved to have been on board a vessel ... in circumstances in which the master, owner or agent of the vessel ... is deemed to have abetted the unlawful immigration of that person, then the vessel ... shall, save as hereinafter provided, be forfeited to the Government.

By sub-section (3)(i)(b) it is provided that without prejudice to the provisions of this Ordinance relating to actual abetment, the master, owner and agent of a vessel ... are all deemed to have abetted the unlawful immigration of any person ... who is proved to have been on board the vessel ... in Palestine or the territorial waters thereof, whether that person or the vessel ... came there voluntarily or not, unless it is proved that one of the conditions set out thereafter obtain.

Mr. Shapiro, who appeared for the Appellant, has in the first place submitted that the Courts of Palestine have no jurisdiction, whether criminal or quasi-criminal, in the territorial waters of Palestine.

The term "territorial waters" has been defined in the Interpretation Ordinance, No. 9 of 1945, as meaning "any part of the open sea within three nautical miles of the coast of Palestine, measured from low water mark."

"Palestine" has, by the same Ordinance, been defined as including "the territories to which the Mandate applies ... including the terri-

torial waters adjacent thereto." And Article 1 of the Palestine Order-in-Council, 1922, (Vol. 3 Laws of Palestine, p. 1570), as amended, provides that "the limits of this Order are the territories to which the Mandate for Palestine applies, including the territorial waters adjacent thereto ..."

Mr. Shapiro submits that the Palestine Order-in-Council, 1922, is governed by the provisions of the Foreign Jurisdiction Act, 1890, (53 & 54 Vict. c. 37), section 1 of which provides that:—

> "It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired the jurisdiction by the succession or conquest of territory."

Mr. Shapiro has drawn attention to the preamble to the Palestine Order-in-Council, 1922, where it is stated that His Majesty makes the order "by virtue and in exercise of the powers in this behalf by the Foreign Jurisdiction Act, 1890, or otherwise." His argument is really this — that the term "foreign country" does not include any territorial waters other than harbours.

Section 16 of the Foreign Jurisdiction Act defines "foreign country" as meaning "any country or place out of Her Majesty's dominions."

Mr. Shapiro has referred to the case of Rex *v.* Keyn (L. R. 2 Ex. D. 63). That case arose out of a collision between a German and a British ship two miles from Dover pier, a passenger in the British ship being drowned as a result of the accident. Keyn, the commanding officer of the German vessel, the "Franconia", was indicted and convicted of manslaughter at the Central Criminal Court. The appellate tribunal held that the conviction could not be sustained.

This case led to the enactment, in 1878, of the Territorial Waters Jurisdiction Act (41 & 42 Vict. c. 73). The preamble of that Act reads as follows:—

> "Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions;
>
> And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom, and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law."

And section 7 provides that the expression "the territorial waters of Her Majesty's dominions", in reference to the sea, means "such part of the sea adjacent to the coasts of the United Kingdom, or the

coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty . . ."

In discussing the case of Rex *v.* Keyn in his book "Great Britain and the Law of Nations" the author, H. J. Smith says, at page 139:—

> "It was beyond dispute that in numerous instances Parliament had enacted statutes affecting both British and foreign vessels within territorial waters. None of these statutes expressly conferred the criminal jurisdiction claimed by the Crown in the case before the Court, and the minority differed from the majority chiefly in holding that the jurisdiction was conferred by the common law. Only two Judges (Chief Baron Kelly and Sir Robert Phillimore) were of opinion that a statute conferring such jurisdiction would exceed the rights given to the riparian state by the law of nations. We may therefore take it as clear that in 1876 the great preponderance of judicial opinion in England was in favour of the view now reaffirmed in the British memorandum, that the rights which States possess over their territorial waters are rights of sovereignty."

The memorandum to which H. J. Smith refers was contained in a letter, dated 6.12.1928, from Great Britain to the Secretary General to the Assembly of the League of Nations, in reply to a questionnaire (see p. 135 of H. J. Smith's book). In the course of their reply to the twelfth question the British Government said:—

> "Rights of jurisdiction are, in practice, only exercised where it is necessary to do so in the interests of good government, but the State itself must be the judge whether or not the interests of good government require it."

Mr. Shapiro has submitted that the Palestine Order-in-Council, 1922, was made primarily under the authority of the Foreign Jurisdiction Act, and secondly under the authority of the Mandate for Palestine, and that the Mandate does not extend to the territorial waters of Palestine. He has submitted, in the alternative, that the Court had no jurisdiction because the vessel was a foreign vessel, that the words "any vessel" in section 12(3)(iii) must mean any Palestinian vessel, and that the words must be read so as not to conflict with international law.

Brierly, in his "Law of Nations", 2nd Edition, page 143, says:—

> "The doctrine which finds most support in the practice of states is that territorial waters form part of the territory of a state as fully as does its land territory, except that there exists a right of 'innocent passage' through them for the ships of other states."

Again, at page 144, he says:—

> "The most reasonable rules on this matter (though they cannot be regarded as settled law) are perhaps those which have been suggested

by the Harvard Research in International Law in a draft contravention prepared in anticipation of the Codification Conference of 1930:—

"A state may not exercise jurisdiction in respect of an act committed in violation of its criminal law on board a vessel of another state in the course of innocent passage through its marginal seas, unless the act has consequences outside the vessel and tends to disturb the peace, order, or tranquility of the state."

— — — — — — — — — —

"A state may exercise jurisdiction over a vessel of another state which is in its territorial waters for purposes other than innocent passage through its marginal sea to the same extent as over a vessel in port."

— — — — — — — — — — —

And again, at page 145, Brierly says:—

"Whatever doubts may exist as to the status of territorial waters, there is no doubt that the waters of a port are inland waters, as fully a part of a state's territory as the land."

Having considered the arguments which have been put forward by both parties I am unable to find that the Foreign Jurisdiction Act, 1890, does not enable H. M. the King to legislate for the territorial waters of Palestine. I agree that the territorial waters of Palestine do not form part of the "foreign country" of Palestine, but they adjoin that country, and they comprise an area over which the "foreign country" of Palestine is entitled to assume such jurisdiction as international law recognises. And in the absence of any words in the Foreign Jurisdiction Act to suggest that such jurisdiction is not to be assumed I find that the Act authorises its assumption. It is impossible to construe the Foreign Jurisdiction Act in such a way as to arrive at the absurd conclusion that His Majesty has no power to legislate, for example, in regard to fisheries and customs, which legislation would naturally extend to the territorial waters, and if it is within the powers of His Majesty to make legislation preventing the unlawful introduction of goods into Palestine it cannot be beyond his powers to make legislation against unlawful immigration.

I find that the Palestine Order-in-Council, 1922, and the Palestine (Defence) Order-in-Council, 1937, are valid by virtue of the Foreign Jurisdiction Act, and that the first ground of appeal therefore fails.

The second ground of appeal is that the Immigration Ordinance, 1941, as amended, is void as being repugnant to or inconsistent with the provisions of the Mandate, in particular Articles 4 and 6 thereof.

Article 6 provides that:—

"the Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall

> facilitate Jewish immigration under suitable conditions and shall encourage, in cooperation with the Jewish Agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes."

It is clear that the provisions of the Immigration Ordinance do purport to give the Government of Palestine complete legal control over the immigration of Jews or other persons who are not nationals of Palestine. It is also a matter of common knowledge that the Government of Palestine is making use of its powers under the Ordinance in order to prevent illegal Jewish immigration. But this does not enable me to find that the Ordinance is *ultra vires* the Mandate. It is not for this Court to decide whether or not the Ordinance is being used in violation of the terms of the Mandate. The Ordinance does not contain any provisions against the immigration of Jews as such. Its provisions apply with equal stringency against all unlawful immigration. In my judgment the Ordinance is not in itself repugnant to or inconsistent with the provisions of the Mandate, and I therefore find that this second ground of appeal fails.

The third ground of appeal is based upon the interpretation to be put on section 12 of the Immigration Ordinance. Mr. Shapiro has submitted that the Government of Palestine cannot legislate so as to make an offence punishable if it is committed by a foreigner outside the limits of Palestine. So far as concerns an offence committed outside the limits of Palestine and the territorial waters thereof I agree that Mr. Shapiro's submission is correct. But in my view the point does not arise in this case. Under section 12(3)(i)(b) the owner is deemed to have abetted the unlawful immigration of any person who is proved to have been on board the vessel *in Palestine or the territorial waters thereof*. That is to say, no offence (punishable in Palestine) is committed by the owner if he abets the immigration, unless the would-be immigrant actually comes into Palestine or its territorial waters. It is quite clear that the Ordinance does not purport to make the act of abetment punishable unless the offence is actually committed *in Palestine or in its territorial waters* by the immigrant's actually coming into Palestine or its territorial waters. The fact that the owner was not in Palestine or the territorial waters thereof at the time is immaterial. If he came here subsequently he could be punished under section 12(3)(ii). Nor am I able to find that the fact of his being a foreigner would be material. A foreigner is subject to the criminal law of this country to the same extent as a Palestinian citizen, if he commits an offence in Palestine or the territorial waters thereof. If the circumstances are such that the owner is deemed to have abetted the unlawful

immigration then the vessel, whether foreign or not, is forfeited under the provisions of section 12(3)(iii). I find that this ground of appeal fails.

The fourth ground of appeal is that the passengers who were on board the vessel were there legally at all material times. It is submitted that because the vessel was brought into territorial waters by a British naval vessel the passengers must be held not to have committed an offence. Section 12(3)(i)(b), however, provides in the clearest terms that the owner is deemed to have abetted the unlawful immigration whether the person or the vessel came into Palestine or the territorial waters voluntarily or not. Criminal Appeal 86/41 (8, P. L. R. 333) is an authority in regard to the meaning to be given to these words. It is for the immigrant to prove that he or she comes within one of the exceptions set out in the sub-section. The fact that the vessel which brought the immigrant ship to Palestine was a British naval vessel appears to me to be immaterial. I find that this ground of appeal fails.

The fifth ground of appeal is that the Respondent having taken upon himself the burden of proving certain facts which he need not have proved, and having failed to prove those facts, the burden of proof was shifted from the Appellant to him. Mr. Shapiro submits that it was necessary for the Respondent to prove affirmatively that the persons on the ship did not come within any of the exceptions, for example, that they were not Palestinian citizens, or that they were not exempted by virtue of section 4 of the Ordinance.

Mr. Shapiro has referred to the case of Rex *v.* Beadon (24 Criminal Appeal Reports, p. 59) in which it was held that though the prosecution might have proceeded at the trial on the basis that under section 1, sub-section 4, of the Aliens Restriction Act, 1914, the burden of proving that he was not an alien lay on the Appellant, they had not taken this course but had themselves accepted the burden of proof and endeavoured to discharge it by putting in evidence an inadmissible document, and accordingly the conviction must be quashed. But in that case it was common ground that the Appellant was born in India, that his parents were British subjects, and that he originally was a British subject. There was no proper evidence that he had ever lost that status. In the present case there is no evidence, and it is not admitted, that the immigrants were Palestinian citizens or that they were otherwise exempted from the provisions of the Immigration Ordinance. And there is an uncontroverted finding of fact by the trial Judge that these passengers were intending to enter the country illegally, and that they

were prohibited immigrants. So the cases are clearly quite dissimilar.

In the result I find that the appeal fails and must be dismissed.

Delivered this 11th day of November, 1946.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 5/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Curry, A/J., Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

David Moyal. APPLICANT.

v.

Amin Beidas & 2 ors. RESPONDENTS.

Appeal to Privy Council — Application for inclusion of a document in the Record.

Application to make two documents part of the Record of the Privy Council, dismissed:—

Application to make a document part of Record for Privy Council must be made to Chief Registrar, not to Supreme Court.

(*M. L.*)

FOR APPLICANT: Mrs. Rubinstein.

FOR RESPONDENTS: Nos. 1 & 2 — Beirouti.
No. 3 — Absent — served.

ORDER.

The Court is of the opinion that the application should have been made to the Chief Registrar under sections 9 and 10 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924. Therefore this application is misconceived and is dismissed.

Respondent asks for costs. Fixed costs of LP. 3 (three).

Given this 3rd day of October, 1946.

A/British Puisne Judge.

CIVIL APPEAL No. 280/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPEAL OF :—

Khairi el Tibi. APPELLANT.

v.

Ahmad Yousef el Fahmawi (also named Kamhawi) & an. RESPONDENTS.

Registered owner claiming eviction — Tenant recognising Plaintiff as his landlord — Intervention of unregistered owner — Challenging registered title.

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity, dated 30th June, 1945, in Civil Appeal No. 120/44, from the judgment of the Magistrate, Jaffa, dated 8th August, 1944, in Civil Case No. 511/44, allowed:—

1. In an eviction case brought by a registered owner against his tenant, who neither in this litigation nor in previous ones ever questioned Plaintiff's right to sue as landlord, intervention, without application by either party, of the third person claiming to be an unregistered owner cannot be justified.

2. a) A registered title, though not indefeasible, must be respected until set aside in an action entered by party challenging it.

b) Where Defendant genuinely relies on Art. 20, Land Code (prescriptive possession) against registered owner, it is for latter to apply to Land Court to have his title confirmed.

(*M. L.*)

FOLLOWED: C. A. 98/39 (6, P. L. R. 507; 6, Ct. L. R. 142; 1939, S. C. J. 478).

DISTINGUISHED: C. A. 295/43 (11, P. L. R. 244; 1944, A. L. R. 239); C. A. 343/43 (11, P. L. R. 303; 1944, A. L. R. 330); C. A. 240/45 (1946, A. L. R. 515); C. A. 230/37 (5, P. L. R. 45; 1938, 1 S. C. J. 39).

ANNOTATIONS:

1. On second point see cases cited, see also C. A. 37/45 (1945, A. L. R. 678; 12, P. L. R. 354) and C. A. 70/45 (1945, A. L. R. 429).

2. On point that tenant is estopped from denying landlord's title see C. A. 4/44 (1944, A. L. R. 435; 11, P. L. R. 289).

(*A. G.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Cattan.

JUDGMENT.

This is an appeal from a decision of the District Court of Jaffa in its appellate capacity, whereby a judgment of the Magistrate's Court of Jaffa in Civil Case No. 511/44 was confirmed.

The learned Magistrate dismissed a claim for rent and eviction made by the Appellant (then Plaintiff) against first Respondent (then Defendant) on the ground that the second Respondent having intervened and challenged Appellant's title, the case could not be decided by a Magistrate.

The Appellant's main contentions are that the second Respondent should not have been joined as a party and that, at any rate, he, the Plaintiff-Appellant held a registered title and was entitled in the circumstances of the case to judgment against his tenant, Respondent No. 1.

It is not disputed that the Appellant acquired through the Execution Office an undivided share in a house property and that his share is registered in the *Tabu*. It is not disputed either that Respondent No. 1 resides in part of that house property and that, prior to the present case, he had been sued by Appellant No. 1 for rent and had had judgment entered against him on two occasions.

When the present litigation started before the Magistrate's Court, Respondent No. 1 was the only Defendant and he admitted having compromised a previous Court claim made by Plaintiff-Appellant but gave a rather evasive denial regarding his failure to pay. The important point is that the first Respondent did not question in his statement of defence the Plaintiff's right to sue as landlord, and, in view of the previous litigation between these two parties, it cannot be doubted that Respondent No. 1 had recognised the Appellant as landlord.

When the trial began, the second Respondent applied to be joined as "third party" on the ground that he was the real owner of the property. The Magistrate granted the application and the trial proceeded with the second Respondent as co-Defendant.

The first question which we propose to examine is whether the learned Magistrate was justified in joining Respondent No. 2 as a defendant.

Application for this joinder was not made by either of the original parties. At the hearing of the 22.6.44 advocate Amin Bey Akel asked that the second Respondent be joined as a third party, in order to prove that the dispute was one about ownership. The Defendant (now first Respondent) did not object but the Plaintiff-Appellant pointed out that the application was not in order. The matter was adjourned by the Magistrate who stated as follows:—

"I grant the application of Amin Bey to be joined as a defendant

in this case in accordance with rule 59 of the Magistrate's Courts Procedure Rules. Hearing adjourned until 13.7.44..."

At the next hearing of the case, the record shows that "Amin Bey for the second Plaintiff appeared" and the case was adjourned on account of the absence through illness of Plaintiff's advocate. At the subsequent hearing the Plaintiff's advocate objected to the ruling whereby the second Respondent was joined as Defendant and the Magistrate ruled that the objection was too late inasmuch as the Court had decided the question on 22.6.44.

Under rule 59 a Magistrate is given discretion to order the addition of the name of a person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary. Was this an instance where the exercise of the discretion was rightly exercised? We feel bound to answer in the negative. The only matter of importance which was submitted to the learned Magistrate in support of the application was that in a previous case where the Plaintiff-Appellant had obtained judgment against some other alleged tenants of the same property, the District Court had reversed the judgment on appeal because the case was one of disputed ownership. This allegation was correct, but the decision of the District Court which was handed to us shows that the facts were that the alleged tenants had denied any privity of contract with the Plaintiff and that Plaintiff's title was challenged by some of the Defendants who alleged that they were the heirs of the real owner. We note that the learned District Court Judge was careful to point out that "it is possible that in an action for estimated rent the Defendant's denial of the Plaintiff's title might be so obviously frivolous that a Magistrate would be justified in disregarding it."

In the present case the facts are totally different because the tenant, for the reasons already given, did not and could not deny privity of contract, and it seems to us difficult, in a case where issue has been joined between a registered owner as landlord and his tenant to justify the intervention as a defendant of a person claiming to be an unregistered owner. We might add that the pleadings were not even ordered to be amended.

We therefore find that the learned Magistrate was not justified in the circumstances to join second Respondent as a party. Being given that several matters of interest have been argued, we propose to deal with certain features of the case connected with second Respondent's part in it. The second Respondent contended that he purchased the property in 1934 and this contention rests on a power of attorney executed by Muhammad el Mughrabi on the 15th April, 1934, ap-

pointing a certain person to sign the instruments of transfer to the second Respondent. This was never carried out and the second Respondent is therefore not registered as owner. The second Respondent also contended that he had been in possession of the property since 1934 and had leased it to several persons including the first Respondent.

We are not concerned with the events which led to the Appellant purchasing a share of the property at action from the Execution Office. The said share was seized in execution against an heir of Muhammad el Mughrabi, who was a registered owner, and so far as registration is concerned, Appellant's title cannot be ignored until his registration is cancelled.

It is worthy of notice that both the Appellant and the second Respondent claim to have derived ownership from the same source, *i. e.* Muhammad el Mughrabi; and it is important to bear in mind that the power of attorney put forward by the second Respondent is dated 10th April, 1934, whereas the Appellant purchased his share at auction in 1942, when began Court proceedings against tenants. It therefore seems beyond dispute that the second Respondent cannot rely on ten years' adverse possession to defeat Appellant's registered title; he only has the power of attorney on which he relies and which was authenticated but not drawn up by a notary.

We have already stated that the learned Magistrate should not have allowed Respondent No. 2 to intervene between Plaintiff-Appellant and Respondent No. 1. His having done so ushered in the difficulty about contested ownership which should not have arisen in this particular action.

The Appellant claimed eviction of his tenant in his capacity of registered owner and he produced his *kushan*. This *kushan* is the best *prima facie* evidence of a right to be registered (see C. A. 98/39 in 6 P. L. R. 507). The registered title is not indefeasible, but until it is shown to have been obtained by mistake or fraud it holds good, and, as stated in the same case, an action must be entered to set aside the registered title. In the present case no step was taken by Respondent No. 2 to have the Appellant's registered title cancelled. The tenant did not claim that he was the owner of the property and this case must therefore be distinguished from such cases as C. A. 295/43, 11 P. L. R. 244, C. A. 343/43, 11 P. L. R. 303, and C. A. 240/45.

The present case is also distinguishable from C. A. 230/37, 5 P. L. R. 45, in which there was no privity between Plaintiff and his alleged tenant and this led to the lessors, acknowledged by the tenant, to be joined as parties. Had such joinder not been made, the Plaintiff could hardly have succeeded and it seems that the object of the joinder was

to determine whether the Plaintiff and the acknowledged lessors were entitled to share the rent.

It seems to us that part of the difficulty in the present case is that the position created by Article 20 of the Ottoman Land Code is sometimes not fully understood. It has been pointed out on many occasions that Article 20 can only be used as a defence. Consequently, where it appears that a defendant may have a good defence based on Article 20 against a registered or other owner, the latter has to take the case to the Land Court; but this principle does not apply where the Defendant does not rely on Article 20 but attacks the title of his opponent on other grounds. We are of opinion that a registered title should command respect until cancelled and that it is only when the registered owner atacks a person who genuinely relies on Article 20 of the Land Code that the registered owner should be compelled to have his title confirmed by a competent Court. It is for the challenger to take necessary steps to have a registered title cancelled (except in the special circumstances mentioned above), and such a challenger would, in proper cases, obtain a stay of proceedings begun by the registered owner.

We hold that this appeal must be allowed and the decision of the District Court set aside. The case is remitted to the Magistrate's Court for trial as between the original parties. Costs of this appeal on the lower scale (to include LP. 10 advocate's fee) are granted to the Appellant and costs in the Courts below are reversed (including advocate's fee).

We wish to mention that the question whether a co-owner may sue on his sole behalf for rent and ask for eviction has not been disputed in the present case and we must not therefore be taken to have considered the point.

Delivered this 25th day of July, 1946, in the presence of Hamoudeh for Appellants and Merquerian for Respondents.

Chief Justice.

CRIMINAL APPEAL No. 44/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: FitzGerald, C. J., De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

V.

Mordechai Cohen. RESPONDENT.

Summary Trials — Defence Regulations, reg. 76 — P. O. in C. Arts. 40 & 41 — M. C. J. O. sec. 6.

Appeal from the ruling of the District Court of Jerusalem in Summary Trial No. 240/45, wherein it was held that the District Court had no jurisdiction under Reg. 76 of the Defence Regulations, 1939, to try summarily offences against the Defence (Prevention of Profiteering) Regulations, 1944, allowed:—

The District Court may try summarily offences under the Defence Regulations.

(*A. M. A.*)

ANNOTATIONS:

1. A preliminary ruling in this appeal is reported *ante*, at p. 415.

2. The following two cases may be compared: CR. A. 16/44 (11, P. L. R. 79; 1944, A. L. R. 125) — offences against Reg. 24A of the Defence Regulations may be tried summarily or on information; CR. A. 88/44 (*ibid.*, pp. 451 & 506) — jurisdiction of District Court not excluded by sec. 35(4) of the Town Planning Ordinance.

3. *Vide* CR. A. 96/46 (*ante*, p. 620) and note 4 as to the absence of provisions entitling the Attorney General to institute summary proceedings before a District Court.

(*H. K.*)

FOR APPELLANT: Assistant Govt. Advocate — (Schajowitz).

FOR RESPONDENT: Goitein.

JUDGMENT.

The only point in this appeal was whether the District Court was right when it held it had no jurisdiction to try summarily counts 49—85. The learned Judge was of opinion that he had no jurisdiction. He based his finding on Regulation 76 of the Defence Regulations, which provides that if a person who commits an offence against the Regulations is summarily tried in a Magistrate's Court, he will be liable to one penalty and if he is tried upon information before a District Court he will be liable to a higher penalty.

Now, the authority for the trial of criminal offences, other than assize cases, in Palestine is to be found in Articles 40—41 of the Order-in-Council, and in the provisions of the Magistrates' Courts Jurisdiction Ordinance. In accordance with Article 40 of the Order-in-Council District Courts are empowered to try all cases which are not within the jurisdiction of the Court of Criminal Assize. They are therefore cloaked with jurisdiction to try criminal cases which are also triable by Magistrates. Defence Regulation 76 purported to do nothing more than to stipulate the penalties, and in our opinion the clear jurisdiction given by Article 40 of the Order-in-Council could not be ousted by

a Defence Regulation dealing with the punishment to be awarded for a breach.

It seems to us therefore that on the election of the Attorney General, the District Court could try the offence summarily, in which event the case would be before the District Court by virtue of the provisions of section 6 of the Magistrates' Courts Jurisdiction Ordinance, and the District Court would be empowered to impose any penalty that a Magistrate could have imposed.

Delivered this 26th day of June, 1946.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 30/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF:—

Solomon Felman. APPLICANT.

v.

Edward Z. Felman. RESPONDENT.

Assistant Registrar of Supreme Court moving Court to rescind order granting conditional leave to appeal to Privy Council.

Application for an order rescinding the order granting conditional leave to appeal to His Majesty in Council, dated 29.5.46, granted:—

Registrar of Supreme Court can properly move the Court to rescind order granting conditional leave to appeal to Privy Council.

(*M. L.*)

FOLLOWED: P. C. L. A. 9/43 (1943, A. L. R. 760; 10, P. L. R. 608).

ANNOTATIONS:

1. Previous proceedings in this case are reported in 1946 A. L. R. 586 and 698.

2. On Registrar's power to move the Court to rescind the order granting conditional leave to appeal see case followed and annotations in A. L. R.

(*A. G.*)

FOR APPLICANT: Michaeli.

FOR RESPONDENT: Scharf and Eliash.

ORDER.

This is a Notice of Motion from the Assistant Registrar of the Supreme Court requesting that an Order of the 29th day of May, 1946, granting conditional leave to appeal should be rescinded. Both parties were

duly served. This notice follows the practice of these Courts over many years. The first point taken by Mr. Michaeli, who appeared for the Appellant in this case, was that there was no power by the Registrar to make any such Motion. This issue was considered in P. C. L. A. 9/43 which in our opinion is conclusive that the Registrar can properly move the Court.

The second point taken was that there was in fact no proper order of conditional leave. It seems strange that this point should have been taken on behalf of Solomon Felman seeing that on a previous occasion he moved this Court for an extension of time of the Order which he is now seeking to argue never existed. On that occasion no one ever questioned the order and his application for extension of time was rejected. We think it is impossible for him now to argue that there was no such Order. We might add that the Order is in fact embodied in the judgment of Mr. Justice de Comarmond and Mr. Justice Abdul Hadi in case P. C. L. A. 30/46. We therefore make an order as prayed, that is we rescind the Order of Conditional Leave to Appeal of the 29th of May, 1946.

L.P. 10.— costs to Respondents.

Given this 4th day of November, 1946.

Chief Justice.

CIVIL APPEAL No. 348/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Ismail Hussein Saleh Kullab. APPELLANT.

v.

Tovia Miller & 3 ors. RESPONDENTS.

Sale by P/A. — Not a "disposition" — Land Settlement proceedings — Contesting the consideration.

Appeal from the decision of the Assistant Settlement Officer, Ramleh Settlement Area, dated 1.6.45 delivered on 8.6.45 in Case No. 2/44/Bashshit, dismissed:—

1. It is not open to a vendor to deny the receipt of the consideration acknowledged, in a power of attorney given to effect transfer, as received.

2. A power of attorney given to implement an agreement to sell is not an unlawful disposition.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* C. A. 31/42 (9, P. L. R. 273; 1942, S. C. J. 342; 11, Ct. L. R. 202).

2. On the second point *cf.* the following authorities: C. A. 404/43 (11, P. L. R. 341; 1944, A. L. R. 695), C. A. D. C. Ha. 80/45 (1945, S. C. D. C. 660 at pp. 663—5), C. A. 245/45 (13, P. L. R. 241; *ante*, p. 507) and C. A. 89/46 (*ante*, p. 542).

(*H. K.*)

FOR APPELLANT: Beiruti.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — In person.
No. 3 — Yifrach.
No. 4 — Nominally cited.

JUDGMENT.

This is an appeal from the decision of the Assistant Settlement Officer of the Ramleh Settlement area. Three parties were concerned in the appeal, one as the Plaintiff, two other persons Tovia Miller and Etel Berkovitz as Defendants and David Moyal and Abdul Rauf Rashid Ash-Shanti as third parties.

The history of the negotiations in regard to the piece of land concerned is readily ascertainable. Originally the Plaintiff was the owner of this land. On the 20th August, 1938 he made a power of attorney before the Notary Public at Jaffa. The power of attorney recites:—

> "On the date hereof I have appointed Abdul Raouf Ash-Shanti to sell and transfer a half share out of 414 shares in the lands I own in the *masha'a* lands of Bashshit Village to whomsoever and whenever he desires and for whatever he desires according to the conditions that may seem fit to him for the price of LP. 100 received by me from him. To effect the transfer at the Land Registry or a renunciation at land settlement of the said half share and of 414 shares in the name of the person nominated and desired by him. To acknowledge on my behalf receipt of the price fully, *etc.*"

Now this is a clear cession of all ownership that the Plaintiff had in these lands to Ash-Shanti. Part of the case for the Plaintiff was that he did not receive the purchase price. How he could advance such an argument is difficult to appreciate seeing that he acknowledged the receipt of LP. 100 (which was the agreed purchase price) in the power of attorney. I am in entire agreement with the Settlement Officer in rejecting his appeal on this ground.

In exercise of the powers given to him under the power of attorney

Ash-Shanti passed on his rights to David Moyal who in turn passed them on to the two Defendants Tovia Miller and Etel Berkovitz.

The land came under settlement, and in order to carry out his obligations to those other parties, Ash-Shanti recorded at settlement a renunciation of his claim in favour of those other parties who scheduled a claim at settlement based on the acquisition from him. It seems to us that there was no objection to this procedure. But at this stage the Plaintiff who parted with his land under the power of attorney, stepped in and asked that the renunciation be cancelled, the object of course being to throw the title back to Ash-Shanti and thus to enable the Plaintiff to contest at settlement the power of attorney he had given to Ash-Shanti. His first contention that he did not receive consideration has been dealt with. He further argued that the renunciation of his claim by Ash-Shanti was a disposition which was contrary to the provisions of the Land Transfers Ordinance in that it had not received the consent of the Director of Land Registration. It was certainly a step on the road to "disposition" but as the land was under settlement and as the final "disposition" would have been confirmed by the Settlement Officer, we agree with the Settlement Officer that the prior consent of the Director of Land Registration was unnecessary. In regard to the third point raised in favour of the Plaintiff we agree with the Settlement Officer for the reasons given by him.

The appeal must, therefore, be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 18th day of November, 1946.

Chief Justice.

HIGH COURT No. 35/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE PETITION OF:—.

Luna Levi (Hezkia). PETITIONER.

v.

Assistant Chief Execution Officer, District Court, Tel-Aviv & an. RESPONDENTS.

Judgment of Rabbinical Court against husband, a foreigner, for monthly payments to his wife — Husband denying in High Court his membership of Jewish Community — Limits of jurisdiction of Rabbinical Court.

Return to an order *nisi*, issued on the 15th day of March, 1946, directed to the first Respondent, calling upon him to show cause why he should not execute the judgment of the Rabbinical Court of Jaffa-Tel-Aviv district, given on 14th January, 1946, against the second Respondent and filed for execution in file No. 478/43 of the Execution Ocice, Tel-Aviv, the order *nisi* discharged:—

1. Judgment of Rabbinical Court — a nullity, if one of parties not a member of Jewish Community, whether or not he agreed to submit to their jurisdiction.

2. A person is not a member of Jewish Community for purposes of Art. 53, Palestine Order-in-Council, unless his name is on register of *Vaad Leumi*.

3. High Court may disallow costs to successful party who is to blame wholly or partly, for litigation having reached that Court without drawing attention to his point at an earlier stage of the proceedings.

(*M. L.*)

FOLLOWED: H. C. 105/45 (1946, A. L. R. 546; 13, P. L. R. 180).

ANNOTATIONS:

1. On points 1 and 2 see case followed (*supra*) and annotations in A. L. R.

2. On question of costs *cf.* case followed, C. A. 274/45 (1946, A. L .R. 324; 13, P. L. R. 111), C. A. 376/44 (1945, A. L. R. 239; 12, P. L. R. 179), C. A. 137/45 (1945, A. L. R. 426; 12, P. L. R. 399) and C. A. 38/45 (1945, A. L. R. 749; 12, P. L. R. 370).

(*A. G.*)

FOR PETITIONER: Hochman.

FOR RESPONDENTS: No.1 — Absent — served.
No. 2 — Kleinzeller.

ORDER.

This is a petition for an order directing the first Respondent to execute the judgment of the Rabbinical Court of Jaffa—Tel-Aviv District, given on the 14th January, 1946 (13th *Shevat* 5706), against the second Respondent who is Petitioner's husband.

On the 4th March, 1946, the first Respondent decided that the judgment of the Rabbinical Court should not be executed because the said Court had no jurisdiction in the matter.

The judgment which Petitioner sought to have executed was to the effect that the second Respondent (Petitioner's husband) had to pay to Petitioner ten pounds per month until further notice. The said sum was stated to be in respect of *"mezonot"* which is translated as meaning "maintenance" or "alimony". In several cases before this

Court difficulty has been encountered with regard to the true meaning of the Hebrew word *"mezonot"*. In the present instance, however, the learned advocates have not touched upon the importance of the distinction but have dealt chiefly with the question whether the second Respondent who is not a Palestinian subject had submitted to the jurisdiction of the Rabbinical Court.

In addition, the second Respondent has, in the present proceedings, raised the point that he is not a member of the Jewish community.

I propose to deal with the last mentioned point first, because if the second Respondent is not a member of the Jewish community the Rabbinical Courts had no jurisdiction whether or not the second Respondent agreed to submit to their jurisdiction.

It seems clear that the second Respondent did not object to the jurisdiction of the Rabbinical Courts on the ground that he was not a member of the Jewish community. Even in the proceedings before the Execution Officer (first Respondent) the point was not mentioned. It was only when Petitioner came to this Court alleging that she and Respondent No. 2 were British subjects and members of the Jewish Community, that Respondent No. 2 in his affidavit stated as follows: "It is denied that Respondent No. 2 is a member of the Jewish Religious Community which is recognised under the law in force."

I have entertained some doubt as to the value of this oddly worded denial, inasmuch as it does not disclose why the deponent is not a member of the Jewish Community. Being given, however, that the deponent was cross-examined before us and that no attempt was made by Petitioner's advocate to attack the averment that he is not a member of the community, I have reached the conclusion that I cannot ignore such denial.

In the Goldenberg case H. C. No. 105/45 it was held that a person is not a member of the Jewish community for the purposes of Article 53 of the Order-in-Council unless such person's name is on the register of the *Vaad Leumi* and it was also held that a judgment of the Rabbinical Court is a nullity when one of the parties is not a member of the Jewish Community.

Having reached the conclusion that I cannot ignore second Respondent's denial that he is a member of the Jewish Community, I find it impossible to make an order which would lead to the execution of a judgment which, so far as I know at present, is probably null. It is hardly necessary to point out that the question of consent to the jurisdiction does not arise when a litigant is not a member of the Jewish Community.

The learned Execution Officer (first Respondent) refused to execute

the judgment on the ground that the second Respondent, being a British subject, was not amenable to the jurisdiction of the Rabbinical Court without his consent and that such consent had not been given in so far as the wife's claim for alimony was concerned. I do not propose to examine whether the reasons given by the first Respondent are sound. In view of the decision I have reached, I have no alternative but to discharge the order *nisi*.

I do not grant costs in this matter because I consider that Respondent No. 2 is partly to blame for the litigation having reached this Court without attention being drawn to the essential requisite that parties to a case before the Rabbinical Courts must be members of the Jewish Community.

Delivered this 29th day of May, 1946.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 41/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Curry, A/J., Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Leah Schmukler & an. — APPLICANTS.

v.

Nissan Rutman. — RESPONDENT.

Application for leave to appeal to Privy Council against judgment of District Court and against order of Chief Justice refusing leave to appeal to Supreme Court — Application for stay of execution pending appeal to Privy Council.

Application for conditional leave to appeal to the Privy Council from the order of the Chief Justice, dated the 15th day of July, 1946, and delivered on the 15th day of August, 1946, and for stay of execution of the judgments of the Courts below in Civil Case No. 1472/45 and Civil Appeal No. 32/46, dismissed:—

Where Court of Appeal has no power to grant leave to appeal or where it has refused such leave it has no power to grant an *interim* stay of execution pending appeal to Privy Council.

(*M. L.*)

FOLLOWED: P. C. L. A. 53/45 (13, P. L. R. 130; 1946, A. L. R. 450).

ANNOTATIONS:

1. The order of the Chief Justice refusing leave to appeal is C. A. 211/46 (*ante*, p. 629).

2. See case followed and annotations in A. L. R.

(*A. G.*)

FOR APPLICANTS: Goitein.

FOR RESPONDENT: Eliash.

ORDER.

Mr. Goitein on behalf of the Applicants applies for conditional leave to appeal to the Privy Council against the judgment of the District Court of Haifa dated 15.4.46 and against the order of the Chief Justice dated 15.7.46 refusing leave to appeal to the Supreme Court. He further prays for a stay of execution pending filing his appeal to the Privy Council.

Mr. Goitein admits that we have no jurisdiction to grant the leave to appeal for which he applies. These applications are therefore dismissed.

It only remains to consider the application for stay. Mr. Goitein argues that apart from the Palestine (Appeal to Privy Council) Order-in-Council 1924 the Court has an inherent power to grant a stay.

In our opinion as this Court has no jurisdiction to entertain the application for leave to appeal it has no power to grant a stay pending application for leave to appeal. It is to be noted that the application for leave to appeal is not in respect of a judgment of this Court. In P. C. L. A. 53/45, 13 P. L. R. 130 it was held that since the Applicant was refused conditional leave to appeal to His Majesty in Council, the Court had no power to grant an *interim* stay of execution and we see no reason for differing therefrom.

Application is accordingly dismissed with LP. 5 costs.

Given this 3rd day of October, 1946.

A/British Puisne Judge.

SPECIAL TRIBUNAL Nos. 1 & 2/45.

IN THE SPECIAL TRIBUNAL CONSTITUTED UNDER ARTICLE 55 OF THE PALESTINE ORDER-IN-COUNCIL.

BEFORE: FitzGerald, C. J., Shaw, J. and Bishop Athenagoras.

IN THE APPLICATION OF :—

Special Tribunal No. 1/45:—

Elena Cattan, widow of Issa Ya'coub Cattan. APPLICANT.

v.

Saliba Ya'coub Cattan & 4 ors. RESPONDENTS.

Special Tribunal No. 2/45:—

Mania alias Mary, wife of Elias Ayoub. APPLICANT.

v.

Saliba Ya'coub Cattan & 4 ors. RESPONDENTS.

Objection to jurisdiction of religious Court by person who has been living in Palestine for about 35 *years but has not been proved to have acquired Palestinian citizenship — Adoption of majors.*

Reference under Rule 354 of the Civil Procedure Rules, 1938, to decide which of the two Courts — the Civil Court or the Greek Orthodox Ecclesiastical Court of First Instance — has jurisdiction to entertain the actions which are the subject matter of this reference:—

1. Question of nationality, when it arises, is one of positive law, there is no presumption.

2. A person who is not a Palestinian citizen and thus regarded as foreigner can only become subject to jurisdiction of Religious Courts if he consents.

3. Adoption of majors is not a matter of personal status and is outside jurisdiction of Religious Court.

(*M. L.*)

ANNOTATIONS:

1. On onus of proving Pal. citizenship see C. A. 19/44 (1944, A. L. R. 347; 11 P. L. R. 373), *cf.* CR. A. 15/27 (2, C. of J. 491 ; 1 P. L. R. 246).

2. On consent to jurisdiction of Religious Court see H. C. 105/45 (1946, A. L. R. 546; 13, P. L. R. 180) and annotations in A. L. R.

(*A. G.*)

FOR APPLICANTS: Eliash.

FOR RESPONDENTS: Goitein.

DECISION.

This is a reference to the Tribunal under Article 55 of the Palestine Order-in-Council. It is true that the Order-in-Council gives exclusive jurisdiction in certain matters to the Religious Courts, but that exclusive jurisdiction in its practical application is limited by the consideration of the status of the person. Where there is a dispute as to status, the matter is referred to this Tribunal under the provisions of Article 55. This reference in fact covers two cases. One is concerned with a woman, Elena Issa Ya'coub Cattan who, it is alleged,

married a certain Issa Ya'coub Cattan on the 8th June, 1945. The other case concerns her daughter Mania, the wife of one Elias Ayoub. The husband Issa Ya'coub Cattan died on the 20th day of June, 1945. The issue before the Ecclesiastical Court was the disposal of his inheritance and probate of his last will.

We will deal with the case of the wife first. It is not denied that when the case came before the Ecclesiastical Court, she refused to submit to its jurisdiction, on the ground that she was a foreigner. It seems to be admitted by all parties that she was of Russian birth and that at one time she held Russian nationality. She has, however, been in Palestine since 1910 and she was undoubtedly a member of the Greek Orthodox Community. At this point it might be convenient to remark that it appears to us that an onus is placed on the Religious Courts which generally speaking does not fall upon the ordinary Courts, to enquire at the outset whether in fact the persons whose cases have actually been listed before them are subject to their jurisdiction.

Decisions have been quoted to us which are undoubtedly an authority for holding in certain circumstances that if a person has behaved in such a manner as to lead to the conclusion that he was a member of a particular faith, he will be estopped from denying this fact. But this is not a question as to whether a person belonged to a particular faith, it is a question of nationality. The question of nationality when it does arise is a question of positive law — there is no presumption. Since the amendment of Art. 59 of the Palestine Order-in-Council every person who is not a Palestinian citizen is a foreigner and foreigners unless they consent are excluded from the jurisdiction of the Religious Courts. It follows that if this woman is not a Palestinian citizen she is a foreigner regardless of her actual national status, and she can only become subject to the jurisdiction of the Religious Courts if she consents. Palestinian citizenship can only be acquired under the provisions of the Palestinian Citizenship Order in Council. Under that Order, Palestinian citizenship is acquired by all Turkish subjects originally resident in the territory of Palestine, on the 1st day of August, 1925. There was no evidence we could accept adduced that she was a Turkish subject on the 1st day of August, 1925; she therefore does not become a Palestinian citizen under that article. It is not contended that she acquired Palestinian citizenship, or that she was naturalised under any other of the provisions of the Order-in-Council. Furthermore, by virtue of the provisions of Article 12(2) of the Order-in-Council she did not on marriage acquire Palestinian citizenship. It follows that for the purpose of the Palestine Order-in-Council she

was a foreigner. It is clear that she objected to the jurisdiction of the Court and in regard to her, therefore, our decision is that her case was not a case of personal status within the exclusive jurisdiction of the Religious Court.

It remains to consider the question of the daughter. It is admitted that she is a Palestinian citizen. In matters of her personal status, therefore, she could be subject to the jurisdiction of the Greek Orthodox Ecclesiastical Court. The only question that arises is whether the issue that concerned her, and which was raised before the Court was one of personal status. That issue was her adoption at a time when she had reached the age of 25 years. Now it will be observed that Article 51 of the Palestine Order-in-Council, which defines all the matters of personal status, includes adoption of minors. Why the adoption of majors, which is permitted by Ecclesiastical law, was not included is not for us to say. The fact remains that the article provides that only the adoption of minors is considered a matter of personal status. Under neither English law, nor Ecclesiastical law as far as we are aware can a woman of 25 be said to be a minor. It follows that the matter of the adoption of this woman, which came before the Ecclesiastical Court, was not a matter of personal status, and the Religious Court had no jurisdiction.

We decide not to award any costs.

Delivered this 28th day of May, 1946.

Chief Justice.

CIVIL APPEAL No. 174/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Radhi Nimer Nabulsi. APPELLANT.

v.

Abdul Rahim Mahmoud el-Hamad. RESPONDENT.

Alteration of contract — New consideration — Written evidence.

Appeal from the judgment of the District Court of Nablus, dated 8.4.46 in Civil Appeal 12/46, dismissing the appeal of the Appellant from the judgment of the Magistrate's Court Tul-Karm, dated 7.3.46 in C. C. No. 551/45, dismissed:—

Minutes entered in the books of a corporation constitute written evidence of an alteration of a contract in writing.

(*A. M. A.*)

ANNOTATIONS: *Quaere* whether there was any consideration for the undertaking to pay Respondent an increased price for something which he was "already under a legal obligation to the (Appellant) to perform".- See Halsbury, Vol. 7, p. 141 and cases cited in footnote (*m*); *vide* also Swain *v.* West (Butchers), Ltd., 1936, 1 All E. R. 224, confirmed on appeal in 1936, 3 All E. R. 261.

(*H. K.*,

FOR APPELLANT: S. Hijab.

RESPONDENT: In person.

JUDGMENT.

This is an appeal from the District Court of Nablus which in its appellate capacity confirmed a judgment of the Magistrate. The Respondent entered into a contract with the Appellant, and here we may say that we agree with both Courts that the Appellant was acting in his capacity as chairman of the Tulkarm Citrus Marketing Co-operative Society and he was rightly sued as such. The terms of the contract were that the Respondent should pack oranges at the rate of 150 mils a box. Later he found that this was not a paying proposition and he refused to carry out the contract. It is quite clear from the evidence that in order to induce him to continue, the Society agreed to an increase in the rate, and to some extra remuneration. Evidence to this effect was given by a member of the society. That there was such an arrangement is recorded in the books of the Society, and the counsel for the Appellant agreed that the society took a decision to this effect. The sole case of the Appellant in the lower Court and in the appeal Court was that he took his stand on the strict wording of the contract and he argued that the Respondent was entitled to not a piastre more or a piastre less than that stipulated in the contract and that the terms of the contract could not be altered by an oral agreement. We agree with the learned Judges of the District Court that this argument cannot avail in the light of the clear amendment to the agreement entered into for a further consideration, and recorded in writing by resolution of the society.

For these reasons the appeal must be dismissed and the judgment of the Magistrate and the District Court be upheld with LP. 10.— inclusive costs.

Delivered this 18th day of November, 1946.

Chief Justice.

CIVIL APPEAL No. 389/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPEAL OF:—

Fareezeh Adeeb el Jafleet & 4 ors. APPELLANTS.

v.

Yusef Taleb. RESPONDENT.

Action for eviction on ground of necessity of reconstruction — Scope of sec. 8(1)(d), Rent Restrictions Ord.

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity, dated 19th November, 1945, in Civil Appeal No. 92/45, from the judgment of the Magistrate, Jaffa, dated 12.7.1945, in Civil Case No. 224/45, allowed:—

1. Provided landlord satisfies Court of the necessity of reconstruction of tenant's flat, the fact that the necessity arises from circumstances altogether disconnected with that flat is immaterial.

2. Question of reasonability or otherwise of reconstruction is for Magistrate to decide in the light of all the circumstances.

3. Magistrate cannot grant eviction under provisions of sec. 8(1)(d), Rent Restrictions Ord., if landlord failed to obtain a permit or licence the obtaining of which is a condition precedent to the operation of that subsection.

(*M. L.*)

ANNOTATIONS: On question of reasonability see C. A. 59/45 (12, P. L. R. 459; 1945, A. L. R. 624); C. A. 161/45 (1945, A. L. R. 683; 12, P. L. R. 419) and C. A. 71/45 (1945, A. L. R. 705; 12, P. L. R. 363) aud annotations in A. L. R.

On point 2 see C. A. D. C. Ha. 151/42, 1943, C. of J., D. C. Haifa, p. 218.

On point 3 see C. A. 26/43 (1943, A. L. R. 110) see also C. A. D. C. Ha. 155/43, 1943, C. of J. D. C. Haifa, p. 416.

(*A. G.*)

FOR APPELLANTS: Cattan and Mulky.

FOR RESPONDENT: Hawari.

JUDGMENT.

This is an appeal from the District Court, Jaffa, which, sitting in its appellate capacity, upheld an order of the Magistrate's Court granting eviction from a dwelling house under the provisions of section 8(1)(d) of the Rent Restrictions Ordinance.

Three points have been raised by Mr. Cattan in favour of the Appellant. The first was that in fact the real grounds on which the application for eviction was based was repair to the flat of the landlord which was independent of the flat of the Respondent. Now, it may

well be that the reason for the structural alteration of the flat of the tenant arose because repairs to the flat of the landlord were desirable but we are of opinion that this is immaterial provided the judge is satisfied that the reconstruction of the flat of the tenant is necessary. It will be observed that sec. 8(1)(d) refers to alteration or reconstruction of premises, and it is immaterial whether the necessity for this reconstruction arises from circumstances altogether disconnected with the flat of the tenant. It follows that we do not consider that there is any substance in this ground of appeal.

The second ground of appeal was that the Magistrate must have been satisfied that the reconstruction was reasonable. We quite agree, but the question of reasonability or otherwise must be left to the Magistrate to decide in the light of all the circumstances. Subject only to a reservation as to the failure to get a permit from the Controller of Heavy Industries with which we will deal presently, we are satisfied that there was evidence which could have caused the Magistrate to be satisfied that this reconstruction was reasonable. For these reasons we would not interfere with the finding of the Magistrate on this point.

There remains for consideration the question of a permit from the Controller of Heavy Industries. Now Regulation 46(b) of the Defence Regulations makes the obtaining of such a permit essential. If, therefore, that permit has not been obtained the condition precedent to the operation of sec. 8(1)(d) does not exist.

We turn now to the finding of the learned Magistrate in regard to this permit. The judgment states:—

> "The fact that he does not obtain a licence from the Heavy Industries, does not affect the licence issued to him by the competent body, but subjects himself to criminal proceedings should he not obtain a licence from the Heavy Industries. The licence referred to in section 8(1)(d) refers to that to be issued by the Local Commission and could not have referred to Reg. 46 of the Defence Regulations in force in 1942, *i. e.* after the enactment of the Rent Restrictions Ordinance."

That in our opinion can only be interpreted as a clear finding of fact by the learned Magistrate that the permit had not been obtained from the Heavy Industries. With all respect, we are unable to agree with the Magistrate's interpretation of the law that as Regulation 46 was passed after section 8(1)(d) of the Rent Restrictions Ordinance it did not apply to that section. It follows that one of the permits the obtaining of which was a condition precedent to the operation of sec. 8(1)(d), was not obtained, and the Magistrate had no authority to grant the order for eviction under the provisions of that sub-section.

The appeal must, therefore, be allowed. Costs on the lower scale to include LP. 5.— advocate's attendance fees. We rescind the order as to costs in the Court below.

Delivered this 1st day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 144/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Zadok Lizbona & 29 ors. APPELLANTS.

v.

Ibrahim Issa Sahyoun, Haifa & 3 ors. RESPONDENTS.

Double registration — Two deeds in respect of same land — Whether purchaser deemed in bad faith.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 8th of February, 1946, in Case No. 141/Tira, dismissed:—

Where a very old Turkish deed exists on a piece of land together with a nearer registration, a purchaser who buys from the more recent owner is not deemed to have bought in bad faith if he failed to ascertain the existence of the old deed.

(*A. M. A.*)

ANNOTATIONS: The extent of a purchaser's duty to make reasonable enquiries as to the validity of his vendor's title is exhaustively discussed in C. A. 119/42 (1942, S. C. J. 755) where English and local authorities are considered.

(*H. K.*)

FOR APPELLANTS: Weinshall.

FOR RESPONDENTS: Sahyoun.

JUDGMENT.

This is an appeal from the decision of the Settlement Officer, Haifa, dated 8.2.46, whereby the Appellants' claim was dismissed, and the land in dispute was ordered to be registered in the name of the first Respondent.

The dispute here concerns one portion of a plot of land having an

area of 11 *dunums,* as estimated by the Settlement Officer and confirmed to us by the Appellants' attorney.

Each of the parties claims to be the owner of this portion, and relies on a deed of registration in support of his claim. The Appellants rely on an extract dating as far back as 1284 fiscal year, and the first Respondent on a registration in his name by purchase from Mohd. Abdul Hafiz in 1926.

The Settlement Officer having heard the arguments of both sides, and having inspected and applied the registration deeds to the land in dispute, has found as a fact that the portion in question is covered by both registrations.

The Settlement Officer further held that the first Respondent had been in possession of this land ever since he bought it, and he did not find that the land was bought in bad faith. Consequently he preferred the extract of the first Respondent to that of the Appellants, and entered judgment in his favour for the ownership of the said land.

The Appellants' attorney has raised three grounds of appeal, namely, that there was no justification for preferring the extract of registration of the first Respondent to that of the Appellants, that the first Respondent was not in possession of the land in dispute for the period of prescription, and that his purchase from Mohd. Abdul Hafiz was in bad faith.

We are of opinion that a decision on this last point, namely the question of purchase in bad faith, is sufficient for the purposes of this appeal, and we need not deal with the first and second grounds that were raised.

With regard to the last ground the Appellants' advocate submits that it was incumbent on the first Respondent, when he bought from Mohd. Abdul Hafiz, to examine the Registers of title in order to verify whether there existed any other extracts of registration for the land in dispute in the names of other persons.

We cannot agree with this submission. Even if it were held that the first Respondent had to verify the extract of his vendor Mohd. Abdul Hafiz in order to be satisfied with the genuineness of the transaction on which the extract was based, still we fail to see how he could verify an old Turkish extract, some 80 years old, in order to ascertain that there were no other extracts of registration for the same land in the name of other persons. We are therefore unable to find that the first Respondent bought in bad faith.

For this reason the appeal must be dismissed with costs on the lower

scale to include LP. 10 advocate's attendance fee. These costs will be paid to the first Respondent.

Delivered this 28th day of November, 1946.

British Puisne Judge.

CIVIL APPEAL No. 6/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPEAL OF:—

Dr. Hanna Nicola Khouri & an. — APPELLANTS.

v.

Raja Bey Salim er Rayyes. — RESPONDENT.

Onus of proof in Land Settlement — Defendant not in a better position.

Appeal from the decision of the Land Settlement Officer, Nazareth Settlement Area, in Case No. 19/Nazareth, dated 2.11.45 and delivered on 7.11.45, allowed and case remitted:—

In Land Settlement proceedings the Plaintiff and the Defendant are in the same position as regards proof. If the Plaintiff fails to satisfy the Officer as regards ownership, the property should not be adjudged to the Defendant, but the latter should also be called upon to prove title. Failing proof by either party, the property goes to Government.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 221/45 (*ante*, p. 693) and note.

(*H. K.*)

FOR APPELLANTS: J. Habiby.

FOR RESPONDENT: Sanders.

JUDGMENT.

De Comarmond, J.: This is an appeal from the decision of the Land Settlement Officer, Nazareth Settlement Area, in case No. 19/Nazareth.

The Appellants and the Respondent both claimed parcels 38 to 44 in Block 16535. In the course of settlement proceedings, the Appellants limited their claim to parcels 40 and 41 and to part of parcel 39 (we gather that the area covered by the reduced claim consists of a threshing floor).

The present Appellants were made Plaintiffs in the settlement proceedings and Mr. Habibi, for the Appellants, has submitted that, being given that both parties relied on title-deeds and possession, the Plaintiffs (now Appellants) and the Respondents were on the same level in so far as burden of proof is concerned. We understood Mr. Habibi's submission to mean that this is not a case where his clients had to make out a case against the other party and where failure to do so necessarily meant that the Defendants were entitled to the land. We agree with Mr. Habibi that the Settlement Officer had to satisfy himself which of the registrations relied upon by the parties applied to the land in dispute. If neither set of registrations did apply, then both parties failed and the land should have gone to Government in accordance with section 29 of the Land (Settlement of Title) Ordinance. It does seem that the Settlement Officer directed his mind to a comparison of the strength of the cases made out by the two contending parties, and this, in our view, is not satisfactory because the failure of one claimant does not necessarily mean success for the other claimant.

— — — — — — — — — — —*

In view of the foregoing, we decide that this case should be investigated anew. We allow the appeal, set aside the decision and direct that the matter be heard and determined by another Settlement Officer who should bear in mind the provisions of section 29 of the Land (Settlement of Title) Ordinance.

We rule that the costs of this appeal be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15. Such costs will be payable (as between the two parties to the present appeal) to the successful party at the re-hearing; if, however, neither of the parties is successful there will be no costs of this appeal.

Delivered this 27th day of November, 1946, in the presence of Mr. Habibi for Appellants, and Mr. Elia for Respondent.

British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

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* Omitted.

(*Ed.*)

CIVIL APPEAL No. 352/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF :—

Dr. Josef Rosner. APPELLANT. (CROSS-RESPONDENT).

v.

Heinrich Resek. RESPONDENT. (CROSS-APPELLANT).

O. C. P. C., Art. 80 — Nature of documentary proof — Must connect Defendant with transaction — Loans and partnerships.

Appeal and Cross-Appeal from the judgment of the District Court, Tel-Aviv, dated 7th of October, 1945, in Civil Case No. 195/43, dismissed:—

1. There are no special provisions regarding the form of documentary evidence required to prove a loan under O. C. P. C. Art. 80, but the document should connect the Defendant with the loan.

2. Where a partnership is alleged by a party, the existence of the partnership must be proved by documentary evidence.

(*A. M. A.*)

ANNOTATIONS:

1. A preliminary ruling in this appeal is reported *ante*, at p. 401.

2. On the meaning of the word "document" in Art. 80 of the Ottoman C. P. C. see C. A. 155/44 (11, P. L. R. 204; 1944, A. L. R. 368) and C. A. 351/45 (13, P. L. R. 94; *ante*, p. 250).

3. On the second point see C. A. 155/44 (*supra*), C. A. 5/44 (11, P. L. R. 562; 1945, A. L. R. 145), C. A. 456/44 (1945, A. L. R. 174) and C. D. C. T. A. 249/43 (1946, S. C. D. C. 498).

4. On what constitutes sufficient evidence to prove a loan see C. A. 374/45 (*ante*, p. 253) and note 3 thereto.

(*H. K.*)

FOR APPELLANT (CROSS-RESPONDENT): F. Badt.

FOR RESPONDENT (CROSS-APPELLANT): Goitein & Klimovsky.

JUDGMENT.

In the trial Court there was a claim and counterclaim, and now there is an appeal and cross-appeal. In the words of the Judge of the District Court "the Plaintiff's and Defendant's respective accounts of most of the various transactions with which they were both concerned conflict

so fundamentally that there is no reconciling them, and it is simply a matter of whose version is to be believed." The trial Court after hearing of the evidence of various witnesses, arrived at certain findings of fact. We see no reason to interfere with these findings of fact which flow from an appreciation of the credibility of the witnesses as they appeared in the witness box. It remains, therefore, only for us to decide whether the trial Court correctly interpreted the law and applied it to the facts.

The Appellant and Cross-Respondent was the Plaintiff in the Court below. He claimed the sum of LP. 449.180 mils as loans advanced to the Defendant (the Respondent and Cross-Appellant). The loan fell into two parts, the first being for LP. 135.453 mils. After hearing the evidence the learned Judge came to the conclusion that in fact the Plaintiff did advance this sum. This is a conclusion from which we see no grounds for differing. The question then arose as to whether the loan was recoverable by reason of the provisions of Article 80 of the Ottoman Code of Civil Procedure, which enjoins that claims exceeding 1000 piastres based upon contract agreements, partnership, leases or debt, must be proved by documents. No indication is given as to what form the document should take, but we are of opinion that the purport of the article was to provide that there should be, apart from oral evidence, some documentary evidence to support the averment of the existence of the loan.

In this case the document which it was alleged satisfied the requirements of Article 80, was P/1. P/1 was an account card which was submitted to careful scrutiny by the Court below. The Judge came to the conclusion that this loan of LP. 135.453 mils could be identified in the document P/1, and he came to the further conclusion that the document was binding on the Defendant because he himself had made entries in it. Now P/1, which was in German, was a record of various transactions between the Plaintiff and the Defendant; it was a loose method of accounting, but we consider that the trial Court was justified in coming to the conclusion that the items entered in it could be identified as various loans to the Defendant altogether amounting to LP. 135.453 mils. We therefore think that the District Court was right in regard to this issue.

The next issue was the other part of the loan of LP. 449.180 mils, *i. e.* the sum of LP. 313.565. This is the item in respect of which the Appellant appeals. He says that this item was on all fours with the item with which we have just dealt, and that the Court was wrong in not allowing it to him. As in the case of the LP. 135.453 mils loan,

the Court found as a fact that this sum of LP. 313.565 mils had been advanced, but when it came to consider the implications of Article 80 of the Code of Civil Procedure it decided that it was not recoverable. The document tendered in support of this part of the loan was Exh. D/13. Again, the Court submitted this document to scrutiny and it came to the conclusion that there was no sufficient identification of it with the loan. In the words of the Court "P/1 just afforded and D/13 just fell short of the necessary documentary proof." The Court gave its reasons for differentiating between the two documents, the main one being that there was no evidence that the Defendant was in any way connected with D/13, as he was with P/1, in that he himself had entered some of the items in P/1, and also that there was no final balance struck in D/13. Now, both documents represented a loose system of accounting, but we think that the trial Court was justified in drawing a distinction between them, and in holding, as it did, that D/13 did not comply with the test which was sufficient to satisfy the requirements of Article 80 of the Ottoman Code of Civil Procedure. We, therefore, agree with the finding on this issue.

The Defendant in the Court below counterclaimed that this sum of LP. 313.565 mils arose out of an alleged partnership between them, and that the question as to whether it was due from one to the other could not be decided until dissolution of partnership. As to this, it is sufficient to say that we agree that it was for the Defendant to prove his partnership by document of partnership and this he failed to do.

The next part of the Defendant's counterclaim, which is dealt in paragraph 9 of the trial Court's judgment, is also based on the allegation of the existence of a partnership. Here again the Defendant failed to discharge the onus that was on him to prove his partnership by documentary evidence, and in consequence the trial Court rightly dismissed his counterclaim.

Another counterclaim which is dealt with in paragraphs 10 to 14 of the judgment of the Court below, was in connection with the organisation of the Australian Soldiers Club in Tel-Aviv. Once more the claim of the Defendant was founded on the alleged existence of partnership. In this case he produced a document D/2, which he alleges was a document of partnership, and further that it sustained his contention as to the true nature of the transactions between the Plaintiff and Defendant. Now, not only do we agree with the trial Court that this was not a document of partnership, but it seems to us that it afforded clear proof that the Plaintiff's account of the transaction was the correct one. We, therefore, agree with the District Court that the Defendant's claim in regard to the Australian Soldiers Club also failed.

A further counterclaim of the Defendant, which is dealt with in paragraph 15 of the judgment, was in respect of the ownership and exploitation of two International benzine transport trucks and one Dodge transport lorry. This was another claim based on an alleged partnership involving brokerage fees. There was no document of partnership, and in any case, as the trial Court pointed out, no contract resulted and no claim for brokerage could have arisen. Lastly, there was the counterclaim by the Defendant for brokerage and commission of LP. 150 in respect of the production of boxes for the Shell Co. by the Plaintiff in partnership with a Mr. Gedda. The Defendant claimed commission fee in respect of this contract. We are of opinion that the trial Court quite rightly came to the conclusion that the Defendant's claim in this respect was entirely refuted by the other evidence.

For these reasons the judgment of the Court below is confirmed in all respects. As both the appeal and cross-appeal are dismissed we award no costs.

Delivered this 25th day of June, 1946.

Chief Justice.

CIVIL APPEAL No. 307/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards, A/C. J.

IN THE APPEAL OF:—

Ali Ahmad Ali & 34 ors. — APPELLANTS.

v.

1. Alexander Aharonson & 54 ors.,
56. Government of Palestine. — RESPONDENTS.

Land Settlement — Onus of proof — L. A. 39/33, C. A. 123/40, C. A. 167/42 — Appreciation of evidence — Substantial injustice.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated 11th July, 1945, in Cases Nos. 20, 64, 99, 21, 24, 31, 46, 22, 42, 96, 17, 47, 52, 39, 55, 102, 36, 40, 100 23, 83, 48, 50, 60, 65, 103 and 104/Nufei'at (consolidated), dismissed:—

Even if the Land Settlement Officer takes wrong principles into account when appreciating the evidence, his decision will not be set aside if it does not result in substantial injustice.

(*A. M. A.*)

REFERRED TO: L. A. 37/33; C. A. 123/40 (both not reported).

DISTINGUISHED: C. A. 167/42 (9, P. L. R. 701; 1942, S. C. J. 715).

ANNOTATIONS:

1. On the onus of proof in settlement proceedings *cf.* C. A. 6/46 (*ante*, p. 756) and note.

2. On the main point see the passages from Phipson cited in the judgment.

(*H. K.*)

FOR APPELLANTS: Elia & S. Khadra.

FOR RESPONDENTS: 1—55 — Kaiserman.
56 — Absent — served.

JUDGMENT.

This is an appeal from a decision of the Land Settlement Officer, Haifa Settlement Area in cases Nos. 20, 64, 99, 21, 46, 22, 42, 96, 17, 47, 52, 39, 35, 102, 36, 40, 100, 23, 83, 48, 50, 60, 65, 103 and 104/Nfei'at (consolidated). These cases were a retrial ordered by this Court on 9th May, 1935, in Land Appeal No. 37/33. The Land Settlement Officer on the 11th July, 1945, dismissed the claims of the present Appellants who now appeal to this Court.

The first ground of appeal is that the Land Settlement Officer wrongfully placed the onus of proof on the Appellants (see Settlement of Title (Procedure) Rules, Rule No. 5). The basis for this argument is that it was admitted by the Respondents that the Appellants were in possession. I can find nothing to support this contention. Indeed, the contrary would appear to be the case from the words used by this Court on 22nd April 1941 when deciding C. A. 123/40. In deciding C. A. 123/40 Sir Harry Trusted (Chief Justice) after citing from the judgment in Land Appeal 37/33, went on to say:—

> "The Appellants now contend that the true position was that it had already been held that they, the Appellants, were in possession of the land, and that the only question was whether they held by virtue of a contract of tenancy. I do not think that was so, and that was not the case they made before the Land Settlement Officer at the re-hearing."

It seems to me tolerably clear that the task which the present Appellants had to perform when before the Land Settlement Officer in 1945, was to satisfy him of their prescriptive right to remain on these lands by reason of adverse possession. This ground of appeal accordingly fails.

If the Appellants were unable to satisfy the Land Settlement Officer by evidence that they had occupied these lands for the period of prescription by adverse possession it seems unnecessary for me to deal

with the question whether or not the matter of tenancy agreements was properly considered by the Settlement Officer. In this respect this appeal differs from C. A. 167/42 (Annotated Supreme Court Judgments, 1942, Vol. II, p. 716). I quote from the decision in that appeal at p. 717 of the report:—

> "It is not denied that the present Respondent satisfied the Land Settlement Officer that there was sufficient evidence to show that he had enjoyed possession of the land for a long period without interference, that is to say, for a period exceeding the period of prescription."

The sole question now remaining for decision is whether the Land Settlement Officer should have, on the evidence before him, found for the Appellants.

It is clear from his decision that the Land Settlement Officer was not impressed by the oral evidence given by the fourteen witnesses called by the present Appellants. Normally, it would therefore be difficult for an appellate Court to interfere. Mr. Elia, for the Appellants, has, however, attacked the decision on three main grounds.

(Firstly.) He quotes the following words of the Land Settlement Officer:—

> "If one witness is disbelieved then all should be or in the alternative if one is accepted, the Plaintiff's case is proved."

I entirely agree with Mr. Elia when he says that this is quite a wrong way of approaching the evidence of several witnesses. I do not think, however, that the enunciation of that erroneous theory really affects matters. (Secondly) Mr. Elia points out that the Land Settlement Officer considered the witnesses unworthy of credence because they did not know of the existence of a settlement called Kadima which had been built on the lands in dispute and of which some ruins existed as late as 1929. Mr. Elia has urged that it was unfair to expect the witnesses to remember, or even to know of, the existence of two or three wooden huts erected on the seashore many years ago. I must admit that there is some force in Mr. Elia's argument, but, on the other hand, the Land Settlement Officer was entitled to comment on the fact that not one of the witnesses admitted knowledge of the existence of this settlement of Kadima. He was surely entitled to express surprise that they did not know of Kadima especially as the site had been surveyed by Palestine Government Surveyors and was shown on the map attached to the decision of the Settlement Officer in case 111/29 Infiat.

(Thirdly) Mr. Elia says that it was unfair of the Settlement Officer to expect the witnesses to know of a certain almond grove which existed

in Reg. Block 10572. The Land Settlement Officer, however, was doubtless entitled to be surprised that all the witnesses denied knowledge of this almond grove especially when it had been expressly excluded from certain contracts of lease made between the *Mukhtar* of the Arab en Nufeiat and the Hadera Colonists in 1928. I am unable (even though there may be some ground for Mr. Elia's criticism of the Settlement Officer's appreciation of the evidence) to say that substantial injustice has been caused. (See Phipson on Evidence 8th (1942) Edition at p. 37 and p. 674).

The Land Settlement Officer in his decision said:—

> "As the Defendants have stated, evidence required to upset a registered title must be good, reliable and clear and no other is sufficient; repetition of insufficient evidence does not make it suffice."

This seems to be a correct statement of the law. The position really is that the Appellants failed to satisfy the Settlement Officer as to their prescriptive right to remain on this land by adverse possession. This Court is unable to interfere with the Land Settlement Officer's decision.

The appeal is accordingly dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 4th day of October, 1946.

Acting Chief Justice.

CIVIL APPEAL No. 118/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw J. and Frumkin J.

IN THE APPEAL OF:—

"Nahlat Jacob" Cooperative Society Ltd. (in liquidation). APPELLANT.

v.

Haya Tabak. RESPONDENT.

Specific performance — Failure by Plaintiff to ascertain rights in Land Settlement — District Court competent in actions for specific performance — Absence no excuse.

Appeal from the judgment of the District Court of Haifa, dated the 15th day of March, 1946, in Civil Case No. 147/44, allowed:—

1. The District Court is competent to deal with claims for specific performance in respect of land.

2. The fact that a person claiming specific performance did not claim the property in Land Settlement is fatal to the action.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point see note 1 to C. A. 97/44 (1945, A. L. R. 14); *cf.* also C. D. C. Ha. 46/46 (1946, S. C. D. C. 638) and note 1.

2. On failure to assert rights during settlement proceedings see C. A. 310/43 (1944, A. L. R. 632) and note 2; *cf.* also C. A. 315/44 (1945, A. L. R. 22).

(*H. K.*)

FOR APPELLANT: A. Weinshall and M. Caspi.

FOR RESPONDENT: B. Caspi.

JUDGMENT.

Frumkin, J.: This is an action brought before the District Court of Haifa in the year 1944 asking for the specific performance of a contract dated the year 1935, the prayer being to transfer in the name of the Plaintiff now Respondent, a plot of land which she has purchased from one Yehezkel Taub of Haifa acting on behalf of a co-operative society now in liquidation. The Appellants are representing the liquidators. The Respondent succeeded in her action and obtained judgment in her favour. Hence this appeal.

The judgment was attacked on many grounds such as jurisdiction, delay, alternative remedy in damages and absence of the ingredients necessary for an order for specific performance but this case must be decided on the main ground that no steps were taken by the Respondent to ascertain her rights at the time when land settlement proceedings were taking place in the locality where the land in dispute is situated.

We will therefore deal with that ground alone and only say one word with regard to jurisdiction and that is that it is now settled law that the District Court has got jurisdiction, if not exclusive anyhow concurrent jurisdiction, to deal with matters of specific performance.

Now, as I said before, the contract relating to the purchase of the land was entered into in 1935. Land settlement proceedings in the locality in question started in 1941 when the settlement notice was published on the 1st of May. The progress notice was published on the 25th of June, 1941. The Schedule of Claims was posted on the 30th of June, 1941, and the Schedule of Rights on the 8th of July, 1943. No steps whatsoever were taken by the Respondent to ascertain her rights during all these proceedings. On her behalf it is stated that she left the locality in 1938 because of disturbances but absence is no

excuse. Persons having interests in places where Land Settlement is in process have to be alert to preserve such interest; particularly when like in the present case the interested party started to build on the land.

On behalf of the Respondent it was argued that the Land Settlement Officer has got no jurisdiction to grant orders for specific performance. It is not necessary to express an opinion on this point at this stage. In essence the claim of the Respondent was for ownership of the land claimed. It is, in any event, a claim of a right in land and such rights must be claimed within the period prescribed in the Land Settlement Ordinance when and where settlement proceedings take place. If the Land Settlement Officer had found himself unable to deal with the claim for specific performance he would have sent the Respondent to a competent Court and awaited its decision. We therefore take objection to the view of the learned Judge of the Court below when in dealing with the matter of land settlement, he disposes of it simply by saying:—

> "I do not think any weight should be attached to the fact that the Plaintiff did not intervene in the land settlement proceedings."

All the object of Land Settlement is that when settlement has been completed at a given place the register should then present a real picture as to the real owners of the land and all this object will be defeated of people will be allowed to let settlement proceed in their absence and then bring actions to ascertain rights which in the result would conflict with the register as settled by the Land Settlement Officer. The Respondent might be in an unfortunate position but she is herself to blame for neglecting her rights.

For this reason alone the judgment of the District Court directing the specific performance of the contract which should involve a change of the register cannot stand and is herewith set aside and the case remitted for the Court below to deal with the claim of the Respondent for damages. We might at this point mention that counsel for Appellants has in Court stated that he still agrees that the full amount of damages be assessed notwithstanding the amount of damages fixed in the contract.

As the Appellant succeeded in the main point they are entitled to costs on the lower scale to include advocate's fees in the amount of LP. 10 for the hearing of this appeal.

Delivered this 29th day of November, 1946.

Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 201/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Madiha bint el Haj Salim Abu el Einein. APPELLANT.

v.

Ahmed Haj Ibrahim Mohd. 'Izz & 3 ors. RESPONDENTS.

Striking-out under C. P. R. 21—21A — Statement of claim disclosing no cause of action — Application by motion — Grounds of application — Equitable and legal ownership, C. A. 6/42.

Appeal from the judgment of the Land Court of Haifa, dated the 15th day of May, 1946, in Motion No. 310/46 in Land Case No. 27/45, allowed and case remitted:—

1. An application that the statement of claim be struck out as disclosing no cause of action should be based under rule 21. Rule 21A may be invoked in the two instances therein mentioned or "on any other grounds" — such grounds to be stated in the notice of motion.

2. An action will lie in the Land Court for equitable ownership together with an order for registration — this may be tantamount to asking for specific performance.

(*A. M. A.*)

DISTINGUISHED: C. A. 6/42 (9, P. L. R. 143; 1942, S. C. J. 220; 11, Ct. L. R. 100).

ANNOTATIONS:

1. On the applicability of rr. 21 & 21A respectively *cf.* Mo. D. C. Jm. 6 & 7/46 (1946, S. C. D. C. 94) and notes thereto; *vide* also Mo. L. C. Ha. 171/46 (*ibid.*, p. 542).

2. On the jurisdiction point *cf.* C. A. 118/46 (*ante*, p. 764) and note 1.

(*H. K.*)

FOR APPELLANT: Wittkowski.

FOR RESPONDENTS: W. Salah.

JUDGMENT.

This is an appeal from an Order dated 15.5.46 of the Land Court of Haifa in Motion No. 310/46 in Land Case No. 27/45. The Defendant in that case applied for the dismissal of the action for want of jurisdiction. The Defendant did not cite the Rule under which he was applying, but Rule 21A was the one applicable, and the Land Court

rightly dealt with the Motion as having been made under that Rule.

The Land Court in the event dismissed the action on the ground that the statement of claim did not disclose a cause of action, and for this purpose it held that the Applicant was not precluded from raising at the hearing other grounds on which the case should be dismissed.

In our judgment the Land Court failed to read the Rule correctly. Rule 21A provides that the Defendant may apply *by motion* to have the case dismissed forthwith on either of the two grounds mentioned *or on any other ground*. This means that if the Defendant wants to rely on some ground, other than the two which are set out, he must specify it in his motion. This he did not do, and he did not ask for and obtain permission to amend his motion.

We also observe that the ground upon which the case was dismissed, *viz.* that the statement of claim did not disclose a cause of action, is one which is provided for in Rule 21. In Rule 21 the *statement of claim* can be *struck out* where it does not disclose a cause of action. But in this instance the Court has *dismissed the case* on the ground that no cause of action is disclosed.

For these reasons we find that the appeal succeeds and that the Order dated 15.5.46 of the Land Court must be set aside.

If we confine ourselves to quashing the Order it may be that the Respondents will make a fresh application for the statement of claim to be struck out under Rule 21, so we will briefly give our reasons for now making the further order that the case be remitted for trial. Having considered the statement of claim we are unable to say that it discloses no cause of action. The Plaintiff has asked for a judgment for ownership and an order for registration. She has not specified whether she is asking for a declaration of legal ownership or of equitable ownership. The averments in the statement of claim, however, clearly show that she is not saying that she has at present a legal title to the property. If she is asking for a declaration of equitable ownership together with an order for registration it might be argued that that is tantamount to asking for an order for specific performance, which is a good cause of action in a Land Court. The Land Court has based its decision on C. A. 6/42 (9, P. L. R. 143), but it might perhaps be argued that in that appeal the Court had in mind the question of legal ownership, and that the decision might have been different if the Court had considered the claim as being one for a declaration of equitable ownership.

In the circumstances we order that the case be remitted for hearing on the merits, without prejudice to any right that the Appellant may

have to ask for an amendment of her statement of claim.

The Appellant must have her costs of this appeal to include LP. 10.— advocaet's fee for attendance at the hearing.

Delivered this 31st day of October, 1946.

British Puisne Judge.

CIVIL APPEAL No. 230/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Kupat Milveh Vechisachon Shitufit Shel Haovdim Be'kfar Saba, Ltd. Kfar- Saba. APPELLANT.

v.

Haim Huberman. RESPONDENT.

Cause of action against more than one defendant — Additional cause of action against one defendant only — Proper manner to apply — C. P. R. 53, 57 — Applicability of English decisions, R. S. C. O. 18 r. 1.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 29th day of May, 1946, in Civil Case No. 376/45, allowed and case remitted:—

Where a defendant alleges that the cause of action against him differs from that against the remaining defendant, he should proceed under C. P. R., r. 57 and file a separate application.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 555.

2. See the notes to the judgment appealed from as to the interpretation to be given to r. 53 of the C. P. R.

(*H. K.*)

FOR APPELLANT: Eliash and Heinsheimer.

FOR RESPONDENT: Caspi and Dvorin.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv which had dismissed an action by the present Appellants against

the present Respondent. The facts, shortly stated, are that the Appellants sued the Respondent (who was the second Defendant in the Court below) jointly with one Israel Yaacobovitz who was the first Defendant in the Court below. The sum sued for was LP. 2139.575 mils with interest from 18th June, 1935. The first Defendant did not enter appearance and judgment was given against him by default on 9th November, 1945. The present Respondent did not file his defence until 11th November, 1945. The Appellant Bank were the holders of certain cheques drawn on the Anglo Palestine Bank by the first Defendant and endorsed in blank by the second Defendant. These cheques were not met, the first Defendant having no funds with the Anglo-Palestine Bank. The allegation of the Appellants is that the second Defendant (the present Respondent) expected the Plaintiffs to treat, and the Plaintiffs did treat, these cheques as cover for the second Defendant's overdraft with the Appellant Bank. Originally, according to the statement of claim, the cause of action alleged by the Plaintiffs against both Defendants was on these cheques and also an allegation of fraud. In addition, the Plaintiffs alleged as against the second Defendant only a debit balance on current account. The Appellants dropped the cause of action on the cheques and when the case came to trial against the second Defendant on the 21st May, 1946, the present Respondent's advocate took the objection that the statement of claim was contrary to Rule 53 Civil Procedure Rules, 1938, in that the same causes of action were not alleged against both Defendants. What was meant was that, although two of the causes of action against both Defendants were the same, there was an additional cause of action against the second Defendant, namely, the cause of action on the current account. It is interesting to note that the reply of the Plaintiff's advocate to that was that a separate application should have been made under Rule 57. Nevertheless, the learned trial Judge decided to hear the case to the end, intimating that he would give his decision on the question of Rule 53 when he came to give judgment. He then heard evidence and gave judgment on the 29th May, 1946, finding against the Plaintiffs on the question of fraud and entering judgment for the Defendant (the present Respondent). He intimated that he was in agreement with the submission of the defence. The learned trial Judge ordered the third cause of action (that is the one on the current account) to be struck out. Against the judgment of the 29th May, 1946, the Plaintiffs now appeal to this Court. There is no appeal against that part of the judgment finding against the Plaintiffs on the issue of fraud.

Mr. Caspi, for the Respondent, in supporting the judgment of the

District Court, relied on the difference between the Palestine Rule 53 and the wording of the corresponding English rule, namely, Order 18 Rule 1 and has cited several English cases on Order 18. Mr. Caspi contends that the mere fact that, by the time the case came to trial, the first Defendant had dropped out makes no difference. Mr. Caspi's suggestion is that the statement of claim from the beginning was a nullity. We wish to guard ourselves against deciding whether judgments of the Courts in England on English rules which may be worded in terms similar to those of the corresponding Palestine Rules necessarily bind us. We think that the matter can be decided by our holding that the remedy of the present Respondent was under Rule 57 and we are of the opinion that the learned trial Judge should have upheld the contention made at the trial by the Plaintiff's advocate when he referred to that rule. We consider that the judgment of the District Court should not be allowed to stand and ought to be set aside. Notwithstanding Dr. Eliash's request that we should enter judgment for his clients against the Respondent we feel that we have no option but to remit the case to the District Court for a re-trial on the issue with regard to what sum, if any, is due on current account. The costs of this appeal will abide the event; but, in order to simplify final arangements, we order that they be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 10.—.

Delivered this 25th day of November, 1946.

British Puisne Judge.

CIVIL APPEAL No. 146/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Sa'adia Afgin. APPELLANT.

v.

Moshe Katiyi. RESPONDENT.

Fresh evidence on appeal — Death of party in eviction proceedings.

Appeal from the judgment of the District Court of Tel Aviv in its appellate capacity, dated 25.3.46 in C. A. 78/45 from the judgment of the Magistrate's

Court, Rehovoth, dated 22.4.45 in C. C. No. 236/44; case remitted on new evidence having been heard by the Court of Civil Appeal:—

> Where an action for eviction is based on the ground that a couple have to live with a third person in a room, the Court will hear evidence on appeal to show that that person died during the proceedings, provided that the Defendant did not hear of the death until after judgment.
>
> (*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 441.

2. On the requirements for fresh evidence to be heard by an appellate Court *vide* C. A. 27/40 (1940, S. C. J. 81), C. A. 278/40 (8, P. L. R. 110; 1941, S. C. J. 97; 9, Ct. L. R. 192), C. A. 133 & 136/41 (9, P. L. R. 101; 1942, S. C. J. 122; 12, Ct. L. R. 39), C. A. 142/43 (1943, A L. R. 796), C. A. 18/44 (11, P. L. R. 256; 1944, A. L. R. 407) and C. A. 57/44 (1944, A. L. R. 438).

Cf., as to criminal cases, CR. A. 19/46 (13, P. L. R. 60; *ante*, p. 236) and note 1 in A. L. R.

(*H. K.*)

FOR APPELLANT: Neder.

FOR RESPONDENT: M. I. Levy.

JUDGMENT.

The Appellant in this case has moved the Court to be allowed to produce additional evidence in order to establish that Respondent's mother died prior to the conclusion of the hearing of the case before the Magistrate's Court.

We have taken cognisance of the affidavits put in by the Appellant and by the Respondent and we have heard the advocates. We are aware that great care must be exercised not to allow fresh evidence to be introduced into a case before an appellate Court unless there are very special reasons to justify such a course. We are of opinion that in the circumstances of the present case, the evidence sought to be introduced should be accepted by this Court because it is obvious that the Appellant was not aware of the fact that Respondent's mother was dead. We cannot believe that he would have failed to bring that evidence to the notice of the Courts below had he known about it.

The judgment of the learned District Court R/President is mainly based on the fact that the present Respondent had good cause to ask for eviction because it was awkward for him to reside with his newly wedded wife in one room which was also occupied by his mother. It being now quite clear that the mother was already dead when the learned Magistrate gave his decision it seems to us imperative that this case should now be remitted to the District Court in order to enable

that Court to do justice to the case. The decision of the District Court is therefore set aside and the case is remitted to the District Court for fresh arguments in the light of the new evidence which has now been added to the record, and for a fresh decision in the matter. Costs of this appeal which we assess at LP. 10 (inclusive) will go to the successful party at the re-hearing before the District Court.

Delivered this 1st day of October, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 117/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: FitzGerald, C. J., De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

Saleh Suleiman El Attileh. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Joint accused — Identical evidence against all — Reasons to be given for differentiating in judgment.

Appeal from the judgment of the District Court of Haifa, dated 11.10.46 in Criminal Case No. 156/46, whereby Appellant was convicted of an offence *contra* section 212 and 29 of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment, allowed:—

> If the evidence against a number of accused is the same, the Court should not accept it against some of the accused only without giving reasons for differentiating.
>
> (*A. M. A.*)

ANNOTATIONS: The decision in this case is in accordance with that in CR. A. 80/45 (1945, A. L. R. 602); see the authorities cited in the note to that case and *cf.* CR. A. 203/45 (13, P. L. R. 13; *ante*, p. 16) and CR. A. 179/45 (*ante*, p. 21, second paragraph of p. 23).

(*H. K.*)

FOR APPELLANT: R. Sa'ad.

FOR RESPONDENT: Crown Counsel — (Heenan).

JUDGMENT.

The result of this will be unfortunate but we have to apply the law on the evidence as it appears before us on the record. According to the record the three Accused were charged with the offence for which

the Appellant was convicted. The evidence of the witnesses for the prosecution did not vary, and in as far as that evidence went it associated each one of the Accused in the same degree with the crime.

Now, it is quite true that the learned trial Judge is entitled to accept the evidence of a witness in regard to one accused and reject it in regard to another, but he must give some reason for so doing and a mere suspicion of *"fassad"* against two is not sufficient reason for differentiating. There must be something in the substance of the evidence itself which differs in its application to one accused from its application to another.

In this case each witness for the prosecution identified each of the accused persons in the same degree with the crime. In these circumstances we are of opinion that the learned Judge was not justified in rejecting this evidence against two Accused and accepting it *in toto* against the third. At the close of the trial it appears to us he was confronted with the alternatives of either convicting all the Accused or acquitting all the Accused. In this case he acquitted two and convicted one, and for the reasons which we have given we are unable to sustain the conviction. The appeal is upheld and the Accused is released unless he is detained on some other charge.

Delivered this 6th day of November, 1946.

Chief Justice.

CIVIL APPEAL No. 175/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Haim Dan Kuker. APPELLANT.

v.

Haim Weiss & 2 ors. RESPONDENTS.

Bei bil wafa — Faragh bil wafa — Agreements within Art. 64 C. P. C. — Effect of R. R. legislation on order of repossession — Failure to deposit into Court entire amount due.

Appeal from the decision of the Land Court of Haifa in Land Case No. 3/46, dated 17.4.46; judgment of lower Court varied:—

In making an order giving effect to a *bei bil wafa* (or *faragh bil wafa*),

the Court should not give the Plaintiff possession before considering the effect of the Rent Restrictions legislation on the Defendant's possession.

(*A. M. A.*)

ANNOTATIONS:

1. Authorities on *bei bil wafa* and *faragh bil wafa* are collated in the notes to C. A. 155/41 (8, P. L. R. 417; 1941, S. C. J. 573; 10, Ct. L. R. 147); see also C. A. 149/45 (*ante*, p. 28).

2. *Quaere* whether a person in possession by virtue of a *bei bil wafa* (or *faragh bil wafa*) could ever claim the protection of the Rent Restrictions Ordinances, as it can hardly be thought that in such a case the parties intend to create a tenancy relationship; *vide* C. A. 278/43 (10, P. L. R. 642; 1943, A. L. R. 786) and C. A. 62/45 (*ante*, p. 125).

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENTS: Olshan.

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 17th April, 1946, of the Land Court, Haifa, in Case No. 3/44, cancelling the registration of a sale in the name of Appellant (original Defendant) Haim Kuker in the Land Registry Haifa (deed No. 1510/42), and also the registration of a mortgage on the same property (deed No. 1511/42), and ordering the registration of the property (Parcel No. 7 Block 11589 Emek Zebulun) in the name of the first Respondent (original Plaintiff) Haim Weiss under the same terms and conditions as it was previously registered in deed No. 5736 of 1937. It was further decreed that the Appellant do vacate the said property and hand over possession forthwith to the first Respondent.

The District Court held that the agreement dated 30th August, 1942, (Exhibit B), between the first Respondent (as vendor) and the Appellant (as purchaser), was a *bei bil wafa* and not an out and out sale as alleged by the Appellant.

It may be observed that as the land is *miri* the agreement could not have been a *bei bil wafa*, although it might have been a *faragh bil wafa*.

Having considered the terms of the agreement and the submissions of the advocates for the parties, I am unable to agree that this agreement was a *faragh bil wafa*. The agreement was clearly a sale with an option to repurchase at the end of a year as from the date of transfer in the Land Registry. Such an agreement comes within the cover of Article 64 of the Ottoman Code of Civil Procedure. If the vendor had repaid the purchase price with interest at the end of the year he could have demanded a re-transfer. The vendor did not, however, repay the purchase price with interest at the end of the

year, and the question to be decided is whether he then lost his right to repurchase.

Clause 3 of the agreement (Exhibit B) reads as follows:—

> "3. It is hereby agreed between the parties that the vendor shall be entitled to return to the purchaser the above sum of LP. 175 together with interest of 9% at the end of a year as from the day of the transfer of the said property in the Land Registry and to have the said property returned to his name.
>
> The purchaser hereby agrees as from now that if the vendor returns to him the sum of LP. 175 together with interest of 9% on this amount at the end of a year from the day of the transfer, he undertakes herewith as from now to transfer (to return) to the vendor the said property in the Land Registry by way of legal transfer and in such case the purchaser shall not be bound to pay to the vendor the above mortgage. But in case the vendor is unable, owing to financial difficulties, to return the said sum of LP. 175 and interest, the purchaser hereby undertakes to pay the vendor the above mortgage of LP. 300, and then the vendor will have no possibility to receive back from the purchaser the said property."

It is the last sentence which requires to be construed. In my judgment the words "and then" must be given due weight, and the only construction I can place upon them is that it is only where the purchaser has paid the amount (LP. 300) of the mortgage that the vendor's right to repurchase is finally barred. If the vendor repays the LP. 175 with interest at 9% before the purchaser pays the LP. 300 then he has the right to recover the property.

It is not denied that the Appellant has not paid the sum of LP. 275 (*i. e.* LP. 300 less LP. 25 already paid), and he has not deposited the money in Court. The Respondent (vendor) on the other hand has deposited in Court the sum of LP. 200 which is made up of LP. 175, being the amount paid on account of the purchase price, and a further sum of LP. 25 which the Respondent had received from the Appellant. That is to say, the Respondent has deposited in Court the sum of LP. 175 which he had to repay under the terms of Clause 3 of the agreement (Exhibit B), but he has not paid anything on account of the interest payable under the same clause.

So I find the position to be this — that the Appellant not having paid the LP. 275 due on account of the mortgage debt the Respondent has not lost his right to reclaim the property on payment of LP. 175, together with interest on that sum for one year at 9%. The first Respondent has deposited LP. 200 in Court, but he has not paid the interest. This interest, together with the sum of LP. 200, is repayable to the Appellant before the first Respondent can get back the property.

The Court below ordered the Defendant (Appellant) to vacate the

property and hand over possession forthwith to the Plaintiff (first Respondent). This order ought not to have been made without consideration of the question whether or not the Appellant is protected by one of the Rent Restrictions Ordinances.

In the result I find that the judgment which the lower Court gave must be amended to read as follows:—

Judgment is given that the registration of this sale in the name of Defendant Haim Kuker in Land Registry, Haifa, Deed No. 1510/42, be and it is hereby cancelled, together with the registration of the mortgage on the said property in the same Land Registry, Deed No. 1511/42. It is decreed and ordered that the said property — Parcel 7, Block 11589 Emek Zebulun — be registered in the name of the Plaintiff Haim Weiss under the same terms and conditions as it was previously registered in Deed 5736 of 1937, provided that the Plaintiff Haim Weiss shall first pay to the Defendant Haim Kuker the sum of LP. 200, together with interest at 9% on the sum of LP. 175 for one year, *i. e.* LP. 15.750.

I do not find that the failure of the first Respondent to pay into Court the sum due on account of interest disentitled him to bring the action, because in Exhibit D/2 the total amount re-payable was (incorrectly) stated to be LP. 200, and in any event the LP. 25 could be regarded as covering the whole of the interest and a part of the loan of LP. 25 which was not covered by the original agreement (Exhibit B).

The Appellant is of course at liberty to bring an action for ejectment against the first Respondent in the competent Court.

The first Respondent (Haim Weiss) can take back the LP. 200 which he paid into Court.

No costs.

Delivered this 29th day of November, 1946.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 180/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Husam Eddin Eff. El Khairi & 2 ors. APPELLANTS.

v.

Abdul Hamid Abdulla Abu Nar. RESPONDENT.

Action for cancellation of registration based on judgment given by a single Palestinian judge — Nullity — C. A. 47/41, C. A. 208/42, Contents of judgment, C. P. R. 205.

Appeal from the judgment of the Land Court of Jaffa, dated 25.2.46 and delivered on 29.4.46 in Land Case No. 32/44, dismissed:—

It is open to a Court to declare that a judgment given by a judge of that Court is null for want of jurisdiction.

(*A. M. A.*)

FOLLOWED: C. A. 47/41 (8, P. L. R. 172; 1941, S. C. J. 179; 10, Ct. L. R. 16); C. A. 208/42 (9, P. L. R. 748; 1942, S. C. J. 785).

ANNOTATIONS:

1. See the cases cited and the notes thereto in S. C. J.

2. A void judgment does not create *res judicata*; Misc. Appl. 32/43 (10, P. L. R. 439; 1943, A. L. R. 603) and cases cited in note 3 in A. L. R.

3. On defective judgments *cf.* C. A. D. C. Jm. 29/46 (1946, S. C. D. C. 526) and note 1.

(*H. K.*)

FOR APPELLANTS: R. El-Hadad.

FOR RESPONDENT: Caspi (by delegation from Z. Usta).

JUDGMENT.

Frumkin, J.: This is an appeal from the judgment of the Land Court of Jaffa which, being a record of brevity, might be cited *verbatim*:—

"Order: (*sic!*)
On hearing counsel for both sides the Court orders that the judgment of H. H. Judge Daoudi was a nullity and that the matter is not *res judicata*. The registration to be cancelled. No order as to costs."

The first ground of appeal is that this judgment is contrary to rule 205 of the Civil Procedure Rules in that it does not contain a concise statement of the case, the Court's finding on material facts, the points for determination, the decision thereon and the reasons for such decision.

This is so, but the main ground of appeal is on a point of law, which this Court is able to determine on the data before it.

Before dealing with what I consider the main ground of appeal it is necessary to state shortly the facts relevant to this case. The Appellant brought an action before the Land Court claiming certain land on the ground of *Awlawiyeh* and obtained judgment by default. The Respondent took steps to oppose the judgment, failed, applied to the Court of Appeal for extension of time in order to appeal the judgment

and again failed. The judgment thus became final and the land in dispute was registered in the name of the Appellant.

The Respondent then instituted the present fresh proceedings before the Land Court asking for the cancellation of the registration in the name of the Appellant on the ground that it is based on what is not a judgment at all but a nullity in that it was given by a single Palestinian Judge of the Land Court, who at that time (27.11.44) had no jurisdiction to sit alone. On behalf of the Appellant it was not denied both here and in the Court below that Judge Daoudi could not sit alone but argued that the matter is now *res judicata* in that the judgment became final and was already executed. It was further argued on behalf of the Appellant that, even if the judgment were a nullity it is not for another division of the same Court to declare its cancellation and attempts which have been made to have it set aside by a higher Court failed.

The point is covered by authority. In C. A. 47/41 it was held, relying on old English authority for the proposition, that a judgment obviously given without jurisdiction is a nullity and that the President of the District Court could hold that an order given by two Palestinian judges without jurisdiction was a nullity. This judgment was followed in C. A. 208/42 in which the Court confirmed a judgment by a President of the District Court declaring that the judgment given by two Palestinian Judges was a nullity and would, therefore, not be considered as ground for *res judicata*. In the present case, the Appellant agrees that Judge Daoudi had no jurisdiction to sit alone when he gave his judgment in 1944.

For these reasons the judgment of the Land Court must be upheld and the appeal dismissed with costs at the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 18th day of November, 1946.

Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

Abdul Hadi, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 217/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Mohammad Hassan Hussein Shrayyem & 3 ors. APPELLANTS.

v.

Zeineh bint Awad el Ali widow of Hassan Hussein Shrayyem & 3 ors. RESPONDENTS.

Notice to produce, C. P. R. 153 — Failure to explain reason for failure to produce.

Appeal from the judgment of the Land Court, Nablus, dated 20th May, 1946, in Land Case No. 11/44, dismissed:—

If a party, after being served with a notice to produce, neither produces the document nor satisfactorily accounts to the Court for his failure to produce, the Court must refuse to admit the document in evidence at that party's instance.

(*A. M. A.*)

ANNOTATIONS: See the commentaries in the Annual Practice to the corresponding O. 31, r. 15 of the R. S. C. J.

Vide also C. A. D. C. T. A. 98/45 (1946, S. C. D. C. 604) and note.

(*H. K.*)

FOR APPELLANTS: A. Michaeli.

FOR RESPONDENTS: R. Jayousi.

JUDGMENT.

In this case although the Appellant advanced two grounds upon which the judgment of the District Court * should be upset, those grounds being (1) the question of adverse possession and (2) the question of the admissibility of a document, we are satisfied that the Appellant, if he is to succeed, must stand or fall on the second ground. Assuming this document was rightly not admitted in evidence, we agree with the District Court's * conclusion that in the circumstances of this case the Appellant had not established adverse possession. Turning now to the question of the disputed document, the Appellant throughout alleged that his claim to this land was based on the existence of a document of sale made by the person who it is admitted was the owner, to his wife. If this could be substantiated it follows that the Appellants

* Should be: "Land Court".

who alone are the successors in title of the wife would succeed. Now notice to produce this document was given under rule 153 of the Civil Procedure Rules, and that notice was not complied with. Failure to comply with the rule does not give a complete discretion to the Judge. It is mandatory to this extent that a person who does not comply shall not be at liberty to tender the document in evidence unless he satisfies the Court that he had some cause or excuse which the Court should deem sufficient for not complying with such notice. It follows that the discretion of the Court is limited to an enquiry whether the person who failed to comply had sufficient cause or excuse. In this case it does not appear that the Appellant gave any cause or excuse. In this Court a vague suggestion has been made that the copy was in the hands of another person and that the Appellant was unable to get it from those hands. If this be so, it is unfortunate for him that he did not tender evidence to that effect in the Court below. Had he done so, we have no doubt that the Court, following several decided cases on this issue would have given him the benefit of the rule. As he failed to produce such evidence to the Court below we must hold that the Court was fully justified in coming to the conclusion that they could not be satisfied, and this being the case the mandatory provisions of the rule automatically operated, and the Court rightly refused permission to produce the document at the trial.

It follows that the appeal must be dismissed with costs at the lower scale to include LP. 10 advocate's fees.

Delivered this 19th day of November, 1946.

Chief Justice.

CIVIL APPEAL No. 84/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Edwards, J.

IN THE APPEAL OF:—

Thuraya Ghazawi, in her personal capacity and on behalf of the estate of her late husband, Saleh Ben Hanna Bahbah. APPELLANT.

v.

Hanna Elias Bahbah & 11 ors. RESPONDENTS.

Opposition, C. P. R. 362 — Application of rule — Competent Court in claim for registration — Land Transfer Ord., sec. 11, C. A. 90/32 — Failure to raise a point in pleadings.

Appeal from the judgment of the Land Court, Nablus, dated 31st January, 1946, in Land Case No. 40/43, dismissed:—

R. 362 C. P. R. is applicable when a person brings in the Land Court an action to set aside a judgment given in the District Court between other parties, but affecting his rights.

(*A. M. A.*)

REFERRED TO: C. A. 90/32 (1, P. L. R. 846; 3, C. of J. 1099).

ANNOTATIONS:

1. See the following authorities on r. 362 of the C. P. R., resp. r. 285 of the M. C. P. R.: C. D. C. T. A. 112/39 (1940, T. A. 23), C. D. C. T. A. 71/41 (1941—2, T. A. 198 — *in Hebrew*), C. A 152/41 (8, P. L. R. 409; 1941, S. C. J. 375; 10, Ct. L. R. 133); C. A. 91/41 (8, P. L. R. 290; 1941, S. C. J. 534), C. A. 279/42 (10, P. L. R. 96; 1943, A. L. R. 88), C. A. D. C. Jm. 76/44 (1944, S. C. D. C. 410); C. A. D. C. Jm. 91 & 92/44 (1945, S. C. D. C. 174), C. A. D. C. T. A. 191/44 (*ibid.*, p. 706), C. A. D. C. Ja. 89/44 (1946, S. C. D. C. 87), C. A. D. C. T. A. 91/45 (*ibid.*, p. 110) and Mo. D. C. Jm. 114/46 (*ibid.*, p. 474).

2. A point of illegality may be taken by the Court even if not pleaded: *vide* C. D. C. Jm. 16/45 (1946, S. C. D. C. 608) and note 4 thereto.

(*H. K.*)

FOR APPELLANT: S. Asal.

FOR RESPONDENTS: No. 1 — Michaeli.
Nos. 2—11 — Absent — not served (dispensed with by Appellant).

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the Land Court of Nablus in Land Case No. 40/43, whereby that Court entered judgment in favour of the present Respondent No. 1 for one quarter share in the whole of the property and ordered registration of that share in his name. In order to appreciate the facts it is necessary to set out the judgment in the District Court judgment Civil Case No. 10/42, in which the present Appellant was the successful Plaintiff. It is as follows:—

"The facts in this case are clear. The Plaintiff's husband and his uncle, Defendant No. 1, contracted with the other Defendants to plant orange grove, and when work is completed to take half the grove. The contract was fulfilled and half of the property was given to Plaintiff's husband and his uncle. When Plaintiff's husband died, Plaintiff was driven away from grove. There is no serious defence from other Defendants but Defendant No. 1 alleges that the husband sold his share to his own father. He was not

summoned as a party and did not ask to join but came as a witness and we cannot see how this benefits Defendant No. 1 in any way. Therefore judgment is entered for Plaintiff, one quarter of the property to be registered in her name and the rest to the heirs of her husband. The claim for damages is dismissed. Defendant No. 1 to pay costs at lower scale. Formal order to *Tabu* to issue."

We would add that in Civil Case No. 10/42, the present Appellant in her statement of claim asked that "one quarter of the land contracted for be registered in the names of herself and her sons."

The Land Court in Land Case 40/43 found, as a fact, that Salen, (husband of the present Appellant) on 18th May, 1935, transferred all his rights to the first present Respondent with the consent of the other parties to the agreement, including Jiries, in return for LP. 300 which he admitted having received.

The substantial complaint of the present Appellant is that the Land Court in the case under appeal virtually reversed the finding of the District Court in Civil Case No. 10/42. To this the advocate for the present first Respondent replies that his client in bringing the Land Court action was merely asserting his right under rule 362 Civil Procedure Rules, 1938. We agree with the Respondent's advocate in his submission that his client was fully entitled to bring the Land Court action and we disagree with the Appellant's advocate when he contends that rule 362 must be limited in its application to cases pending at the time when the Civil Procedure Rules, 1938, came into force. We therefore think that since in the case before us the Respondent (Plaintiff) was asking for registration of land, the competent Court, within the meaning of that word in rule 362, was the Land Court of Nablus. We do not agree with the Appellant's contention that because the Respondent was a witness in Civil Case No. 10/42 he is estopped from bringing the Land Court action, nor do we agree that his only remedy was to apply in Civil Case No. 10/42 to be joined as a defendant under rule 67(2). We therefore conclude that the Land Court was entitled to hear Land Case No. 40/43. We may add that none of the Defendants in Land Case 40/43 (other than the present Appellant) entered appearance. We are, therefore, concerned solely with the Appellant and the first Respondent to this appeal.

One of the grounds of appeal is that the Land Court did not deal with the point that the transaction made by the son of the first Respondent having been effected outside the Land Registry it was null under section 11, Land Transfer Ordinance. (See C. A. 90/32, Vol. 1, P. L. R. p. 846). We would reply that neither in her written Statement of Defence nor in the final speech of her advocate in the Court

below did the Appellant raise this point. Apart from those facts, however, it must be remembered that the registered owners of the land in question have abandoned any right to the property. The Appellant can only rely on the rights which her late husband, Saleh, had in the property and (as has been found by the Land Court) Saleh in 1935 transferred all his rights to his father for good consideration. We therefore see no reason why the land should not be registered as directed by the Land Court in the case under appeal, especially seeing that the registered owners have abandoned all claim. The appeal is accordingly dismissed with fixed (or inclusive) costs of LP. 10.—.

Delivered this 28th day of November, 1946.

British Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

CIVIL APPEAL No. 373/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPEAL OF:—

J. Jacob Darwish. APPELLANT.

v.

Moshe Goldenberg in his personal capacity and as administrator of the estate of Zila (Cecilia) Goldenberg. RESPONDENT.

Usurious Loans — Satisfying the Court that usurious interest included in debt —— Corroboration.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 12th November, 1945, in Civil Case No. 7/43, allowed and case remitted:—

In order to satisfy the Court that usurious interest has been taken in respect of a loan it is not necessary that evidence as regards each and every payment made by the Plaintiff should be corroborated.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C., at p. 596.

2. On the effect of sec. 6 of the Evidence Ordinance in civil cases see note 2 to C. A. 27/46 (*ante*, p. 668).

3. On re-opening of settled accounts under the Usurious Loans Ordinance see P. C. 28/44 (13, P. L. R. 228; *ante*, p. 279) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANT: Sussman.

FOR RESPONDENT: Respondent Goldenberg in person in his personal capacity.
Weyl for Goldenberg in capacity of administrator of his wife's estate.

JUDGMENT.

The Appellant was the unsuccessful Plaintiff in a case brought by him before the Tel-Aviv District Court against Mr. Goldenberg. This latter was sued both in his personal capacity and as administrator of the estate of his late wife, Zila Goldenberg. The Plaintiff's case as set out in the Statement of Claim was that in February, 1936, he had undertaken to pay LP. 804 to Mr. Goldenberg by means of 12 promissory notes of LP. 67 each, the first of which matured on the 5th June, 1936; that he subsequently made certain payments but had failed to redeem all the notes as they fell due, and that he finally agreed to mortgage his property for the sum of LP. 600 in favour of Mr. Goldenberg's wife in settlement of the debt. Plaintiff's allegation is that when he granted the mortgage he was not indebted in the sum of LP. 600 and that the said sum comprises usurious interest. In the statement of claim the Plaintiff does not indicate what portion of the LP. 600 is in respect of interest; I must, however, mention that the Plaintiff did produce subsequently a statement purporting to show what he had paid in respect of the twelve promissory notes (totalling LP. 804). According to that statement (marked P. 3) the balance remaining due at the time he mortgaged his property was LP. 267.800 only.

The Defendant did not call evidence before the Court of trial but he cross-examined the Plaintiff and introduced documentary evidence in support of the averment made in his written defence to the effect that the greater part of the payments mentioned by the Plaintiff were either made on behalf of the Plaintiff and of a Mr. Hudada jointly, or were made in respect of other debts.

In order to complete the story outlined in the Statement of Claim, I would add that the record reveals that the real start of the complicated transactions between the Appellant and Mr. Goldenberg (Respondent) was a loan made by the latter to the former. In order to secure repayment of the loan, the Appellant granted to the Respondent a lease of a house belonging to him. In February, 1936, the lease was

rescinded and the Appellant gave the 12 promissory notes already mentioned. I might mention that there is no dispute as regards what took place prior to the giving of the promissory notes by the Appellant.

I must now introduce Mr. Hudada who was Appellant's partner in a leather factory until 1937.

Mr. Hudada also borrowed money from Mr. Goldenberg, granted the latter a lease of his house and, in fact, went through the transactions already described as having taken place between Mr. Darwish (the Appellant) and Mr. Goldenberg (the Respondent). The latter thus held a number of promissory notes signed by each of the two partners and he relies on a letter marked D. 2 dated 9.7.36 addressed by him to Darwish and Hudada which shows that it had been agreed that the indebtedness of the two partners should be merged.

Mr. Goldenberg's suggestion is that the Appellant decided in 1937 to put an end to his joint indebtedness with Hudada and that a compromise was arrived at fixing LP. 600 as the account still due by the present Appellant personally. A letter marked P. 13 addressed by Mr. Goldenberg to the Appellant was produced as bearing out Mr. Goldenberg's contention.

The present case is based solely on the Usurious Loans Ordinance, 1934, and the Plaintiff-Appellant cannot hope to reduce his liability under the mortgage unless he "satisfies" the Court that usurious interest has been charged and that, consequently, the transaction must be re-opened and an account taken.

It must be kept in mind that in a case brought under the Usurious Loans Ordinance the question in issue is whether there is sufficient reason for going behind a written document and having accounts taken. In other words, the decision to re-open a transaction and to have an account taken is only a preliminary step and does not finally fix the position of the parties.

The learned trial Judge refused in the present case to have accounts taken and stated that the Plaintiff's evidence having been contradicted by the Defendant, corroboration was necessary. The necessity for corroboration arises under section 6 of the Evidence Ordinance which lays down that no judgment shall be given in any civil case on the evidence of a single witness unless such evidence is uncontradicted or is corroborated by some other material evidence. The trial Judge held that corroboration was lacking and expressed his views in paragraph 7 of his judgment which reads as follows:—

> "The Plaintiff's evidence is not like a story which must be believed or rejected in its entirety, in which case corroboration of one part might be taken to render the truth of the whole story more likely.

His evidence relates to a number of separate payments and independent items, and corroboration with regard to one cannot be held to constitute corroboration with regard to all the others."

I am afraid that the learned trial Judge lost sight of the point that corroboration of each payment was not essential so long as there was corroboration of the repayment of such an amount as would necessarily mean that the balance remaining due was so far below LP. 600 as to satisfy him that usurious interest had been added to the capital remaining due.

It is therefore necessary to remit the case back to the District Court for a finding as to whether (in the light of the ruling given above) the Plaintiff did "satisfy" the Court within the meaning of section 2 of the Usurious Loans Ordinance, that usurious interest was included in the sum of LP. 600 which is the amount of the mortgage debt.

The judgment of the District Court is hereby set aside and the case remitted for a fresh finding (on the record as it now stands and without any further hearing).

The costs of this appeal will abide the event. If the Plaintiff succeeds, he will be entitled to costs of this appeal on the lower scale with LP. 10 advocate's attendance fee; such costs to be paid jointly by the Respondents. If the Defendants succeed, costs of this appeal will be paid by the present Appellant on the lower scale to each Respondent with LP. 5 advocate's attendance fee for the learned advocate who appeared once for the administrator of the estate of Zila Goldenberg.

Delivered this 3rd day of December, 1946.

British Puisne Judge.

HIGH COURT No. 58/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPLICATION OF:—

Lipa Lipman. PETITIONER.

V.

1. The Registrar, District Court, Jerusalem,
2. Chairman of the Municipal Commission, Jerusalem. RESPONDENTS.

One of 2 Respondents in High Court failing to show cause — Affidavit sworn by other than Respondent himself — Form of jurat.

Return to an order *nisi,* dated the 18th day of June, 1946, directed to the first Respondent, calling upon him to show cause why his order, dated the 20th day of May, 1946, should not be set aside and why the moneys deposited in the Land Court Jerusalem by Belpetrole (Egypt) Societe Anonyme Ltd. on or about the 22nd day of September, 1945, should not be released in accordance with law:—

1. High Court will not make order *nisi* absolute for reason only that one out of two or more Respondents, either through neglect or because he is neutral, failed to show cause or file an affidavit in reply.

2. a) Affidavits in reply should follow as closely as possible the usual forms and be sworn by Respondents themselves.

b) High Court may reject affidavit not sworn by Public Officers themselves but by a deputy or assistant of theirs; it will accept them only in certain circumstances, if satisfied that such a course is justified and not prejudicial to Petitioner.

3. Swearing an affidavit "to the best of one's knowledge and belief" is a matter which affects the weight to be attached to the affidavit but is not, by itself, a reason for rejecting it.

(*M. L.*)

REFERRED TO: H. C. 90/44 (1944, A. L. R. 526; 11, P. L. R. 483).

ANNOTATIONS: For cases where H. C. made the rule *nisi* absolute when no affidavit *at all* was filed see H. C. 111/45 (1946, A. L. R. 293) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONER: Goitein.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — S. Said.

ORDER.

An order *nisi* was issued on the 18th June, 1946, against the Registrar of the District Court of Jerusalem (first Respondent), calling upon him to show cause why an order made by him on the 20th May, 1946, should not be set aside and why certain moneys, deposited in the Land Court of Jerusalem by Belpetrole (Egypt) Societe Anonyme Ltd. as compensation for a property compulsory acquired, should not be released according to law.

The Petitioner was co-owner, with several other parties, of the property that was compulsorily acquired. The second Respondent named by Petitioner is the Chairman of the Municipal Corporation of Jerusalem, who signed an order of attachment of the moneys paid into Court. The attachment was made in order to enforce payment of rates

due to the Municipal Corporation in respect of the expropriated property.

The Registrar of the District Court of Jerusalem wrote to the Petitioner on the 20th May, 1946, informing him that he felt unable to order payment to the Petitioner unless an order be made by a competent Court releasing the attachment. It is this so-called "order" that the Petitioner seeks to have us set aside.

On the return day, learned counsel for the Petitioner (Mr. Goitein) submitted that the order *nisi* should be made absolute because the first Respondent (*i. e.* the Registrar) had not filed an affidavit in reply. Mr. Goitein further submitted that the second Respondent was not entitled to be heard because the affidavit filed on his behalf was not a proper affidavit for the purposes of these proceedings.

We do not consider that an order *nisi* should be made absolute in a case like the present one simply because the first Respondent does not show cause. We are of opinion that if one of the Respondents does show cause, the order cannot be made absolute until such Respondent has been heard. To hold differently would lead to the extraordinary result that a respondent who is probably more vitally interested than the first Respondent would not be heard because the first Respondent fails to show cause either through neglect or possibly because he is neutral.

Mr. Goitein's second submission is that the affidavit filed by the second Respondent is defective both in form and in substance and furthermore is not sworn by the proper person.

The affidavit is appended to a document signed by advocate Saba Said who holds a general authority to represent the second Respondent in all Courts. The said document is described as an application and sets out the reasons why the order *nisi* should not be made absolute. It contains, *inter alia,* an averment that the Petitioner has an alternative remedy. The affidavit appended to the so-called application is that of an Assistant Accountant of the Municipal Corporation who swears that, to the best of his knowledge and belief, matters contained in the application signed by Mr. Saba Said are true.

We agree with Mr. Goitein that the form of the reply is odd and is not in conformity with the model set out in the Schedule to the High Court Rules, 1937. We think that litigants would be well advised to follow as closely as possible the usual forms and avoid filing affidavits not sworn by them. In High Court No. 90/44, 11 P. L. R. p. 483, it was stated that the High Court had accepted affidavits sworn by the deputy or assistant to a Government official who is named as Respondent. We agree that such a concession is justified in certain

circumstances, the more so as there has been some doubt as to whether more than one affidavit may be filed by one respondent and this has made it awkward for Respondents who cannot personally swear to certain facts. On the other hand, we desire to make it clear that Respondents would be well advised not to assume that it is their undoubted right to file affidavits not sworn by themselves; unless the Court is satisfied that such a course is justified and is not prejudicial to the Petitioner, any such affidavit may be rejected. In the present case we are not quite convinced that it was necessary or justifiable to have the affidavit sworn by an Assistant-Accountant of the Corporation. We have, however, reached the conclusion that it would not be fair to treat the affidavit as non-existent, but we wish to make it clear that in future a less lenient view may be taken.

The last point we have to deal with is that in the affidavit filed by the second Respondent, the deponent swears "to the best of his knowledge and belief." This is a matter which affects the weight to be attached to the matters verified by the affidavit, and is not, by itself, a reason for rejecting the affidavit. It seems to us that there are cases where a respondent cannot be more positive, for example, where a question of pure law is in issue.

We decide to hear the advocate of the second Respondent but we express no opinion at the present stage as to how far he will be able to rely on the affidavit put in on behalf of his client.

Given this 22nd day of October, 1946, in presence of Mr. E. M. Manny for Petitioner and Mr. S. Said for 2nd Respondent.

British Puisne Judge.

CIVIL APPEALS Nos. 361 & 370/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw, J. and Curry, A/J.

IN THE APPEALS OF :—

C. A. No. 361/45:—

Sa'adia Menahem Moses. APPELLANT.

v.

Dr. Itzhak Rosner. RESPONDENT.

C. A. No. 370/45:—,

Dr. Itzhak Rosner. APPELLANT.

v.

Sa'adia Menahem Moses. RESPONDENT.

Reading into ground of appeal a submission not contained in it — Tenant's attack on power of attorney of landlord's agent not amounting to a denial of landlord's title — Question of estoppel.

Appeals from the judgment of the District Court of Tel-Aviv, dated 30.9.45 in Civil Appeal No. 64/45 from the judgment of the Magistrate in Civil Case No. 1204/44:—

1. Appellate Court should not read into a ground of appeal a question which cannot be read into it, and unless Court acts in exercise of its powers under Rule 316, Civil Procedure Rules, it should not consider such question.

2. Tenant's questioning agent's right to sue on landlord's behalf — not a denial of latter's title, and no question of estoppel arises, particularly when power of attorney under which the action was brought is not the same under which the agent purported to act when negotiating the lease.

(*M. L.*)

ANNOTATIONS:

1. On point 1 *cf.* C. A. 192/44 (1945, A. L. R. 161), C. A. 150/45 (1945, A. L. R. 455; 12, P. L. R. 345), C. A. 305/44 (1945, A. L. R. 272; 11, P. L. R. 613), CR. A. 158/44 (1945, A. L. R. 302; 12, P. L. R. 89) and annotations.

2. On point of estoppel see C. A. 280/45 (1946, A. L. R. 2) and annotations.

(*A. G.*)

C. A. No. 361/45:—

FOR APPELLANT: E. Z. Fellman.

FOR RESPONDENT: Weisel.

C. A. No. 370/45:—

FOR APPELLANT: Weisel.

FOR RESPONDENT: E. Z. Fellman.

JUDGMENT.

Shaw, J.: These two appeals have been consolidated with the consent of the parties. Both are from the judgment dated 30.9.45 of the District Court, Tel-Aviv, in Civil Appeal No. 64/45 whereby the judgment dated 16.4.45 of the Magistrate of Tel-Aviv in Civil Case No. 1204/44 was set aside and the case remitted for completion.

There appear to me to be only two points which need be dealt with. The first is whether the learned Judge correctly held that the landlord (who is the Appellant in Civil Appeal No. 361/45) had

raised the question of estoppel under his first ground of appeal.. That ground of appeal reads as follows:—

> "The learned Magistrate erred in holding that Appellant was not the holder of a legal power of attorney."

With great respect to the learned Judge I am quite unable to read into this ground of appeal any submission that the tenant was estopped from pleading that the landlord's agent had no authority to bring the action.

The learned Judge did not purport to act in exercise of his powers under what one may call the second part of Rule 316 of the Civil Procedure Rules. That is to say, he considered the question of estoppel although it had not been set forth in the notice of appeal, and without giving leave to urge it after good cause shown.

The second point is still more material. The learned Judge stated:—

> "I consider the attack on the agent's position as such is tantamount to an attack on or denial of the landlord's title and that in view of Respondent's original acceptance of Mr. Yaakov's position he is at all times estopped from attacking it and that consequently it was not a defence that the learned Magistrate should have entertained."

I find myself quite unable to agree. The tenant was not denying his landlord's title. He was questioning the right of the agent to bring an action on behalf of the landlord. That is quite a different thing to attacking the landlord's title. And it may further be observed that the tenant was not, in Civil Appeal No. 1204/44, attacking the power of attorney under which the agent purported to act when the lease was negotiated. He was attacking a later power-of-attorney (dated 29.2.44) which the agent purported to act upon when he brought the second action. So it could not even be argued that having accepted the validity of a power-of-attorney for the purpose of obtaining the lease the tenant was estopped from saying that it was invalid when it was a question of his being sued for eviction. It was not the same power-of-attorney.

I therefore find that the Magistrate rightly entertained the defence. The learned Judge did not find that the Magistrate's decision in regard to the power-of-attorney itself was wrong, and I am myself unable to come to any such conclusion.

The result is that the tenant's appeal (Civil Appeal No. 370/45) succeeds. The judgment of the District Court must be set aside and the Magistrate's judgment must be restored.. The landlord's appeal (Civil Appeal No. 361/45) must be dismissed. The Appellant in

Civil Appeal No. 370/45 (Dr. Itzhak Rosner) will have one set of costs in the fixed sum of LP. 15 (fifteen pounds).

Delivered this 11th day of October, 1946, in the presence of Dr. Weisel for Appellant and absent served Respondent.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

HIGH COURT No. 20/45.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE CASE OF:—

Bishara Eid Nasser & an. — PETITIONERS.

v.

Settlement Officer, Tiberias & 9 ors. — RESPONDENTS.

Amendment in register directed by Land Settlement Officer without formal application for revision of Schedule of Rights — Question of alternative remedy.

Where no formal application under sec. 33(4), Land (Settlement of Title) Ordinance for revision of Schedule of Rights was made, Land Settlement Officer has no power to direct an alteration or amendment not covered by sec. 68 of the Ordinance.

(*M. L.*)

ANNOTATIONS: *Cf.* C. A. 315/44 (1945, A. L. R. 23) for a recent decision that failure to exercise remedy under sec. 33(4) is fatal.

(*A. G.*)

FOR PETITIONERS: Cattan and Subhi Khadra.

FOR RESPONDENTS: No. 1 — Pinhassowitz.
Others — H. Atalla and Moghannam.

ORDER.

This High Court application arises out of a decision of a Land Settlement Officer. In his decision of the 2nd July, 1942, the Settlement Officer in dealing with Claim No. 9 by the Petitioners for parcel 15212/38 said:—

> "I think it is fair and reasonable to grant that parcel to them in acknowledgment of their registered title."

On 30th December, 1943, the Schedule of Rights was published in accordance with section 33 of the Land (Settlement of Title) Ordinance and the Petitioners appeared therein as owners of the said parcel which was shown as having an area of 8.284 *dunums*.

The Respondents allege that it was agreed Petitioners should have the parcel only on the condition that the area did not exceed 1/89 of the whole, which in fact was approximately an area of some 4 *dunums*. It appears that Respondents did not make then a formal application for revision of the Schedule of Rights as provided by section 33(4) of the Ordinance but they merely made a verbal objection to the Settlement Officer, writing subsequently on the 17th March as a result of which on 22.5.44 without any reference to the Petitioners he directed the Land Registrar to make an amendment to the entry in the register whereby the area of Petitioners' parcel was reduced from 8.284 *dunums* to 4.592 *dunums*. The Settlement Officer purported to do this under section 68(3) of the Ordinance. It is perfectly clear that this subsection does not apply to these circumstances. That subsection merely provides that where there is found a discrepancy between the boundaries or area of the parcels as appearing on the land and those shown on the survey plan or between the area of a parcel as furnished by a fresh survey, the area shown in the registration and the area found by calculation from the survey plan, the particulars of the survey plan shall prevail. It further makes provision for the Commissioner of Lands to authorise the Director of Surveys to amend the survey plan after the latter by investigation has established that there was an error in the original survey plan. This subsection gives no power whatsoever to the Settlement Officer to alter or amend the registration. Subsection 2 does not apply to the present case and the facts in this case cannot fall within the ambit of subsection 1 which gives a Settlement Officer power to authorise a Registrar to correct any clerical errors in the register and to introduce clerical amendments or additions thereto. This amendment to the registration goes much further than a mere clerical error. It follows, therefore, that the Settlement Officer had no power to make the order of 22.5.44.

Mr. Moghannam, however, argued on behalf of the Respondents that the jurisdiction of the High Court was discretionary and the remedies which it could grant were not given unless they were necessary in the interests of justice. He drew our attention to Exhibit 5 — a letter from the Settlement Officer to the advocate of the Petitioners explaining the reason for the amendment. It appears therefrom that

the Settlement Officer never intended Petitioners should have an area exceeding their 1/89 share. Mr. Moghannam points out that if we granted the petition we should be giving effect to a decision not intended by the Settlement Officer and therefore contrary to justice and equity. I must say I was considerably impressed by that argument for undoubtedly if we make the order absolute the result will be to make final a decision not intended by the Settlement Officer. However the position must also be surveyed from the point of view of the Petitioners. Petitioners are now faced with a decision which they cannot appeal or get amended. Respondents argued that Petitioners had an alternative remedy under section 66 of the Ordinance, but clearly that section does not apply to the circumstances in this case. Had the original decision been made as amended, it may well be that the Petitioners might have appealed successfully, whereas if this petition is not granted they will have lost, through no fault or negligence on their part, all possibility of obtaining a reversal of a decision with which they do not agree. On the other hand there can be no doubt that Respondents were negligent in not making a formal application for revision of the Schedule of Rights within the 30 days as provided under section 33(4). In such circumstances it can only be the party at fault who should suffer.

For the foregoing reasons the order *nisi* is made absolute and we grant Petitioners an inclusive fee of LP. 10.

Given this 4th day of June, 1946.

A/British Puisne Judge.

HIGH COURT No. 84/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Edwards, J. and Curry, A/J.

IN THE APPLICATION OF :—

Moshe Goldenberg. PETITIONER.

v.

The A/Chief Execution Officer, District Court, Tel-Aviv & an. RESPONDENTS.

Order of Rabbinical Court for payment of alimony pendente lite — Jurisdiction of Rabbinical Court disputed by husband — Function of

Chief Execution Officer — Power of Religious Courts to grant alimony pendente lite.

Return to an order *nisi*, dated the 16th day of September, 1946, directed to the first Respondent, calling upon him to show cause why his Orders dated 2nd September, 1946, given in Tel-Aviv Execution Maintenance File 309/45, should not be set aside and why he should not refrain from executing the judgment given by the Tel-Aviv Rabbinical Court in File No. 910/46, dated 25th *Sivan*, 1946, the order *nisi* is discharged:—

1. Chief Execution Officer when asked to execute an order of Rabbinical Court for alimony *pendente lite* is not called upon to embark on an enquiry as to whether Rabbinical Court had jurisdiction, even though judgment debtor was challenging the jurisdiction of that Court.

2. Religious Courts in Palestine have power to grant alimony *pendente lite* even where their jurisdiction is challenged by one of the parties.

(*M. L.*)

FOLLOWED: H. C. 105/45 (1946, A. L. R. 546; 13, P. L. R. 180).

ANNOTATIONS: See case followed and annotations in A. L. R.

(*A. G.*)

PETITIONER: In person.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Levanon.

ORDER.

In our view the Chief Execution Officer was right in holding that he was not called upon (when asked to execute an order for payment of alimony *pendente lite*) to embark on an enquiry as to whether the Rabbinical Court had jurisdiction even although the present Petitioner was challenging the jurisdiction of that Court. That question would, doubtless, be decided by the Rabbinical Court in the main proceedings before them.

The question of the power in a Religious Court in Palestine to grant alimony *pendente lite* has already been decided in H. C. 105/45 Vol. 13 P. L. R. page 180 between the same parties and we may say that we not only agree with but feel bound by that judgment. For those reasons we discharge the order *nisi* with costs to the second Respondent, *i. e.* fixed (inclusive) costs of LP. 10.—.

Delivered this 1st day of November, 1946.

British Puisne Judge.

HIGH COURT No. 78/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: FitzGerald, C. J. and De Comarmond, J.

IN THE APPLICATION OF —

Moshe Cohen. PETITIONER.

v.

A/Chief Execution Officer, District Court, Jerusalem & an. RESPONDENTS.

Fixed sum awarded as costs to several Respondents — One Respondent claiming whole sum — Proper remedy open to judgment debtor.

Return to an order *nisi*, dated 9th day of September, 1946, directed against the Respondents, calling upon them to show cause why the second Respondent, being only one of the parties to whom costs were awarded, should not receive only a part of the LP. 20 adjudged in the order, dated 30.4.45, in Execution File No. 261/45, and if so what part, the rule is discharged:—

Where Court dismissed an application with a fixed sum as costs and, although there were several Respondents, one of them claims the whole sum, High Court will not intervene, as Petitioner has an alternative remedy in Art. 6, Execution Law (reambiguous point in judgment).

(*M. L.*)

ANNOTATIONS:

1. On point that H. C. will not interfere when Petitioner has an alternative remedy see H. C. 117/45 (1946, A. L. R. 662) and annotations.

2. On Art. 6 of the Execution Law see I. T. A. 19/43 (1945, A. L. R. 549) and annotations.

3. Note the words used by the Court in this case: "The High Court will *rarely* intervene when there is another remedy."

(*A. G.*)

PETITIONER: In person.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Witkowski.

ORDER.

This is a return to an order *nisi*, arising out of the judgment given in High Court Case 25/46. The relevant passage of the judgment of Mr. Justice Edwards is as follows:—

"For the foregoing reasons I dismiss this petition and discharge the order *nisi* with fixed costs of LP. 20."

There were four Respondents to that petition. Apparently the Petitioner was aggrieved with this order and he succeeded in obtaining an order *nisi* in the High Court, which we emphasize was confined to directing the Respondents to show cause why the second Respondent, being only one of the parties to whom costs were awarded, should not receive only a part of the LP. 20 adjudged in the order dated 30.4.45.

We are sitting here as a High Court, and we must invite attention to Article 6 of the Execution Law which clearly contemplated the situation that the Petitioner avers has arisen, and which indicates the remedy that is open to him. We are not sitting here as a Court of Appeal. The High Court will rarely intervene when there is another remedy open to the Petitioner. In this case it has been indicated there is a clear alternative remedy in Article 6 of the Execution Law, and this being so we cannot make this rule absolute.

The rule is therefore discharged, with LP. 5 costs payable to the second Respondent.

Given this 6th day of November, 1946.

Chief Justice.

HIGH COURT No. 95/46.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

BEFORE: Shaw and Frumkin, JJ.

IN THE PETITION OF:—

Eliahu Mamman. PETITIONER.

v.

Chief Execution Officer & an. RESPONDENTS.

Proper practice and procedure for recovery of unsatisfied balance of mortgage debt — Enforcement of notarial instruments.

Petition for an order to issue to Respondent No. 1 to show cause why his order, dated 4.10.46 in Execution File No. 5141/38, should not be set aside, dismissed:—

1. Mortgages under Land Transfer Ordinance cannot be regarded as being in same category as notarial instruments for purposes of execution.

2. A mortgagee seeking to realise any unsatisfied balance cannot seize and sell through Execution Office any property of the mortgagor without obtaining a judgment from appropriate Court and then taking execution proceedings in usual manner.

(*M. L.*)

ANNOTATIONS: On execution of documents drawn up by a Notary Public see H. C. 41/44 (1944, A. L. R. 553; 11, P. L. R. 438), and annotations, see also H. C. 57/46 (1946, A. L. R. 591).

(*A. G.*)

FOR PETITIONER: Neder.

FOR RESPONDENTS: *Ex parte.*

ORDER.

This is an application for an order *nisi.*

The point before us has been very clearly stated and discussed by the learned Relieving President of the District Court, Tel-Aviv, sitting in his capacity as Chief Execution Officer, in Execution file No. 5141/38, in his order dated 4.10.46, against which this application is brought, and we think that we cannot do better than to quote what he said:—

> "Mr. Neder raises a novel point in execution proceedings. It may be illustrated thus: A owns Whiteacre and Blackacre and mortgages Whiteacre to B for LP. 1000. B takes execution proceedings and Whiteacre is sold. Only LP. 700 is realised. Mr. Neder argues that B can, without recourse to the Courts, apply to the Chief Execution Officer in the same execution proceedings to sell Blackacre in order to realise the deficit of LP. 300. The position here is that there were two mortgages, but the principle is the same. The property was transferred to the first mortgagee in full satisfaction of his mortgage debt and interest. There was thus nothing left for the second mortgagee. Mr. Neder contends that the second mortgagee can without recourse to the Courts, apply in the same execution file to sell other property belonging to the mortgagor.
>
> The argument is based on Articles 69 and 72 of the Ottoman Notary Public Law. Those Articles make provision for the taking of execution proceedings in respect of certain instruments prepared and authenticated with all due formalities by a Notary Public. The solemnities attaching to such instruments are a guarantee that they faithfully represent the real intention of the parties and accordingly execution proceedings may be instituted in respect of them without prior recourse to the Courts.
>
> Article 69 deals with the execution of notarial acknowledgements of debts and authorises the sale of movable or immovable property in satisfaction of the debt as in the case of a judgment debt.

Article 72 deals with the execution of secured debts by authorising proceedings *against the secured property*. When it is said in lines 9, 10 and 11: "The Execution Officer will seize the movable or immovable property left as security and sell them by public auction in accordance with section 69", all that is meant in my opinion is that the sale of the property in question *i. e.* the secured property, will be sold in accordance with the Execution Law.

The mortgage in respect of which the present application is made was not a notarial instrument. It was of course, made in pursuance of the provisions of the land Transfer Ordinance, Chapter 81 of the Laws. Mr. Neder argues that the legal requirements of Chapter 81 confer upon the transaction a special status, putting it in the same category as a notarial instrument so that execution proceedings may be taken in respect of it by the attachment of other property belonging to the mortgage *. Whilst this proposal might in the majority of mortgage cases be eminently reasonable inasmuch as in the majority of such cases the mortgagor admits the debt (as he does in the case under consideration), it is a novel departure from ordinary practice and I am of opinion that neither the execution law nor the Notary Public Law sanctions such a procedure.

For instance, Article 72 of the Ottoman Notary Public Law which deals with loans of money evidenced by notarial instruments and granted on the security of immovable property authorises the execution office to seize and sell the immovable property "left as security"; it does not authorise the execution office to seize and sell *other* property. Even if it did I would not agree that mortgages under the Land Transfer Ordinance can be regarded as being in the same category as notarial instruments for the purposes of execution.

The mortgagee can, of course, claim the balance of a mortgage debt which remains unsatisfied after the realisation of the security — see section 7 of the Mortgage Law (Amendment) Ordinance, Chapter 95, amending Article 11 of the Ottoman Law concerning the mortgage of immovable property, 1331 — but the word "claim" must mean claim before a competent Court. In my opinion it is necessary for the mortgagee in the present case to obtain a judgment for the unsatisfied balance of the debt before the appropriate Court and then to take execution proceedings in the usual manner. I therefore refuse the application."

After hearing Mr. Neder, for the Applicant, we find ourselves in complete agreement with the views of the learned Relieving President. The application must, therefore, be dismissed.

Given this 8th day of November, 1946.

British Puisne Judge.

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* *Scil.:* Mortgagor.

CRIMINAL APPEAL No. 109/46.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL.

BEFORE: De Comarmond, J., Curry, A/J. and Frumkin, J.

IN THE APPEAL OF :—

Ahmad Mohammad Dardas & an. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Food Control prosecution — No right of election — Reg. 9 Defence (Amend. of Food Control Ord. 1942) Regs. 1944 — "Notwithstanding anything contained in sec. 3, 6 or 7 of the M. C. J. O., 1939" — Food Control (Restriction of Movement) Order, 1944, "between the frontiers of Palestine and/or any village, Tribal unit, settlement, municipal or local council area" — Palestine Standard flour — Hockin v. Ahlquist Bros. Ltd. — Failure to produce exhibit — Accomplices, corroboration.

Appeal from the judgment of the District Court of Jerusalem in its appellate capacity, dated the 23rd day of September, 1946, in Criminal Appeal No. 60/46 whereby an appeal from the judgment of the British Magistrate's Court of Jerusalem, dated 28.6.46 in Criminal Case No. 3955/46, whereby the 1st Accused was sentenced to pay a fine of LP. 25 or two months' imprisonment on the 1st count and to pay a fine of LP. 75 or four months' imprisonment on the 2nd count and the 2nd Accused to pay a fine of LP. 15 or six weeks imprisonment on the 1st count, was dismissed; appeal dismissed:—

1. In a prosecution for a food control offence the offender may be tried by a Magistrate's Court without being entitled to elect trial by the District Court.

2. Although it is advisable that the prosecution should bring an exhibit or sample of the exhibit before the Court, failure to do so need not be fatal to the case.

(*A. M. A.*)

FOLLOWED: Hockin *v.* Ahlquist Bros., Ltd., 1943, 2 All E. R. 722.

ANNOTATIONS:

1. The ruling on the first point confirms the decision in CR. A. D. C. Ha. 42/44 (1944, S. C. D. C. 158).

2. See *ibid.* for the interpretation of an order worded similarly to that under consideration in this case.

3. For authorities on the right of election generally see note 3 to CR. A. D. C. Jm. 124/45 (1946, S. C. D. C. 30); *cf.* also CR. A. D. C. T. A. 5/46 (*ibid.*, p. 447) and CR. A. D. C Jm 32/46 (*ibid.*, p. 459).

4. On the second point *vide* the case quoted and *cf.* CR. A. D. C. Jm. 98/46 (1946, S. C. D. C. 649) and note thereto.

(*H. K.*)

FOR APPELLANTS: F. Nazzal.

FOR RESPONDENT: Stulz.

JUDGMENT.

This is an appeal by leave from the District Court of Jerusalem against a judgment given on the 23rd of September, 1946, in Criminal Appeal No. 60/46, dismissing an appeal from the judgment of the British Magistrate's Court of Jerusalem. The two Appellants, together with two other parties, were charged with having contravened the Food Control (Restriction of Movement Order), 1944, as amended by the Food Control (Restriction of Movement) (Amendment) Order (No. 2) of 1944. The particulars of the charge were that the four Accused attempted to move out of the boundaries of the Jerusalem Municipal area a number of sacks containing Palestine Standard Flour without a written permit, issued and signed by the Food Controller or other authorised official. The first Appellant was also charged together with another person for being in possession of a controlled article (Palestine Standard Flour) in circumstances which raised a reasonable suspicion that they had bought the flour by way of wholesale without the necessary authority. The case for the prosecution put very shortly was, that the first Appellant provided the money with which the flour was bought and subsequently rode on the truck which conveyed the flour outside the Municipal boundary and which was driven by the second Appellant. The truck was stopped by Food Control Inspectors outside the municipal area and the flour was seized.

The first ground of appeal was that the Appellants were not given the opportunity to elect for trial before the District Court. This ground was argued before the learned Relieving President and he rejected it but in so doing showed some hesitation as to the interpretation to be placed upon section 10 of the Food Control Ordinance, 1942, as replaced by Regulation 9 of the Defence (Amendment of Food Control Ordinance, 1942) Regulations, 1944. We find no difficulty in holding that the words "notwithstanding anything contained in section 3, 6 or 7 of the Magistrates' Courts Jurisdiction Ordinance, 1939", are wide enough and make it quite clear that an offender may be tried by a Magistrate's Court without being entitled to the privilege of electing for trial by the District Court as provided in section 6 of the Magistrates' Courts Jurisdiction Ordinance.

The second ground of appeal relates to the wording of paragraph 2 of the Food Control (Restriction of Movement) Order, 1944, as subsequently amended. The gist of the difficulty lies in the words "between the frontiers of Palestine and/or any village, tribal unit, settlement, municipal or local council area." In this particular instance the flour was being moved out of the Municipal area of Jerusalem and the learned

advocate for the Appellants has submitted that the wording of the Order is obscure and that it is not clear that an offence was in fact committed. The learned Relieving President conceded that the wording was not very felicitous but he pointed out that the second sub-paragraph clarifies the meaning of the first paragraph and makes it clear enough that a person moving Palestine Standard Flour out of a municipal area without a movement permit commits an offence. We agree with this view and hold that the second ground of appeal fails.

The third and fourth grounds argued by the learned advocate may be dealt with together. These grounds are based on the allegation that there was no proof that the flour was Palestine Standard Flour and furthermore that a specimen of the flour should have been produced. After reading the evidence of the Chief Food Inspector, Mr. Finn, we are satisfied that there was ample justification for the Courts below to be satisfied that the flour was of the type alleged in the charge. It is true that no specimen of the flour was produced in Court but as pointed out by the learned Relieving President this is not essential. The case quoted in the judgment of the District Court is quite to the point. It is the case of Hockin *v.* Ahlquist Brothers Ltd. (1943) 2 A. E. R. p. 722. We would add that at the time of the trial before the Magistrate, the flour was still lying in store and the Accused were therefore not deprived of the facility of having it examined if they had so desired. We would, however, endorse the learned Relieving President's remarks that it is advisable for the prosecution whenever possible to bring before the Court the exhibit or at least a sample of the exhibit.

The learned advocate for the Appellants then addressed himself to the question of sufficiency of evidence against Appellant No. 1. His main point is that the only evidence against this Appellant is that of Arafa Ata el Natch, who stated that he received money from the Appellant, went to buy the flour, had the flour loaded on the truck and came back with the truck to a spot where he met the first Appellant who subsequently drove away in the truck. On behalf of the first Appellant it was urged that the witness Arafa was an accomplice and that his evidence should have been corroborated. The learned Magistrate found that Arafa was not an accomplice but added that, even if he were, there was corroboration. The learned Relieving President upheld the Magistrate and said that Arafa was not an accomplice, and we are satisfied that this ruling is correct in the circumstances of this case. After taking cognisance of the evidence against this Appellant, we find no reason to doubt that there was sufficient evidence to find him guilty beyond any reasonable doubt.

With regard to Appellant No. 2, who was the driver of the truck, the burden of the argument submitted to us is that he may have been negligent in not insisting to see the movement permit but that on the whole the evidence was not sufficient to convict him. The learned Magistrate who heard the case paid attention to this line of argument and pointed out that the second Appellant knew quite well that a movement permit was necessary and in spite of that he took no step to make sure that there was such a permit. The learned Magistrate did not believe the story that one of the Accused (who has not appealed) had given the driver his word of honour that there was a permit, and we find no reason for interfering with this finding of fact which, in our opinion, was quite justified. In conclusion, therefore, the appeal stands dismissed.

Delivered this 27th day of November, 1946.

British Puisne Judge.

CIVIL APPEAL No. 206/45.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Mustafa Dawud Abd el Hamid El Dasuqi & 11 ors. APPELLANTS.

v.

'Adel Khalil 'Abd el Hamid El Dasuqi & 4 ors. RESPONDENTS.

Leave to appeal in Land Settlement — Appellant cannot be heard on grounds in respect of which no leave granted — P. C. L. A. 21/43 — Remedy where partial leave granted — C. A. 44/36.

Appeal from the decision of the Settlement Officer Tulkarm, given in Faradisia/16 on 26th February, 1945; preliminary ruling:—

The Appellant in Land Settlement proceedings may only be heard on the points on which leave to appeal has been granted. If the Settlement Officer grants leave on some points only, application may further be made to the Chief Justice.

(*A. M. A.*)

REFERRED TO: P. C. L. A. 21/43 (not reported).

DISTINGUISHED: C. A. 44/36 (4, P. L. R. 91; 8, C. of J. 462; 2, Ct. L. R. 49).

ANNOTATIONS: "With regard to the point ..., that really does not arise on any of the points of law on which the District Court gave leave ..."; C. A. 110/39 (6, P. L. R. 558; 1939, S. C. J. 506; 7, Ct. L. R. 10). See also C. A. 86/43 (10, P. L. R. 204; 1943, A. L. R. 105).

(*H. K.*)

FOR APPELLANTS: Nos. 1 & 11 — A. L. Salah.
Rest — W. Salah.

FOR RESPONDENTS: Nos. 1—4 — Scharf for Mrs. Rubinstein.
No. 5 — In person (A. L. Salah says that he also represents Respondent No. 5).

RULING.

At the hearing of this appeal from a decision of the Land Settlement Officer, Tulkarm, in case No. Fardisia/16, a preliminary objection has been taken by Mr. Scharf, for the Respondents, that the Appellants are entitled to be heard only on those points arising from the decision of the Settlement Officer on which that Officer has himself granted leave to appeal.

The facts are that the Appellants' advocate submitted an application for leave to appeal under section 63(1), Land (Settlement of Title) Ordinance (as amended). In the written application were set out, *seriatim*, eleven distinct grounds of appeal. The application went on to say:—

> "Whereas Your Worship has stated that three pertinent points of law have been raised by advocate for Applicants it is prayed that leave to appeal to the Supreme Court be granted."

In his order on the application the Settlement Officer granted leave to appeal on the three pertinent points of law raised by himself in his decision and referred to in the last paragraph of the application, and also on two other points, namely 5 and 7 raised in the application.

Walid Eff. Salah, for the Appellants, contends that the Settlement Officer had no power partly to refuse and partly to grant the application, but should have granted the application in its entirety or refused it in its entirety; but that, in any event, by partly granting the application there has not been an entire refusal and he cannot now apply to the Chief Justice for leave to appeal. Walid Eff. Salah goes on to argue that, having granted the application in part, the Appellants are entitled to attack the whole of the decision of the Land Settlement Officer before this Court. It seems to us, however, that we are precluded from hearing any appeal from the Land Settlement Officer unless

leave to appeal has been granted either by the Settlement Officer or by the Chief Justice.

The position at the moment is that the Appellants have been able to show that they have obtained leave on no more than five grounds as we have already mentioned. We consider that, the Applicants being dissatisfied with the decision of the Settlement Officer in refusing to grant them leave to appeal on the grounds other than the five mentioned, should have approached the Chief Justice. Mr. Scharf has referred to P. C. L. A. No. 21/43, where similar procedure seems to have been successfully adopted, the only difference being that as the Law then stood, the application was made to the President of the Land Court instead of to the Chief Justice. We do not consider that Civil Appeal No. 44/36, Vol. IV, P. L. R. p. 91, can be invoked by the Appellants as it dealt with a different Ordinance, namely, the Magistrates' Courts Jurisdiction Ordinance, 1935.

For these reasons we think that the Appellants must be limited in ing this appeal to the five grounds on which the Settlement Officer hem leave to appeal.

this 2nd day of December, 1946.

British Puisne Judge.

CIVIL APPEAL No. 1/46.

SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

EFORE: FitzGerald, C. J. and Shaw, J.

IN THE APPEAL OF:—

The Palestine Jewish Colonization Association. APPELLANT.

v.

Nathan Katz. RESPONDENT.

Merger — Arbitration clause in contract for sale — Merger in sale — Sale by renunciation — Construction of contracts, Legott v. Barrett — Onus of proof against merger.

Appeal from the order of the District Court of Haifa in Civil Case No. 201/45, dated the 7th day of December, 1945, allowed:—

An agreement to make a disposition is merged in the deed completing the transaction.

(*A. M. A.*)

FOLLOWED: Leggott *v.* Barrett, 1880, 15 Ch. D. 306, 51 L. J. (Ch.) 90, 43 L. T. 641.

ANNOTATIONS:

1. The order of the District Court is reported in 1945, S. C. D. C. at p. 672.

2. *Cf.* C. A. 262/43 (1943, A. L. R. 776) which was relied upon by the District Court and the notes thereto.

(*H. K.*)

FOR APPELLANT: Wittkowski.

FOR RESPONDENT: Elhanani.

JUDGMENT.

This is an appeal from the judgment dated 7th December, 1945, of the District Court of Haifa, in Civil Case No. 201/45, allowing an application for the appointment of an arbitrator.

The facts were briefly as follows:—

On 18th March, 1931, the parties entered into an agreement for sale of certain plots of land by the Respondent to the Applicant. Clause 11 thereof provided for a reference of all disputes, suits and differences arising out of the agreement to arbitration; each party was entitled to appoint his own arbitrator.

On 25th September, 1933, the parties executed an agreement for a mortgage to secure the Appellant Company in respect of the indebtedness of the Respondent arising out of the disposition of the property. That agreement for mortgage was not before the lower Court, but the Court was made cognisant that one of its clauses was as follows:—

> "The present mortgage agreement only alters the conditions of payment by the former, Nathan Katz, to the PICA Co. as provided for in the contract for sale dated 18th March, 1931, and its additional clauses. All other clauses of the said contract for sale remain in force."

On the same date (*i. e.* 25.9.33) and pursuant to their agreement, the parties made a formal deed of mortgage (Ex. B.) which was subsequently registered.

On 28th December, 1933, the land was transferred by the Appellants, under a form of renunciation of title (Ex. A) in favour of the Respondent executed in the course of land settlement operations. The history of the transaction is recited in that document by reference to the agreement for sale, the agreement for mortgage and the deed of mortgage. It was provided that the deed of mortgage should come into effect upon the signing of the renunciation.

It was submitted for the Respondent before the lower Court that the arbitration clause in the agreement for sale was expressly kept

alive, and was still binding between the parties, by virtue of the condition quoted from the agreement for mortgage which, it was submitted, remained in force. It was argued for the other side that there was a merger in the deed of mortgage, and that accordingly there was no arbitration clause in existence.

The first point that strikes us is the failure to include any arbitration clause in the deed of mortgage (Exh. B) which was made on the very day that the agreement for mortgage had been made. It seems to us to be highly improbable that the parties should have forgotten to include such an important condition if their common intention was that it should be included. It is more reasonable to suppose that the omission was made intentionally. It may well be that the parties when they signed the agreement for mortgage wished to guard themselves from any suggestion that by signing that agreement they were waiving the various clauses in the agreement for sale. There is no reason for assuming that the parties wished the various clauses in the agreement for sale, dated 18.3.31, to be operative after the actual sale (which was in this case a renunciation) had taken place.

The normal rule has been stated in the case of Leggott *v.* Barrett (15 Ch. D. 1880, p. 306) where the following appears in the judgment of James, L. J., at p. 309:—

> "... but I cannot help saying that I think it is very important, according to my view of the law of contracts both at Common Law and in Equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself."

The party who was alleging that there was no merger in this instant was the Respondent, and we think that the onus of showing that there was no merger rested upon him. So it was really for him to produce the agreement for sale, and the agreement for mortgage, in order to show that the mortgage and the renunciation were not co-extensive with those executory deeds.

In place of the agreement for sale, and the agreement for mortgage, we now have a formal mortgage deed (Exhibit B) and a renunciation of title (Exhibit A), neither of which documents provides for any reference to arbitration.

We can find nothing which takes this case out of the normal rule, and in our judgment the learned Judge erred in holding that there was no merger.

In the result the appeal must be allowed with costs on the lower

scale to include an advocate's attendance fee in this Court of LP. 10.—. The order for costs and advocate's fee in the lower Court must be reversed. That is to say, the Appellant will have costs on the lower scale in the lower Court to include LP. 4 advocate's attendance fee.

Delivered this 4th day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 247/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards, J. and Curry, A/J.

IN THE APPEAL OF:—

Abdulla Hasan Quadoura Abu Ramadan & 6 ors. APPELLANTS.

v.

Jum'a Bin Mustafa Masri. RESPONDENT.

Land Settlement — Evidence at variance with memorandum of claim — Estoppel — Verbal claim — Matters not raised before Settlement Officer cannot be taken on appeal.

Appeal from the decision of the Asst. Settlement Officer, Gaza Settlement Area, dated 27.5.46, in Case No. 10/Beit Lahiya, dismissed:—

Where a claimant in Land Settlement proceedings makes a verbal claim which is reduced to writing, he is not estopped from showing that his case rests on a different basis from that made in the verbal claim.

(*A. M. A.*)

ANNOTATIONS: Compare C. A. 303/43 (1944, A. L. R. 486) and note 1; see also C. A. 249—253/45 (13, P. L. R. 173; *ante*, p. 612).

(*H. K.*)

FOR APPELLANTS: S. Bseisso.

FOR RESPONDENT: A. Daoudi — (by delegation from A. Ghuneim).

JUDGMENT.

This is an appeal from a decision of the Assistant Land Settlement Officer, Gaza, in Case No. 10/Beit Lahia, in which he dismissed the claim of the present Appellants and ordered registration in the name of the Respondent in two *qirats* of land.

Mr. Bseisso, for the Appellants, says that in 1914 his clients agreed

to buy from a lady, named Amna, the two *qirats* and that they had exercised possession for over 12 years after which the Respondent arbitrarily took the land from them. The Appellants brought a possessory action in 1934 against the Respondent in the Magistrate's Court, Gaza, but they were referred to the Land Court. In 1937 Land Settlement operations commenced and they had then to submit their claim to the Settlement Officer.

The Appellants rely on an alleged agreement of sale and on possession. They failed to establish their claim before the Settlement Officer, and it is impossible for us to say that on the material before him the Land Settlement Officer came to a wrong conclusion. The question is entirely one of fact for him and we cannot change his finding. The sole question now is whether there was sufficient material before the Settlement Officer to entitle him to award the land to the Respondent. Much has been made of the fact that, at the hearing, the Respondent gave evidence which seemed rather to change the nature of his case from what it had appeared in his memorandum of claim. The Respondent verbally made his claim to the Settlement Officer (or his clerk) who reduced it to writing. While it is true that this Court has held that, in cases before District Courts, Land Courts and Magistrates' Courts parties must be held to their statements of claim, we think that different considerations apply in Land Settlement proceedings. To begin with, there was no statement of claim in the accepted sense of the term. As we have said, the Respondent verbally told the Settlement Officer or his clerk what his claim was. We therefore agree with the Assistant Settlement Officer in thinking that the Respondent was not estopped when he went before the Land Settlement Officer from showing that his case rested on rather a different basis, than that of the verbal statement which he made to the Settlement Officer or his clerk.

At the hearing the Respondent based his claim on inheritance from his mother. It is clear that the original owner of the land was the grandfather of the Respondent. The grandfather had two daughters, one of whom was the mother of the Respondent and the other, of course, his aunt. There was evidence of an independent witness who knew the Respondent's mother and aunt. This witness, Muhammad Mustafa er Radi, deposed that, when he returned to the village from military service about 1917, he found the Respondent in possession of the two *qirats*. He further deposed that these two *qirats* were owned by Amna and her sister, that is to say, by the Respondent's aunt and his mother. Mr. Bseisso has referred to the judgment of the Magistrate of Gaza in C. C. 1235 of 1934 in which the present Respondent was

the successful Defendant. In that judgment the Magistrate said that the Respondent took possession of the one *qirat* by inheritance from his mother, Halime, and of the second *qirat* by way of lease from his aunt Amna. Mr. Bseisso's suggestion is that, at any rate, as regards one *qirat* (the *qirat* of Amna) there is no proof that the Respondent was anything other than a tenant. This matter does not seem to have been raised before the Settlement Officer and there seems to have been no claim by Amna, or anyone representing her, to this *qirat*.

In these circumstances we do not think that we ought to disturb the finding of the Assistant Settlement Officer who had dismissed the claim of the Appellants and had ordered registration of the shares in dispute in the name of the Respondent.

The appeal is accordingly dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.

Delivered this 13th day of December, 1946.

British Puisne Judge.

CIVIL APPEAL No. 71/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: De Comarmond, J. and Curry, A/J.

IN THE APPEAL OF :—

Hilmi Hasan Salih el Bakkar & 77 ors. APPELLANTS.

v.

The Attorney General on behalf of the Government of Palestine. RESPONDENT.

Prescription — Quarries — Whether long possession sufficient without evidence of cultivation, Land Code, Art. 78, C. A. 65/40, C. A. 21/43 — Quarried land does not become mulk — Land Settlement Ord. sec. 54 — C. A. 238/37.

Appeal from the judgment of the Settlement Officer, Nablus Settlement Area dated 30.1.46, in Case No. 1/Nablus, dismissed:—

1. A claim of prescription under Art. 78 of the Land Code cannot succeed without evidence of cultivation.

2. C. A. 238/37 cannot be applied in Land Settlement against the Govern-

ment where the latter contend that the land was never granted to an individual.

(*A. M. A.*)

FOLLOWED: C. A. 65 & 76/40 (7, P. L. R. 288; 1940, S. C. J. 168); C. A. 21/43 (10, P. L. R. 231; 1943, A. L. R. 331).

DISTINGUISHED: C. A. 238/37 (5, P. L. R. 37; 1938, 1 S. C. J. 32; 3, Ct. L. R. 63).

ANNOTATIONS:

1. On the first point see, in addition to the cases cited, C. A. 306, 311 & 318/44 (*ante*, p. 211), where C. A. 65 & 76/40 and C. A. 21/43 (*supra*) are also referred to.

2. *Vide*, on the second point, C. A. 342 & 321/45 (13, P. L. R. 341; *ante*, p. 396).

3. As regards the possibility of inferring ownership from possession and the ruling in C. A. 238/37 (*supra*) *cf.* C. A. 309/43 (1944, A. L. R. 676).

(*H. K.*)

FOR APPELLANTS: A. Shehadeh.

FOR RESPONDENT: Asst. Government Advocate — (Hazou).

JUDGMENT.

De Comarmond, J.: The Appellants have for a number of years been working stone-quarries on the hill which lies to the north of Nablus. When Settlement proceedings began, each of the Appellants claimed the land he was quarrying together with extensions north and south, *i. e.* each claim embraced a quarry together with adjacent areas not yet quarried. The total area of all the individual claim covers almost the whole of Block 24054. The land in Block 24054 is not suitable for cultivation. It is not registered in the *Tabu* but is shown as State Land in the Rural Property Tax Registers.

The Appellants' claims were resisted by the Government and the Settlement Officer decided the case after hearing arguments on the legal aspects of the case. Mr. Hashwi, who represented the Government, admitted that the Claimants or other persons may have been quarrying prior to 1928 and for a longer time than anybody remembers, and the Settlement Officer ruled that it was not necessary to adduce evidence establishing quarrying as a form of occupation of the lands from time immemorial.

The Appellants' advocate submitted to the Settlement Officer that the land was of the *mulk* category and that his clients were owners thereof; in the alternative, the submission was that the land was *miri* land. In either case, the contention was that the possession of

the Claimants and their ancestors had begun before the occupation by the British.

The Settlement Officer mentions that the Appellants did not claim to have acquired the land by cultivation and prescription under Article 78 of the Land Code. When arguing the appeal, Mr. Shehadeh (for the Appellants) advanced the theory that Article 78 has been impliedly repealed and that cultivation is no longer an essential requisite for making title under Article 78. I am of opinion that the Appellants cannot invoke Article 78 on the strength of quarrying operations only. In C. A. No. 65/40 7 P. L. R. 288, and C. A. No. 21/43, 10 P. L. R. 231, it was held that cultivation is an essential ingredient. The first mentioned case laid down that cultivation means such regular cultivation as is reasonably possible having regard to the nature of the land and the crops for which it is suitable.

Mr. Shehadeh has also submitted that the long occupation by his clients and their ancestors for quarrying purposes created a presumption that the land, if *miri* land, had been granted by Government and that Government is estopped from denying his clients' title. I fail to see on what legal principle such a submission rests.

With regard to the suggestion (it amounts to no more) that the land is *mulk,* I find no reason to disagree with the Settlement Officer's view that such a proposition is not tenable. The Appellants have no title deed or *Firman* establishing that the land is *mulk.* Mr. Shehadeh referred to the principle that a well sunk on *mewat* land becomes *mulk* property: this is only true if the well is sunk with the permission of the State, and I see no merit in the argument that a person who quarries on State land may claim that the quarry has become his *mulk* property because there has been, so far as is known, no intervention by Government.

Put shortly, the Appellants' case is that long occupation of State land confers a title by prescription. I am unable to agree that the local law warrants such a contention. Section 54 of the Land (Settlement of Title) Ordinance, Cap. 80, does empower a Settlement Officer to register as owner a person who has been in possession of land where no adverse registration exists but it does not go so far as to derogate from the provisions of Article 78 of the Ottoman Land Code.

The only difficulty I have experienced in the present case is due to the decision in C. A. No. 238/37 (1938) P. L. R. p. 37, which was a Land Court case in which the Appellant claimed ownership on the ground of inheritance and possession. In that case, the Court of Appeal upheld the principle that where neither party has any registered title nor any document of title, evidence of possession may be submitted

and the Court may infer title from the fact of possession. I would mention that C. A. No. 238/37 was not quoted to us by the learned advocates. After consideration, I have reached the opinion that C. A. No. 238/37 does not affect a case under Cap. 80 where the Government has raised the point that the land was never granted to any individual.

The appeal is dismissed with costs on the lower scale and an advocate's attendance fee of LP. 5 (to be paid jointly and severally by the Appellants).

Delivered this 23rd day of December, 1946.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 203/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

1. Mary Bandar Elias Mary Mass,
2. Elias Rashid Haddad & 4 ors. RESPONDENTS.

Expropriation of Land — Determination of amount of compensation — Matters to be taken into account.

Appeal from the judgment of the Land Court of Haifa, in Land Case No. 2/44, delivered on 24th May, 1946, dismissed:—

In determining the value of land expropriated, and in the absence of actual sales in the locality, the Court may take into account genuine offers to purchase although they did not terminate in sales.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 489.

2. *Cf.* the cases cited in the note to the judgment under appeal.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Wicks).

FOR RESPONDENTS: No. 2 — Weinshall & S. Shamma.
Nos. 1, 3, 4, 5 and 6 — Absent — served.

JUDGMENT.

Frumkin, J.: This appeal arises out of a difference between the parties as to the amount payable by Government for the expropriation of certain land in Safad. There are several modes of arriving at values of property expropriated. There is the basis of market value. It is what a willing purchaser would pay to a willing vendor for a similar property. Another way is the construction basis. It is to find out what would be the cost of constructing a new building instead of the one expropriated. Thirdly there is the calculation on the capitalisation system. It is to find out what is the income derived from the property, thus arriving at the capital value of the property. The parties in this case have agreed that the value of the property should be decided upon by this last mode.

Without expressing any opinion whether this is the right or the best way of calculation and if there are no other ways and forms, we accept this as basis, as did indeed the Court below. The difference between the parties is as to the rate of interest to be taken as basis in order to reach the capital value of the property in dispute. They agreed that the net annual income of the property in question is LP. 248 *p. a.* The Appellant brought evidence to prove that similar properties yield 7% *per annum,* and that in arriving at the capital value of the property one should take the amount of LP. 248 as 7% of the capital, while the Respondent produced evidence that similar properties yield only 3% and therefore the amount of LP. 248 should be taken as representing 3% of the capital value. The learned Judge in the Court below accepted the latter rate and the appeal by the Attorney General is based mainly on the point that the learned Judge erred in accepting the evidence as to 3%.

In scrutinizing the evidence we find that the sales of property, which, according to the evidence of the Appellant yielded a net income of 7% were properties outside Safad and we find that one cannot take yieldings of property in places like Tel-Aviv and Haifa for calculating what is the net income of properties in a small place like Safad.

Crown Counsel for the Appellant contends that in arriving at the conclusion that property in Safad yielded only 3% or something in its vicinity there were two erroneous calculations, (a) that the one sale which took place in Safad and for which evidence was given, namely the house of the Scotch Mission, was sold at a special price and does not represent the real value of the property. The answer to that is that, even if one takes the value of the property to be the one fixed

by the valuer and not the actual sale price, the rent of that property will still be something near 3½ or 4% and not 7%.

The second basis which to the mind of the Crown Counsel was erroneous is that the Court should not accept evidence as to offers which were to his mind not *bona fide*. I think the learned Crown Counsel is wrong also in this contention. In the absence of actual sales in a particular locality, there is no reason why one should not try to find out the proper value of property through genuine offers, and not every offer which does not terminate in a real sale can be regarded as not being *bona fide*. It is a matter of credibility and weight of evidence for a Court of trial to come to the conclusion whether or not the offers made were genuine and serious, and not fabricated or camouflaged, for the sake of obtaining fictitious values. In this case the learned Judge of trial did not accept that the offers testified to by what he considered reliable witnesses were not genuine.

We see therefore no reason to interfere with the judgment given by the Court below whereby it fixed the value of the property in dispute on good evidence.

The appeal must therefore be dismissed with costs on the lower scale to include LP. 15 advocate's fees for attendance at the hearing.

Delivered this 23rd day of December, 1946.

Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 239/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Aziz Sweidan. RESPONDENT.

Export licence — Seizure and forfeiture — Application against seizure — Proof of ownership — Estoppel — Notice of forfeiture need not be sent to owner only — Ownership in goods — When title passes —

Intention of parties — Import, Export and Customs Powers (Defence) Ord., sec. 6, as amended.

Appeal from the judgment of the District Court of Haifa, dated the 12th of June, 1946, in Civil Case No. 39/46, allowed:—

1. Only the owner of goods seized by the customs may sue for their return.

2. At the conclusion of a sale the property in the goods passes even if the price is not paid.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 57[2].

2. For authorities on forfeiture under the Customs legislation see note 1 in A. L. R. to C. A. 320/44 (12, P. L. R. 119; 1945, A. L. R. 385).

3. On the second point *vide* C. A. 76/42 (9, P. L. R. 386; 1942, S. C. J. 395; 12, Ct. L. R. 99).

4. See the case cited in the note to the judgment under appeal.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Wicks).

FOR RESPONDENT: A. Lipshitz.

JUDGMENT.

Shaw, J.: Having heard the Respondent's advocate we do not consider it necessary to call upon the Appellant to reply.

This is an appeal from the judgment dated 12th June, 1946, of the District Court of Haifa, in Civil Case No. 39/46. A quantity of soap was seized on 2.10.45, on board an Italian destroyer which was lying in Haifa port, on the ground that an attempt had been made to export the soap without a licence granted by the Director of Customs, Excise and Trade, or any competent authority.

Several grounds of appeal have been argued, but we find that it is unnecessary for us to deal with any except one. The Respondent sued as being the owner of the soap which had been seized. The Appellant denied that the Respondent was the owner of the soap. Whether or not the soap was validly seized, it is quite clear that the Respondent could not succeed in his action unless he were the owner of the soap. One of the grounds of appeal is that the Court below was wrong in finding that the Plaintiff was the owner of the soap.

In deciding whether the property in the goods had passed from the Respondent to the purchaser we must look first to the intention of the parties. On referring to the evidence of the Respondent himself I find the following in his cross-examination:—

> "I sent an employee to the officer to collect the price for me, but I did not send the employee with the soap. The officer himself took the soap to the destroyer which was anchored at the port. The officer counted the pieces of soap at my shop and received same at my shop."

In re-examination the Respondent stated:—

> "If price not paid I either take back the goods or raise an action."

In the evidence-in-chief of the Respondent's witness Sam'an Manuel Qurzun, I find the following in his examination-in-chief:—

> "It was my duty to return the soap to my employer's shop should they fail to pay me the price thereof as I was instructed by my employer."

and in cross-examination I find:—

> "When the soap was taken out of the ship it was 12.30 *p. m.*, and I had been in the ship about two hours and a half to three hours waiting to cash the price."

This witness stated that the Italian officer had actually distributed a quantity of soap to members of the crew, but the distribution had been stopped and the soap taken back before the customs authorities seized it.

It is in my judgment quite clear from the evidence of the Respondent himself that the sale was completed, and the property in the goods had passed to the purchaser, at the shop.

Article 369 of the *Mejelle* provides as follows:—

> "The effect of the conclusion of a sale is ownership, that is to say, the purchaser becomes the owner of the thing sold and the vendor becomes the owner of the price."

Mr. Lifshitz for the Respondent has submitted that it would be unfair to decide the case on the ground of ownership if in fact the goods were not lawfully seized. But the question of ownership in this case is fundamental. If the Respondent is not the owner, he clearly cannot sue as owner.

It has been submitted that the Director of Customs who ordered the forfeiture of the goods, in addressing the notice of forfeiture and the two subsequent letters, Exhibits P/1A and P/2 to the Respondent, had himself considered the Respondent as being the owner of the goods, and that this was a binding admission on the part of the Director that the Respondent was the owner.

I can find no force in this submission. The question of ownership is a question of mixed fact and law, and even if the Director thought when he wrote the letters that the Respondent was the owner, that would not make him so. The desirability of sending a notice to the Respondent is shown from the fact that the Respondent made a claim.

Section 6 of the Import, Export and Customs Powers (Defence) Ordinance, No. 51 of 1939, as amended by the Defence (Amendment of the Import, Export and Customs Powers (Defence) Ordinance, 1939) Regulations, 1945, provides that the notice of forfeiture may be sent to various persons, not only to the owner. Nor did the Director of Customs describe the Respondent as owner either in the notice or in the two subsequent letters.

In the result I find that this appeal must be allowed, with costs on the lower scale to include an advocate's attendance fee of LP. 10. The Appellant must have his costs in the lower Court on the scale on which they were awarded to the Respondent, that is to say, costs on the lower scale and an advocate's fee of LP. 25.

Delivered this 23rd day of December, 1946.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 51/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Edwards, J.

IN THE APPEAL OF:—

Khadijeh bint Mohamed Yahya. APPELLANT.

v.

Shalom Sverdlov. RESPONDENT.

Evidence — Production of copy of P/A certified by Notary Public — Rule in C. A. 137/44 — Discretion regarding adjournments — Admission of unstamped document in evidence, S. D. Ord., sec. 16(2).

Appeal from the judgment of the District Court, Haifa, dated 1st of February, 1946, in Civil Case No. 179/45, allowed and case remitted:—

A certified copy of a power of attorney executed before a Notary Public does not come within the rule in C. A. 137/44, and does not prove itself.

(*A. M. A.*)

DISTINGUISHED: C. A. 137/44 (1945, A. L. R. 202).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C. at p. 73.

2. On the admissibility or otherwise of certified copies see the District Court proceedings in connection with C. A. 137/44 (*supra*), *i. e.* L. C. Jm. 43/43 (1944, S. C. D. C. 175 & 374).

(*H. K.*)

FOR APPELLANT: H. Asfour.

FOR RESPONDENT: A. Lipshitz.

JUDGMENT.

This is an appeal from the District Court of Haifa. The appeal was advanced on three grounds. The first concerns the production of an inadequately stamped document. Mr. Asfour has argued that the procedure contemplated by s. 16(2) of the Stamp Duty Ordinance, had not been followed and that the document should not have been admitted. We think that this argument cannot be sustained in the light of the evidence. It is clear that the learned Judge considered the question of the production of this document. He followed s. 16(1) of the Stamp Duty Ordinance and imposed a penalty. He then added the words "clerk of the Court and Registrar will take all necessary action as provided by law", the necessary action contemplated being obviously the procedure set out in the section. We think that in so doing the learned Judge had fulfilled his statutory obligations. He had every reason to believe that the clerk of the Court and the Registrar would have taken all necessary steps to safeguard the interests of the revenue which is the main object of s. 16 and he rightly admitted the document.

The second ground concerned a question of evidence, *i. e.* whether a certain document was admissible. The Appellant sought to produce a certified copy of a power of attorney registered with the Notary Public. In adopting this procedure he relied on C. A. 137/44. It is quite clear from the judgment in C. A. 137/44 that the learned judges were careful to emphasize the particular type of document which in their opinion was admissible; the document which they admitted was a judgment of the *Sharia* Court with the stamp and seal of the *Sharia* Court. We consider that it would be unwise to extend the principle which has been conceded in that case. It is a fact that certain private document registered in the *Sharia* Court are by virtue of *Sharia* law transmuted into judgments of the *Sharia* Courts and they may well come within the ambit of the principle established in C. A. 137/44, but we are of opinion that other private documents, although registered with the Notary Public such as the one which it was sought to produce in this case do not come within the ambit of the decision in C. A. 137/44.

The third ground was that the learned President was wrong in refusing an adjournment to enable the Appellant when he was confronted with this ruling to call the Notary Public. It is true that this Court will rarely interfere with the discretion of a trial Court in granting an adjournment and we confess that this point has caused us some anxiety. The question that arises is whether the Appellant and his legal advisors had reasonable ground for thinking that C. A. 137/44 covered this particular case. If he did he was clearly justified in resting content with the production of the certified copy. Until our decision in this case we think that it was not unreasonable on his part to think that C. A. 137/44 covered his document.

In these circumstances we consider that the learned President ought to have granted an adjournment and we shall allow the appeal on this ground and remit the case for retrial.' Costs to abide the event.

Costs of this appeal to be taxed on the lower scale to include LP. 10.— advocate's attendance fee at the hearing to the ultimately successful party.

Delivered this 3rd day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 75/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Curry, A/J.

IN THE APPEAL OF:—

Afif Yousef Kardoush. APPELLANT.

v.

Afaf Saliba Kardoush & an. RESPONDENTS.

Arbitration — Award made in breach of promise claim — Arbitrator making an error of law — Not patent illegality, C. A. 270/45 — Lawyer Arbitrator — Deviation by arbitrator from fundamental principles of law and procedure.

Appeal from the judgment of the District Court, Haifa, dated 15th February, 1946, in Civil Case No. 263/42 (Motion Nos. 419, 455 and 456/45), allowed:—

Where the issue submitted is a question of law and the arbitrator is a lawyer, the Court will not set aside the award merely because it might itself have come to a different conclusion.

(*A. M. A.*)

FOLLOWED: C. A. 270/45 (*ante*, p. 191).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 569.

2. See the annotations to the case followed and *cf.* also C. A. 135/45 (12, P. L. R. 525; 1945, A. L. R. 826) and Mo. D. C. Ha. 188/45 (1945, S. C. D. C. 692); see generally Annotated Laws of Palestine, Vol. 2, p. 130, heading *"Misapplication of the Law"* and pp. 135—6, heading *"Error patent on face of the Award"*.

(*H. K.*)

FOR APPELLANT: F. Atalla.

FOR RESPONDENTS: J. Habiby.

JUDGMENT.

This is an application for leave to appeal which we shall treat as the appeal itself.

The District Court, Haifa, set aside an award made by an arbitrator. The proceedings which gave rise to the award were initiated in the District Court at Haifa, Case No. 263/42. That was a claim arising out of a marriage arrangement. The rejected suitor claimed out-of-pocket expenses amounting to LP. 68, and a further sum of LP. 400 by way of, as he called it, moral and punitive damages, which could more properly be described as damages for the insult to his dignity. The District Court, with the consent of both parties, referred the claim to arbitration, a lawyer, Mr. Elias Kousa, being appointed arbitrator. The two issues, that is the issue in regard to the specific damages arising from the out-of-pocket expenses, and the issue of the damages for loss of dignity, were argued before the arbitrator, and finally he adjudicated upon them and made his award. The award was attacked in the District Court only in so far as it purported to award damages for loss of dignity. It was said that the award bore on the face of it a patent illegality in that the arbitrator had no power to award such damages. The learned Judge came to the conclusion that the arbitrator did not have this power, and he set the award aside.

As to this we say with respect that we doubt whether the learned Judge was right in the view he took of the law, but in any case, the question as to whether such an award could be set aside even granting an error in law is governed by the decision in Civil Appeal No. 270/45, to which unfortunately the learned Judge's attention was not invited. In that case it was decided that where the issue submitted is a question of law and the arbitrator is a lawyer, the Court will not set aside the arbitration merely because it might itself have come to a different con-

clusion. This follows the underlying principle of all arbitration proceedings that the parties wish to oust the jurisdiction of the Court. No doubt if a deviation on the part of the arbitrator from fundamental principles of law and procedure was disclosed, the Court might set the award aside, but in this case it cannot be suggested that any such fundamental error was made.

For these reasons we think that the District Court erred.

The appeal is allowed and the decision of the District Court is reversed. The award is confirmed with inclusive costs of LP. 10.

Delivered this 10th day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 8/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Curry, A/J.

IN THE APPEAL OF:—

Hussein Abed Hussein el Khadra & an. APPELLANTS.

v.

Rahija Mahmoud Bakkar & 11 ors. RESPONDENTS.

Jurisdiction of District Court — Validity of irrevocable Powers of Attorney for sale of land — Claim by heirs for a declaration that the Powers of Attorney executed by their ancestor are null and void and for a further declaration that they are still lawful owners of the land in question -- Consequential relief.

Appeal from the judgment of the District Court of Haifa, dated 2.1.46 in Civil Case No. 157/44, dismissed:—

Although actions for cancellation of Powers of Attorney normally fall within the jurisdiction of the District Court, where the real prayer is a declaration of ownership of land, the action is one for the Land Court.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 63.

2. As regards the narrow "line of demarcation between the two jurisdictions" of Land and District Courts see note 4 to C. D. C. Jm. 115/44 (1946, S. C. D. C.

p. 655); *vide* also C. A. 118/46 (*ante*, p. 764) and C. A. 201/46 (*ante*, p. 767).
(*H. K.*)

FOR APPELLANTS: Cattan.

FOR RESPONDENTS: Sharf and A. Lipshitz.

JUDGMENT.

This is an appeal from the District Court of Haifa in which the learned President held that sitting as a District Court he had no jurisdiction, the matter being one concerning land.

The case arises as many similar ones because of the dual capacity in which District Court judges function sitting in the same Court at one time as civil law judges and at another as Land Court Judges. It is true that at times the line of demarcation between the two jurisdictions is narrow, but it seems to us that the real test to be applied is what is the fundamental issue between the parties? In order to arrive at an answer to that question, we are of opinion that the judge can go behind the wording of the writ to ascertain the true nature of the claim. Mr. Cattan admits that in this case one of the issues concerns title to land, but he says that that is consequential, the main issue is the validity of the power of attorney. We are unable to agree with this appreciation of the nature of the claim. It seems to us that there can be no doubt that the main issue in this case is the title to land. I ask myself the question: What brings the Appellant to Court? It is true he came to Court on the validity of the power of attorney, but the only reason why he questions that power of attorney is because he fears it will be interposed between him and the ownership he claims in this land. His real prayer is contained in para. 11(b) of his amended statement of claim. That is a prayer that he be registered and confirmed in his ownership of this land. The fact that the cancellation of the power of attorney would give effect to that prayer, and that normally cancellation of powers of attorney falls within the jurisdiction of the District Court, does not in a case such as this, where the power of attorney deals solely with the question of the ownership of land, take it outside the jurisdiction of the Land Court.

For this reason we consider that the District Court was right and the appeal must be dismissed. Costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 2nd day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 248/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards, J. and Curry, A/J.

IN THE APPEAL OF:—

Moh'd Mustafa Ahmad Er-Radi'. APPELLANT.

v.

Heirs of Abdallah Hasan Qaddurah Abu Ramadan, Gaza & 9 ors. RESPONDENTS.

Land Settlement — L. S. Ord., sec. 10(3), action based on unregistered document — Res judicata — Matters not in issue, C. A. 201/38.

Appeal from the decision of the Assistant Settlement Officer, Gaza Settlement Area, dated 27.5.46, in Case No. 9/Beit Lehia, dismissed:—

1. A Land Settlement Officer may hear actions based on unregistered documents of sale.

2. A Land Settlement Officer is not bound, in dealing with length of possession, by a finding of another Court on a question of possession, where the length of the period was not in issue.

(*A. M. A.*)

FOLLOWED: C. A. 201/38 (5, P. L. R. 477; 1938, 2 S. C. J. 122; 4, Ct. L. R. 150).

ANNOTATIONS:

1. As regards the effect of sec. 10(3) of the Land (S. of T.) Ordinance *cf.* C. A. 317/44 (11, P. L. R. 641; 1945, A. L. R. 264) and cases cited in note 4 in A. L. R., dealing with the similar sec. 8(2) of the Land Courts Ordinance.

2. On the second point compare C. A. 159/43 (10, P. L. R. 338; 1943, A. L. R. 523); see also L. C. Ha. 21/43 (1946, S. C. D. C. 215, at pp. 218—9) and note 2.

(*H. K.*)

FOR APPELLANT: S. Bseisso.

FOR RESPONDENTS: Nos. 1—7: N. Germanus.
Nos. 8—10: Formally cited — absent — served.

JUDGMENT.

Curry, A/J.: This is an appeal from the Assistant Settlement Officer, Gaza. Both parties claim title through Mustafa Ahmed er Radi. The Respondents, who were the Plaintiffs before the Settlement Officer, claimed by purchase in 1333 and by inheritance and possession. The

Appellant claims by purchase from his father, Mustafa, and by prescriptive possession. The Settlement Officer was satisfied by the document produced by the Respondents that they had in fact purchased from the deceased in 1333. He was not satisfied with the document produced by the Appellant that he had bought from his father. Whilst it is true that the document upon which the Respondents relied was a document of sale which has never been registered, I am in agreement with the Settlement Officer that by virtue of the proviso to section 10, sub-section (3) of the Land (Settlement of Title) Ordinance he is not bound by any rules of the Ottoman Law prohibiting the Court from hearing an action based on an unregistered document.

The only other question of merit that arises in this appeal is whether the Settlement Officer was bound by the judgment of the Magistrate's Court of 1934. In that action the Respondents claimed possession against the Defendants and they lost their action. The learned Magistrate in his judgment states:—

> "After having heard the evidence of both parties on the question of possession it has been proved by the Defendant's witnesses that the Defendant has been in possession for ten years. The Court is inclined to believe the evidence as the Plaintiff's witnesses have testified that the Defendant has been in possession for the last six years."

I am in entire agreement with the Assistant Settlement Officer that the point at issue in that case was whether the present Appellant was then in possession and the finding of the Magistrate was conclusive upon that point only. In that action for possession, the length of the period for which the Defendant had been in possession was not in issue and therefore could not bind the Settlement Officer. The Settlement Officer relied upon Civil Appeal No. 201 of 1938, Vol. 5, P. L. R. page 477. I see no reason for disagreeing with the Settlement Officer.

For the foregoing reasons the appeal must be dismissed. The Respondent is entitled to costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.

Given this 23rd day of December, 1946.

A/British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 193/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Michael Neeman. APPELLANT.

v.

Shlomo Ben Israel Mizrahi. RESPONDENT.

Contract for sale of land — Failure by purchaser to pay all instalments of purchase price, C. A. 50/26 — Recovery of purchase price from one of two vendors, C. A. 44/28 — Cause of action — Delay, C. A. 133/38 — Forfeiture, penalty, C. A. 261/40, Mayson v. Clouet, Mussen v. Van Diemen's Land Co., C. A. 128/41.

Appeal from the judgment of the District Court of Tel-Aviv sitting as a Court of Appeal in C. A. 60/45, dated 9th April, 1946, allowed:—

1. In an action brought for the recovery of purchase price on the ground of breach of contract by the vendor, the Plaintiff cannot succeed on the ground of his own refusal to complete.

2. Delay in filing an action for the recovery of purchase price does not bar the claim unless it exceeds the period of limitation.

3. Parties may agree that the purchaser's deposit should be forfeited. No question of penalty arises in such cases.

4. In the absence of express provisions in the contract to the contrary, one of two vendors can only be liable for the return of half the purchase price.

(*A. M. A.*)

REFERRED TO: Mayson *v.* Clouet, 1924, A. C. 980, 93 L. J. (P. C.) 237, 131 L. T. 645, T. L. R. 678; Mussen *v.* Van Diemens Land Co., 1938, Ch. 253, [1938] 1 All E. R. 210, 107 L. J. (Ch.) 136, 158 L. T. 40, 54 T. L. R. 225; C. A. 50/26 (1, P. L. R. 131; 1, C. of J. 29); C. A. 44/28 (1, P. L. R. 328; 1, C. of J. 315); C. A. 133/38 (5, P. L. R. 363; 1938, 1 S. C. J. 414; 4, Ct. L. R. 98); C. A. 261/40 (8, P. L. R. 71; 1941, S. C. J. 36; 9, Ct. L. R. 61); C. A. 128/41 (8, P. L. R. 356; 1941, S. C. J. 332; 10, Ct. L. R. 43).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 224.

2. On return of purchase price see note 1 to C. A. 80/43 (1943, A. L. R. 222); *vide* also C. A. 187/43 (10, P. L. R. 615; 1944, A. L. R. 7) and note 1 in A. L. R.

3. See C. A. 12/46 (13, P. L. R. 245; *ante*, p. 649) and note 2 in A. L. R. on forfeiture of deposits.

4. On the first three points see generally the cases quoted in the judgment and

in the decision of the District Court (*supra*, note 1).

5. On the last point *cf.* C. D. C. Ha. 153/44 (1946, S. C. D. C. 468) and note thereto.

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Bedolach.

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 9.4.46 of the District Court, Tel-Aviv, in Civil Appeal No. 60/45.

The action was brought by the Respondent (purchaser) against the Appellant (who was one of two vendors) for the return of moneys (LP. 83.350 mils) paid under a contract, dated 23.12.35, for the sale of land.

The cause of action was an alleged breach by the Appellant as set out in paragraph 5 of the statement of claim which reads as follows:—

> "Defendant failed to comply with the terms of the said contract and did not transfer said land to the Plaintiff being unable to do so because he does not own such a plot. He offered to Plaintiff, instead, another plot which does not wholly correspond to the said plot."

The Magistrate found that the failure to complete was due to the default of the Respondent (purchaser), and the District Court accepted the Magistrate's finding on that point. The Magistrate in the third paragraph of his judgment stated:—

> "Plaintiff was negligent and did not pay all that was due from him under the terms of the contract nor did he come to accept the transfer in due time and even later when he was called upon to do so by Defendant, but as the question of breach of contract or damages is not before me, it is immaterial who was in default."

In view of the averment in paragraph 5 of the statement of claim I am unable to understand why the learned Magistrate said that there was no question before him of breach of contract. The action was based on the allegation that the Appellant (vendor) had "failed to comply with the terms of the said contract."

The Magistrate finally gave judgment for the recovery by the Respondent (purchaser) of only one-half of the money paid on account of the purchase price, holding that as there were two vendors the Respondent was not entitled to recover the other half from the Appellant.

The Respondent (purchaser) cross-appealed in the District Court, asking for the return of the whole of the purchase price. The learned Judge dismissed the appeal, and gave judgment in favour of the Respondent in the cross-appeal.

Mr. Eliash, for the Appellant, has in the first place submitted that both the Magistrate and the District Court erred in holding that it was immaterial that the contract was broken by the purchaser. He has referred us to C. A. 50/26, 1 P. L. R. 131. The appellants in that case based their action on a breach of contract of which the District Court held that there was no evidence. The Appellant then claimed to refuse to complete, and to be entitled to repayment of the purchase money. The Court of Appeal in the course of its judgment said:—

> "In our opinion, however, it is not open to the Appellants to vary the nature of their claim in this manner. The action was based on breach of contract, and must be decided on that ground: the defence has been directed to the question whether or not a breach has been committed by the Respondents; it has not been concerned with the question what damages are payable by the Appellants in the event of their refusal without justification to complete.
> If the Appellants desire to claim repayment of the purchase money on the ground of their own refusal to complete, they must commence an action based on this ground, when it will be open to the Respondents to make a counter-claim."

In my judgment this appeal must succeed on this point alone.

Certain further points were argued by Mr. Eliash. One bears on the question of delay. The contract was made in 1935, but the action in the Magistrate's Court was not filed until 1944, and Mr. Eliash submits that the Respondent cannot succeed after so great a delay. He has referred us to C. A. 133/38, 5 P. L. R. 363. But in my judgment if the Appellant could prove that he was legally entitled to the money he could bring an action for its recovery at any time before the period of limitation had expired. To hold otherwise would be to introduce a new period of limitation of uncertain length in bar of a legal debt.

A further point argued by Mr. Eliash is that the District Court erred in holding that the money paid on account of purchase price was not forfeited. Clause 6 of the contract provided that:—

> "... In case the purchaser or his legal representative fails to appear in the *Tabu*, the vendor will be automatically released from any liability or responsibility in respect of the purchaser by virtue of this contract, and the vendor will be entitled to appropriate the sums paid by the purchaser to the vendor on account of this sale towards the satisfaction of the fixed and pre-estimated damages payable pursuant to the following para."

And clause 8 provided that:—

> "... or in case the purchaser will in any other manner violate this contract, in whole or in part, — then the vendor will be entitled to rescind the present contract and all the moneys which the pur-

> chaser had already paid to the vendor on account of the land will be considered as fixed and pre-agreed damages."

It was clearly the intention of the parties that if the purchaser broke the contract the sums which he had paid on account of the purchase price should be kept by the vendor. With regard to this point the District Court said in para. 4 of its judgment:—

> "Now under both clause 6 and clause 8 of the contract it was provided that in the event of the Respondent's defaulting, the Appellant and his co-vendor should be entitled to retain as pre-estimated damages any moneys already paid by the Respondent. This to my mind is clearly a penalty clause and not true liquidated damages; for no definite sum is mentioned, and the Respondent, when he defaulted, might have paid next to nothing or, on the contrary, he might have paid nearly the whole of the purchase price (which was LP. 123.760); and yet there is nothing to show that the damage suffered by the Appellant through the default would have been greater in the latter case than in the former. The forfeiture clauses cannot therefore be considered as a genuine pre-estimate of damages and must be regarded as penalty. They are therefore invalid."

The learned Judge referred to C. A. 261/40, 8 P. L. R. 71, and also to Mayson *v.* Clouet (1924) A. C. 980. In C. A. 261/40 the Court said:—

> "Mayson *v.* Clouet, 1924, p. 980 lays down quite clearly that whether a claim to refund of the purchase price can succeed depends in the first instance on the terms, if any, of the contract on this point."

The headnote in Mayson *v.* Clouet contains the following:—

> "Held, that the rights of the parties depended upon the contract; and that, although the purchaser was in default, the instalments were recoverable, since the contract distinguished between the deposit and the instalments and provided for the forfeiture of the deposit only."

And at page 985 the following appears in the judgment of Lord Dunedin:—

> "There remains, however, the question decided by the learned Chief Justice as to whether instalments can be recovered, and various authorities were cited to Their Lordships.
> Their Lordships think that the solution of a question of this sort must always depend on the terms of the particular contract."

The point to be observed is that there is no suggestion whatever that the instalments cannot be forfeited if the contract so provides. It is clear therefore that the contract must be looked at, and in the present case there was clear provision, agreed to by the parties who signed the contract, that the vendor should retain the amounts paid on account of the purchase price if the purchaser broke the contract.

Mr. Eliash has also referred us to the case of Mussen *v.* Van Diemen's

Land Co., A. E. L. R. 1938, Vol. 1, p. 210, which was referred to in the judgment in C. A. 128/41 (8, P. L. R. 356). In that case it was held that the provision in the contract for the retention of all moneys already paid by the Plaintiff was not a penalty, and the Plaintiff was not entitled to recover the sum of LP. 40,200 or any part thereof.

In his judgment, at page 218, Farwell, J., says:—

> "With the exception of those cases, and the one to which I am going to refer, I know of no case in which the Court has relieved against what I am going to call a penalty, in the case of a sale of land where there is an express stipulation in the contract that the money is to be retained by the vendor in the event of the purchaser failing to complete the contract. I certainly do not intend to create a precedent for such a relief, because, as I have already pointed out, I myself am wholly unable to see what equity there is in favour of a plaintiff who has in fact, whatever the reason, failed to complete his contract.. He has entered into contract with his eyes open, knowing what he was doing, and he now seeks relief, although he is no longer in a position to complete the contract and to carry out his obligation."

I find that the learned Judge erred in holding that the sums paid on account of purchase price were recoverable.

Mr. Eliash finally argued, in regard to the cross-appeal, that there was no basis in law for the proposition that a party who keeps in the background avoids liability. He has referred us to C. A. 44/28, 1 P. L. R. 328, where it was held that in the absence of express provision making partners jointly and severally liable under a contract, each partner is liable only for one-half of the amount of the obligation.

I find that the learned Judge erred in holding that the Appellant could, in any event, be liable to repay more than half of the money.

In the result I find that the appeal must be allowed, the judgments of the Courts below set aside, and the Respondent's action dismissed. The Appellant will have fixed costs in this Court in the sum of LP. 15 (fifteen pounds). The Appellant must also have his costs, on the lower scale, in each of the Courts below, to include an advocate's fee of LP. 15 for attendance in both of those Courts.

Delivered this 23rd day of December, 1946.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 258/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

Ben-Zion Arshon as administrator of the estate of Ichiel Michel (Michaelis) Arshon. APPLICANT.

v.

Zvi Gladstone & 39 ors. RESPONDENTS.

Land Settlement Appeal — Extension of time — C. P. R. 324 inapplicable, C. A. 380/43, C. A. 192/46.

Application under rule 324 of the Civil Procedure Rules, 1938, for extension of time within which to file an appeal from the Decision of the Land Settlement Officer, sitting at Tiberias, dated 9th April, 1946, in Case No. 12/Ein Zeitun, refused:—

Time to file an appeal in Land Settlement proceedings may not be extended under C. P. R., r. 324.

(*A. M. A.*)

FOLLOWED: C. A. 380/43 (11, P. L. R. 49; 1944, A. L. R. 271); C. A. 192/46 (13, P. L. R. 354; *ante*, p. 717).

ANNOTATIONS: See the note in A. L. R. to C. A. 192/46 (*supra*).

(*H. K.*)

FOR APPLICANT: M. Hochman.

FOR RESPONDENTS: No. 31 (Keren Kayemeth Leisrael Ltd.) — Eliash.

Rest — No appearance.

ORDER.

I am of opinion that this case is covered by Civil Appeal No. 380/43 and 192/46, which are authorities of stating that I have no power to grant the extension, as Rule 324 of the Civil Procedure Rules, 1938, has no application to the present case.

The application for extension is therefore refused.

Given this 20th day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 79/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: FitzGerald, C. J. and Shaw, J.

IN THE APPEAL OF:—

Raymond Litwinsky. APPELLANT.

v.

Russel & Co., Receivers of Litwinsky Bros. in liquidation & 2 ors. RESPONDENTS.

Partnership — Dissolution — Dismissal of employee — Secs. 31, 46 *— Decision of majority.*

Appeal from a decision of the District Court of Tel-Aviv dismissed:—

The grant of an *ex gratia* payment to an employee is an ordinary matter, within the meaning of sec. 31, which can be decided by a majority of partners.

ANNOTATIONS: Note that the resolution to award an *ex gratia* payment had been passed *after* the partnership had already been in the course of liquidation. Does sec. 31(viii) apply to such a case and can such a resolution create a liability within the meaning of sec. 46?

See sec. 45 of the Ordinance as to the restrictions on the partners' "continuing authority" in case of dissolution.

(*H. K.*)

FOR APPELLANT: I. Benjamini.

FOR RESPONDENTS: No. 1 — B. Sassoon.
Nos. 2—3 — Eliash.

JUDGMENT.

In this case it is unnecessary to decide whether there was a trade custom such as has been argued.

It appears to us that the point at issue can be determined by reference to section 31 of the Partnership Ordinance. That section states that any difference arising as to ordinary matters connected with the partnership business can be decided by a majority of the partners. In this case it is not denied that two out of three partners, by a resolution, decided to award to Mr. Gross who had been Chief Clerk with the firm for 17 years a sum of money outside his normal salary. The first question that arises is whether this comes within the ambit of ordinary matters. We are of opinion that it does. In most businesses nowadays it is usual to make provision from profits for the award of a gratuity

or honorarium to a particular member of the firm who has given long service to the firm or for such awards even to a class of employees of the firm. Now having come to the conclusion that this was an ordinary matter within the meaning of the section it follows that the two partners were entitled to make the decision which they did. That decision then creates a liability within the meaning of section 46 of the Partnership Ordinance.

For these reasons we are of opinion that the Court was right in confirming the award of the sum to Mr. Gross.

Costs of this appeal to be taxed on the lower scale to include LP. 10 advocate's fee to Messrs. Russell & Co. and LP. 10 advocate's fee to the other two Respondents.

Delivered this 4th day of December, 1946.

CIVIL APPEAL No. 90/46.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL.

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPEAL OF:—

Nathanieh Sea Shore Development Company Ltd. — APPELLANT.

v.

Leib Susel Stub. — RESPONDENT.

Notarial notice — C. A. 90/43 — Object of notice — Waiver of rights under agreement — Construction, "facing".

Appeal from the judgment of the District Court of Tel-Aviv dated 24th February, 1946, in Civil Case No. 236/44, dismissed, but judgment varied:—

The object of a notarial notice is to give the party in default a chance of avoiding being in default.

REFERRED TO: C. A. 90/43 (10, P. L. R. 225; 1943, A. L. R. 326).

ANNOTATIONS:

1. On the question of the notarial notice see C. D. C. Jm. 45/41 (1945, S. C. D. C. 628, at pp. 642 *et seq.*) and C. A. 432/44 (12, P. L. R. 302; 1945, A. L. R. 310) with note 2 in A. L. R.

2. For recent authorities on interpretation of contracts see C. A. 211/46 (*ante*, p. 629) and note.

(*H. K.*)

FOR APPELLANT: Zeltner.

FOR RESPONDENT: H. Cohen.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel Aviv, which Court had ordered the Appellants to pay LP. 204 and costs in an action brought by the Respondent for breach of a contract to do certain works on land let or sold by the Appellants to the Respondent by virtue of an agreement entered into on the 11th October, 1934.

The trial Judge found that the Defendants had transferred to the Plaintiff in accordance with the agreement, which he termed an "agreement of sale", three plots of land situated on the seashore at Nathanya and that they had undertaken to execute certain works such as making a road, installing water-pipes, preparing an electric line with power and light *etc.* by 11th October, 1939. It is not disputed that the Appellants failed to execute the works by that date.

The Appellants' advocate attacks the judgment of the District Court on several grounds, the first being that the Respondent should have sent to the Appellants a notarial notice. The Appellants do not deny that both parties had waived the necessity of sending a notarial notice. The argument of Mr. Zeltner, for the Appellants, is that, since the statement of claim was not filed until 1944, a period of five years had elapsed between the maturing of the obligation and the filing of the statement of claim. In these circumstances it is urged that a notarial notice should have been served having regard to the terms of the judgment of this Court in Civil Appeal No. 90/43 Annotated Law Reports (1943) p. 327.

The learned trial Judge found that the 11th October, 1939, was the last date for the execution of the works and that a notarial notice could not have been sent before that date; but that, after the omission to perform the works, a breach had already occurred and the sending of the notarial notice would not have afforded an opportunity to put matters right.

The object of a notarial notice is, of course, to give the party in default a chance of avoiding being in default. We agree with the reasoning of the trial Judge and this ground of appeal fails.

The next ground of appeal is that the Plaintiff had waived his rights. The learned trial Judge went carefully into this matter and referred to correspondence between the parties from about December, 1939, onwards. In 1944 the Plaintiff again stressed in a letter the need for the execution of the works and the Appellant Company in reply promised to fulfil after the War all their obligations under the agreement. This ground of appeal also fails.

The next ground of appeal deals with the construction of clause 3 of the agreement which is in the following terms:—

> "The company undertakes to construct the public road facing the demised premises and to make the said road fit for use by the lessee or his assigns."

Considerable discussion took place before us as regards the meaning of the word "facing". We think, however, that we must have regard not only to the wording of the clause itself but also to the intention of the parties as can be ascertained from the other clauses.

Mr. Zeltner, for the Appellants, contends that all that the Company had to do was to make a road in front of the plot. In answer to a question by the Court he said that the Respondent might have to drive or to walk or ride over the sand-dunes until he reached his plot, but that, in course of time, other plots would doubtless have roads in front which roads would be connected up with the Respondent's plot. We cannot accept this argument. It seems to us that the clear intention of the parties was that a *public* road should be made connecting and linking up the Respondent's plot with these other plots and with the other areas in the vicinity. We accordingly agree with the interpretation put on clause 3 by the learned trial Judge.

The next ground of appeal is that the learned trial Judge erred in finding that the price of electric poles shortly before the war, in 1939. was LP. 5 for each pole with wires. It is said that there was no evidence on which the trial Judge could base his finding. There was, however, the evidence of Mr. Abraham Lev, who estimated the value at LP. 8. Mr. Zeltner says, however, that this figure was based on 1945 prices. There was also the evidence of Mr. Cohen who said that the prices were between 15% and 20% higher in 1945 than they were in 1939. This gave the trial Court some basis on which to work, and we accordingly think that the trial Judge was justified in fixing LP. 5 as the price of a pole. This ground of appeal also fails.

It has been argued by parties that the trial Judge erred in awarding the Plaintiff the sum of LP. 40 damages. The appeal is dismissed but the judgment of the District Court is varied by reducing the sum awarded to the Plaintiff to LP. 164 instead of LP. 204. The Appellants will pay the Respondent's costs of this appeal to be taxed on the lower scale and to include an advocate's attendance fee at the hearing of LP. 5.

Delivered this 23rd day of December, 1946.

British Puisne Judge.

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PREPARED BY DR. D. SHLOSSBERG, ADVOCATE.

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ADDENDA & CORRIGENDA

Page 7, *Note*: Further proceedings in this case: H. C. 94/46 (*post*, p. 719);
15, *Note*: Further proceedings in this case: C. A. 261/46 (1947, A. L. R. 88);
24, *line* 11, *read*: "CIVIL APPEAL No. 303/45" *instead of* ".....303/43";
29, *line* 7, *read*: C. A. 155/41 (8, P. L. R." *instead of* "..... (9, P. L. R.";
68, *Note*: Further proceedings in this case: C. D. C. T. A. 214/44 (1946, *Hamishpat* 93 — *in Hebrew*);
70, *second & third line of headnote* 3, *substitute* "onus" *for* "presumption";
72, *Note*: The appeal itself is reported in 1947, A. L. R., at p. 273;
99, *Note*: Further proceedings in this case: P. C. L. A. 53/45 (*post*, p. 450);
110, *Note*: Previous proceedings in this case: C. A. 105/45 (1945, A. L. R. 507);
114, *Note*: The judgment of the Land Court is reported in 1945, S. C. D. C., at p. 107;
148, *line* 4 *from the bottom, read*: "January, 1946" *for* "December, 1945";
174, *Note*: Further proceedings in this case: P. C. L. A. 1/46 (*post*, p. 269); the judgment has been confirmed in P. C. 43/46 (1947, A. L. R. 277);
191, *Note*: Further proceedings in this case: P. C. L. A. 30/46 (*post*, pp. 698, 586 & 740);
231, *Note*: Further proceedings in this case: P. C. L. A. 46 & 50/45 (*post*, p. 502), H. C. 71/46 (*post*, p. 600) & H. C. 65 & 66/46 (*post*, p. 603);
241, *Note*: Further proceedings in this case: C. A. 238/46 (1947, A. L. R. 108);
244, *Note*: Further proceedings in this case: C. A. 342/45 (*post*, p. 492) and C. A. 321 & 342/45 (*post*, p. 396);
269, *Note*: See the note to p. 174, *supra;*
291, *Note*: Further proceedings in this case: H. C. 91/46 (*post*, p. 715);
337, *immediately before* ANNOTATIONS *add*: "(N. S.) 391).";
343, *line* 2 *of annotations, read*: "(1945, S. C. D. C. 584)" *instead of* "(1946, ...)";
345, *Note*: Further proceedings in this case are reported in 1947, A. L. R. 5;
375, *Note*: The appeals themselves are reported in 1947, A. L. R. 233;
383, *Note*: The appeal itself is reported *post*, p. 688;
387, *Note*: Further proceedings in this case are reported in 1947, A. L. R. 107 and the appeal itself *post*, p. 767;
396, *Note*: See the note to p. 244, *supra*;
401, *Note*: The appeal itself is reported *post*, p. 758;
402, *Note*: Further proceedings in this case: H. C. 30/44 (1947, A. L. R. 242);
416, *Note*: The appeal itself is reported *post*, p. 738;
447, *line* 2 *of annotation* 2, *read*: "(1944, A. L. R. 486)" *instead of* "(.... 488)";

Page 451, *line* 2 *of annotation* 1, *read*: "*ante*, p. 98)" *instead of* "1945, A. L. R. 98)";

452, *Note*: Previous proceedings in this case: C. A. 235/40 (8, P. L. R. 23; 1941, S. C. J. 18);

490, *Note*: The District Court proceedings in this case which are referred to in the judgment are reported in 1946, S. C. D. C., at p. 474;

493, *Note*: See the note to p. 244, *supra;*

496, *insert* "22nd" *between* "this" *and* "day" *in the* 16*th line from the* bottom;

500, *Note*: The judgment under appeal is C. A. 236/42 (10, P. L. R. 383; 1943, A. L. R. 509);

502, *Note*: See the note to p. 231, *supra*;

508, *line* 2 *of annotation* 2, *read*: "L. C. Jm." *instead of* "L. C. Ha.";

523, *Note*: Previous proceedings in this matter: C. A. 125/40 (8, P. L. R. 165; 1941, S. C. J. 205; 9, Ct. L. R. 171);

548, *Note*: Further proceedings in this case: H. C. 84/46 (*post*, p. 795) and S. T. 2/46 (1947, A. L. R. 25);

587, *Note*: See the note to p. 791, *supra*;

621, *replace annotation* 4 *by the following*: "4. The position has since been regularised by the enactment of the Criminal Procedure (Summary Trials by District Courts) Ord., No. 70 of 1946";

630, *Note*: Further proceedings in this case: P. C. L. A. 41/46 (*post*, p. 746);

632, *line* 11 *from the bottom, read*: "HIGH COURT No. 55/46" *instead of* "..... 58/46";

641, *Note*: The decision of the Jaffa District Court referred to on p. 642 is C. A. D. C. Ja. 53/46 (1946, S. C. D. C. 339); see also C. A. D. C. Ja. 6, 7, 9—36 & 43/46 (*ibid.*, p. 353) which is likewise overruled by the order in this case;

686, *Note*: The judgment under appeal is reported in 1946, S. C. D. C., at p. 773;

698, *insert the following at the end of annotation* 1: "and *post*, p. 740";

720, *Note*: The judgment of the Court of Criminal Appeal convicting the Petitioner in this case is CR. A. 210/45 (13, P. L. R. 16; *ante*, p. 7);

733, *Note*: The judgment under appeal is C. A. 278/45 (13, P. L. R. 65; *ante*, p. 53);

744, *Note*: Further proceedings in this case: H. C. 62/46 (1947, A. L. R. 395).

767, *Note*: See the note to p. 387, *supra*;

788, *Note*: Previous proceedings in this case: C. A. 362/44 (12, P. L. R. 34; 1945, A. L. R. 51 & 1945, A. L. R. 433); the final order is reported in 1947, A. L. R., at p. 228 (*sub* No. 68/46" *instead of* "58/46");

796, *Note*: See the note to p. 548, *supra*.

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[1] Now replaced by Advocates Ord., No. 32 of 1938.

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* As am. by Coroners (Am.) Ord. 1946, No. 49 of 1946.

* As amended by R. R. (D. H.) (Am.) Ordinance, 1946, No. 48 of 1946.

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