ANNOTATED
LAW REPORTS
1947

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VOL. 1

Publisher
S. BURSI, 20 ACHAD-HAAM ST., TEL-AVIV

Printed in Palestine.

Co-op. Printing Press "Hapoel Hazair", Tel Aviv.

CIVIL APPEAL No. 252/46.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Shmuel Koenigsberg. APPELLANT.

v.

Hamisrad Hakablani Shel Haovdim Haivrim Betel-Aviv Ltd. RESPONDENT.

Workmen's Compensation — Scale of compensation in the case of partial incapacity — W. C. Ord., 2nd Schedule, paras. 1(*b*)(*ii*), 3 — *Failure to hear evidence.*

Appeal from the judgment of the District Court of Tel-Aviv, dated 31st May, 1946, in Motion No. 664/45 (Civil Case 1543/44) whereby the application for setting aside of the award given by the learned Magistrate, Mr. Zuckerman, of Tel-Aviv, in his capacity as arbitrator under the Workmen's Compensation Ordinance, was dismissed; appeal allowed and case remitted:—

> In awarding compensation for partial incapacity the arbitrator should ascertain the average weekly earnings prior to the accident and the average weekly amount which the workman is earning or capable of earning after the accident. He may then award the difference between those two amounts, provided the statutory maximum is not exceeded.
>
> (*A. M. A.*)

ANNOTATIONS:

1. *Cf.* Halsbury, Vol. 34, pp. 914 *et seq.*, sub-sec. 2.
2. For recent Palestinian authorities on similar questions *vide* C. A. 181/46 (*ante*, p. 625) and note; see also C. D. C. Ha. (1946, S. C. D. C. 437).

(*H. K.*)

FOR APPELLANT: Hochman.

FOR RESPONDENT: Krongold.

JUDGMENT.

Frumkin, J.: This is an appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, whereby because of a disagreement between the two Judges sitting in the case, the appeal was dismissed. The appeal was from a judgment given by one of the Magistrates sitting as arbitrator in Workmen's Compensation. The facts giving rise to the arbitration proceedings are not in dispute in so far as it is agreed that the Appellant who was employed by the

Defendant company, had an accident in the course of the work and was entitled to compensation. And in fact he received compensation for total incapacity of work during a given period, and the dispute between the parties relates only to the amount of compensation due for partial incapacity.

The Magistrate awarded compensation on a percentage basis having had before him evidence as to the percentage of incapacity at the beginning and the end of the disputed period, taking as basis for the percentage the maximum amount provided by law for weekly compensation. The Appellant was not satisfied with the amounts and calculation, appealed to the District Court, and as already indicated above, the Judges disagreed and, as the law then stood, the appeal was dismissed.

Counsel for Respondent does not support the judgment of the Magistrate and indeed he agrees on the two main points of appeal, namely (1) that the Magistrate took a wrong basis for the calculation of the percentage due, and (2) that he acted arbitrarily in fixing the percentage of incapacity without any evidence except as related to the beginning of the period of partial incapacity and its end.

Our attention has not been called to any rules under paragraph 1(b)(ii) of the Second Schedule to the Workmen's Compensation Ordinance, under which the High Commissioner may prescribe for the scale of the amount of compensation to be paid in case of partial incapacity, and I take it that no such scale has been prescribed. The case must therefore be governed by the general provisions of paragraph 3 of the same schedule which, in dealing with partial incapacity, provides that:—

> "The weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident."

and the proper considerations which the Magistrate should have relied upon were (a) to find out what was the average weekly earnings of the Appellant prior to the accident, (b) what is the average weekly amount which he was earning or capable of earning in some suitable employment or business after the accident, (c) take as basis the difference between these two averages and award such difference, provided it does not exceed the maximum amount allowed by law.

In the result, both the judgments of the District and the Magistrates' Courts are set aside and the case remitted to the Magistrate for completion in accordance with the instructions given. Costs to follow the

event, and to facilitate taxation we allow LP. 10 inclusive costs to the ultimately successful party for the hearing of this appeal.

Delivered this 23rd day of December, 1946.

Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 14/45.

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

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Abdul Raouf El Haj 'Abdul Rahman Abu Laban, *Mutawalli* over the *wakf* of Hajjeh Requiyeh bint el Haj Mohammad Malakha & an. APPLICANTS.

v.

Fuad Haider & 2 ors. RESPONDENTS.

Execution of judgment during pendency of appeal before Privy Council — Question of adequacy or otherwise of Bank guarantee.

Application for an order that the guarantee in the amount of LP. 500 dated the 26.6.45 by the Ottoman Bank of Jaffa and filed by the Applicants herein in the Execution Office Jaffa on the 26.6.43 is a good and adequate guarantee in compliance with the requirements of condition (iii) of the order of this Honourable Court dated 30.4.45 granting Respondents Leave to Appeal to the Privy Council:—

1. Where Court of Appeal when granting conditional leave to appeal to Privy Council directs execution to be proceeded with provided decree holder files a Bank guarantee in a specified sum and Chief Execution Officer doubts whether the guarantee filed by decree holder is adequate and therefore refuses execution, proper Court for decree holder to apply to the Court of Appeal which made the order.

2. If Court of Appeal did not expressly direct where guarantee to be furnished by decree holder as condition precedent to execution was to be filed, it may be filed in Execution Office, not necessarily in Court of Appeal.

3. Court of Appeal may find wording of Bank guarantee adequate in spite of omission therein of words occurring in Art. 7, Palestine (Appeal to Privy Council) Order-in-Council.

(*M. L.*)

ANNOTATIONS:

1. For previous proceedings in this case see 1946 A. L. R. 344 and annotations.

2. *Cf.* on question of guarantees in connection with a leave to appeal to the Privy Council P. C. L. A. 20/43 (1944, A. L. R. 264) and annotations.

(*A. G.*)

FOR APPLICANTS: Elia.

FOR RESPONDENTS: Yifrach.

ORDER.

The present Applicants are the Respondents in an appeal which is now pending before the Judicial Committee of the Privy Council. When conditional leave to appeal to His Majesty in Council was granted to the Appellants on the 30th April, 1945, the Court directed:—

> "That the execution of the judgment of this Court dated 20.3.45 be proceeded with provided the Respondents to this application will file a bank guarantee from one of the three banks Barclays, Ottoman or Anglo-Palestine, in the sum of LP. 500 within two months."

On the 26th June, 1945, *i. e.* less than two months after the 30th April, 1945, the Ottoman Bank of Jaffa entered into a guarantee in the required amount in favour of the Appellants (hereinafter referred to as "the present Respondents") "for any damages or rights that they may be legally entitled to claim from the above named Respondents as a result of the execution of the judgment of the Supreme Court in its appellate capacity dated 20.3.45 in Civil Appeal No. 165/44 in case the said judgment is set aside by the Privy Council." The document was filed at the Jaffa Execution Office on the same day, *i. e.* the 26th June, with a request that execution be proceeded with. Notice of execution was issued in April, 1946, and on the 2nd May, 1946, the present Respondents applied to the Supreme Court in its appellate capacity for a provisional stay of execution on the ground that the present Applicants had not filed a bank guarantee either within or after the period of two months specified in the order granting conditional leave to appeal. That application did not reveal that a guarantee had been filed at the Execution Office; it was heard *ex parte*, and the Court in dismissing it stated that the then Applicants (*i. e.* the present Respondents) "should go to the Execution Officer and point out to him that execution should not proceed as the order of this Court has not been complied with."

On further representations made to the Execution Officer by the present Respondents the Assistant Chief Execution Officer of Jaffa expressed the view that he could not proceed with the execution "until and unless the Supreme Court expresses its satisfaction with the guarantee." As a result the present Applicants have applied to this

Court for an order to the effect that the bank guarantee filed on the 26.6.45 in the Execution Office at Jaffa satisfied the requirements of condition (iii) of the Order granting conditional leave to appeal.

Mr. Yifrach, for the present Respondents, has submitted that this application is misconceived and that the Applicants should have proceded by way of petition to the High Court. We do not agree with this submission. It is clear that the object of the present application is to obtain information or clarification in order to enable the Execution Officer to proceed. In fact, the Execution Officer might have acted under Article 6 of the Execution Law.

The crux of this matter is that this Court, when laying down the conditions under which execution might be proceeded with, stated clearly what guarantee would be satisfactory. Had the Court merely stated that guarantee had to be furnished to its satisfaction for a certain amount, the position would have been different and it would then have been necessary for the guarantor to be approved *etc.* The conditions imposed by the Court conveyed clearly that a guarantee given by one of the three banks therein mentioned would satisfy the Court. The Court did not expressly direct where the guarantee was to be filed, and we see no reason to hold that the document had to be filed in this Court. We do not go so far, however, as to hold that it would have been wrong to file the document in this Court.

There is only one other point to be considered, namely, whether the guarantee given by the Ottoman Bank is properly worded. The present Respondents contend that the wording is defective and does not secure the object in view.

This contention is based on the fact that the words "for the due performance of such Order as His Majesty in Council shall think fit to make thereon" which occur in Article 7 of the Order-in-Council, have not been used in the form of guarantee signed by the Bank.

The question which we have to decide is whether the wording of the guarantee which is reproduced at the beginning of this judgment is adequate. We are of opinion that it is adequate.

We therefore hold that the present Applicants have complied with the conditions imposed by this Court with regard to the furnishing of security prior to execution.

We wish to add that litigants would be well advised to follow wherever possible, well established precedents and forms so as to avoid the raising of objections inspired by the sight of something which, although correct, is unfamiliar.

We allow LP. 10 (ten) inclusive costs to be paid to Applicants by the Respondents to this application.

Given this 26th day of September, 1946, in the presence of Mr. Elia for Applicants and in absence of counsel for Respondents (served).

British Puisne Judge.

CIVIL APPEAL No. 20/46.

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

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

IN THE APPEAL OF:—

Rahel Zaroum in her capacity as sole heir of Yahya Yehuda Shlomo Tabib, now deceased & an. APPELLANTS.

v.

Reuven Ben Yehoshua Cohen. RESPONDENT.

Action against sub-tenant — Sub-letting ratified by landlord's act.

Appeal from the judgment of the District Court Jerusalem, dated 26.11.45 in C. A. 42/45 from the judgment of the Magistrate's Court Jerusalem dated 10.7.45 in C. C. 1510/44, dismissed:—

Landlord's suing the tenant for rent collected by him from subtenant amounts to ratification of the sub-letting within ambit of Art. 447 of *Mejelle.*

(*M. L.*)

ANNOTATIONS:

1. The judgment appealed from is reported in 1945 S. C. D. C. at p. 567.
2. On waiver of breach by sub-letting see C. A. 178/44 (1945, A. L. R. 172) and annotations.
3. *Semble*: Whenever the judgment mentions "appellants" in connection with leave to occupy the house or in connection with ratification of the sub-letting it should have said the 1st Appellant.

(*A. G.*)

FOR APPELLANT: Perlmutter.

FOR RESPONDENT: Grossman.

JUDGMENT.

This is an appeal by leave from the judgment of the District Court, Jerusalem, which upheld conclusions arrived at by the Magistrate of Jerusalem. It appears that the Appellants allowed Mr. Abraham

Garbuzi and his wife to live in the house which is the subject matter of the dispute. After the death of Mr. Garbuzi, his wife continued to occupy the house and in fact sublet rooms to other persons, one of whom is the Respondent.

Now it seems to us that the only question that arises is: Did the Appellants by any action on their part ratify this sub-letting? In this connection the relevant article of the *Mejelle* is Article 447, which provides that if any unauthorised person lets anything on hire the legality of that hire depends upon the ratification of the owner. We would emphasize that on a strict interpretation of the article it is not necessary that the unauthorised person should have held himself out to be acting as an agent. We have now to consider the alleged act by which it was sought to establish that the Appellant in fact confirmed this sub-letting, so as to bring it within the ambit of Article 447. The Appellant in Civil Case 100/44 in the Magistrate's Court sued Mrs. Garbuzi. Paragraph 4 of his statement of claim reads as follows:—

> "Further the sum of LP. 40 is due from her to the Plaintiffs which constitute the sums of rent collected by her for the lease of 3 rooms and two kitchens and two stores in the house of the Plaintiff."

This claim by the Appellant is quite clearly a claim for rent and a claim for nothing more than rent. In order to succeed in his claim for rent he must have adopted the contract upon which alone the claim for rent was based. That action was settled and his claim for rent was conceded by that settlement to the extent that although he did not in fact receive the actual cash, the sum of LP. 40 was set off against other advantages which the Appellant derived. In our opinion there cannot be any doubt that that action on his part amounted to ratification within the meaning of Article 447 of the *Mejelle*. This being so, it is unnecessary for us to decide the other points raised by the Respondents as to whether there was silence on the part of Appellant during a period of years before the case and whether that silence amounted in law to estoppel.

The appeal must be dismissed and the judgment of the District Court upheld. Inclusive costs of LP. 10.—.

Delivered this 21st day of October, 1946.

Chief Justice.

HIGH COURT No. 53/46.

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

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

IN THE APPLICATION OF :—

Said Mohammad Hamad & 4 ors. PETITIONERS.

v.

Chief Execution Officer, District Court, Tel Aviv & 4 ors. RESPONDENTS.

Purchase and mortgage of undivided shares in land — Co-owners claiming right of prior purchase — Land Court ordering attachment of mortgaged shares — Enforcement of mortgage and order of Chief Execution Officer and of Director of Land Registration to transfer the shares to the highest bidder — Ineffectiveness of Chief Execution Officer's order cancelling order of attachment made by Land 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 his order dated the 26th March, 1946, in Execution file No. 31/45, Tel Aviv, for the release of attachment in respect of shares of Respondent No. 4 should not be cancelled pending the determination of Land Case No. 14/44 of the Land Court, Nablus, and to Respondents 2 and 3 to show cause why they should not refrain from registering Respondent's No. 4 shares in favour of Respondent No. 5 *vide* file 277/46 Land Registry, Tulkarm; rule *nisi* made absolute:—

1. Chief Execution Officer has no power to cancel or to vary an order of provisional attachment made by a competent Court.
2. Where a conservatory attachment has been levied on land at the instance of persons claiming right of *awlawiyeh* the land cannot be sold through Execution Office to satisfy a mortgage debt, even if the mortgage was registered prior to the *awlawiyeh* claim.

(*M. L.*)

REFERRED TO: H. C. 48/40 (7, P. L. R. 379; 8, Ct. L. R. 55; 1940, S. C. J. 507); C. A. 364 and 365/44 (12, P. L. R. 152; 1945, A. L. R. 321).

ANNOTATIONS:

1. On point 1 see H. C. 48/40 (*supra*) see also H. C. 71/46 (1946, A. L. R. 600).
2. On point 2 see C. A. 364 and 365/44 (*supra*).

(*A. G.*)

FOR PETITIONERS: Hamoudeh.

FOR RESPONDENTS: No. 1 — Absent — served.
Nos 2—3 — Crown Counsel — (Southworth). (withdrew with the permission of the Court).
No. 4 — Absent — served.
No. 5 — Eliash.

ORDER.

The Petitioners are co-owners of certain parcels of the Miskeh lands. On the 15th November, 1943, Mr. Gissin (Respondent No. 3 *) acquired three out of 729 shares in the parcels aforesaid, and on the same day he mortgaged the shares acquired by him to Keren Kayemeth Leisrael Ltd.

In 1944 the Petitioners instituted an action in the Land Court of Nablus, Cause 13/44, to enforce their right of prior purchase against Respondents 4 and 5, and other co-owners, in respect of the aforementioned shares, and on the 25th May, 1944, the Petitioners obtained from the said Land Court a provisional attachment on the aforementioned shares pending the determination of the action before the Nablus Court. The Land Registrar of Tulkarm was served with the order of provisional attachment.

On the 3rd June, 1945, Keren Kayemeth Leisrael Ltd., the mortgagees, applied for execution against Respondent No. 4 at the Execution Office at Tel Aviv and execution proceedings took their usual course. On the 15th March, 1946, the mortgaged shares were sold in execution to Respondent No. 5, who was already a co-owner. On the 24th March, 1946, Respondent No. 5 paid the purchase price, and two days afterwards the Chief Execution Officer of Tel Aviv issued an order to the Land Registrar at Tulkarm (Respondent No. 3) to cancel all attachments laid on the shares of Respondent No. 4 which had been purchased at public auction, and to register the shares in the name of Respondent No. 5. Respondent No. 3 was thus placed in a dilemma; on the one hand he had the order of provisional attachment issued by the Nablus Court, and on the other hand he had orders from the Chief Execution Officer of Tel Aviv to cancel all attachments on the shares. Ultimately, on the 25th April, 1946, the Director of Land Registration informed the Registrar of the Nablus District Court that, in view of the unambiguous order received from the Chief Execution Officer of Tel Aviv, he had issued directions to the Registrar of Lands at Tulkarm to comply with the order given by the Execution Officer of Tel Aviv. The Petitioners then decided to apply to the High Court for an order directing the Chief Execution Officer of Tel Aviv (Respondent No. 1) to show cause why his order of the 26th March, 1946, for the release of the provisional attachment clogging the shares of Respondent No. 4 should not be cancelled pending determination of the Land Court case No. 14/44 at Nablus. The Petitioners point out

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* *Scil.*: No. 4.

in paragraph 8 of their petition that the release of the attachment would be fatal to their claim for *awlawiyeh*.

The Director of Lands has filed an affidavit explaining the position from his standpoint and leaving the matter in the hands of the Court.

On behalf of Respondent No. 5 an affidavit sworn by Mr. Danin was filed.

Mr. Eliash appeared for Respondents No. 4 and 5 and contended that the order *nisi* should be discharged because the Petitioners had failed to disclose that the shares under reference had been mortgaged prior to the grant of a provisional attachment by the Nablus Land Court.

We do not consider that this argument is justified in this case, inasmuch as Petitioners' case was based mainly on the point that a provisional attachment granted by a competent Court could not be cancelled at the request of a Chief Execution Officer.

Mr. Eliash also submitted that the Petitioners should have taken action as prescribed by Article 17 of the Provisional Law of Disposition of 30th March, 1912, or Article 115 of the Law of Execution of 11th May, 1914, and that failure so to do precludes them from interfering with the consequences of the sale by execution of the mortgaged property.

Mr. Hammoudeh for the Petitioners relied on H. C. 48/40, P. L. R. 379, which laid down that a Chief Execution Officer had no power to vary an order of provisional attachment made by a Magistrate's Court. He also quoted Civil Appeals 364 and 365 of 1944 (12, P. L. R. 152) which were *awlawiyeh* cases in which the Court of Appeal pointed out that the Plaintiff should, when filing a statement of claim, lodge a *caveat* or obtain an order of conservatory attachment for which provision is made in Article 294 of the Ottoman Code of Civil Procedure.

It is not disputed in the present case that the Plaintiffs in Case 13/44 Nablus Land Court, obtained a provisional attachment of the shares of land which are the subject matter of the said case. We have not been told whether the provisional attachment was granted under Rule 303 of the Civil Procedure Rules, 1938, or under the provision added to Article 271 of the Ottoman Code of Civil Procedure on the 2nd April, 1329 (*i. e.* 1911 *A. D.*); but it is clear that the shares were attached by the Nablus Court in order to prohibit their alienation pending the determination of the case. The question which has arisen is whether a claim under Article 41 of the Ottoman Land Code, backed

by a provisional attachment, can be nullified by execution proceedings begun after the provisional attachment had been entered at the Land Registry.

It is true that Article 17 of the Provisional Law of Disposition of Immovable Property provides that where immovable property is being sold through the *Tapou* Offices by public auction in accordance with special laws, and an action claiming such property is brought before the sale is completed, the Court will suspend the proceedings of the auction and that if the action is brought after the completion of the sale the Court shall not hear the case unless the delay was due to a lawful cause. It should here be noted that by virtue of section 14 of the Land Transfer Ordinance as amended by Ordinance 16 of 1938, it is now the President of the District Court who orders the sale which is carried out in the Execution Office.

There is also Article 115 of the Execution Law of 1332 which provides that a person claiming possession of immovable property which is under auction must make his claim before the issue of the final order of sale and pray for postponement, and may on furnishing security be allowed fifteen days to obtain from the Court an order of stay of execution; otherwise the execution shall proceed.

In the present instance, the Petitioners did not attempt to intervene directly in the execution proceedings and did not obtain a Court order staying execution, but they had started proceedings claiming the property and had lodged a provisional attachment even before execution proceedings were begun. It therefore seems necessary to relate the execution proceedings at Tel Aviv with the entry in the Tulkarm registry of the provisional order of attachment issued by the Nablus Court.

Was the Chief Execution Officer of Tel Aviv justified in proceeding with execution and sale because the present Petitioners did not apply to him for a postponement, or should he have paid heed to the provisional attachment of the property by order of the Nablus Court even without an application being made by the Petitioners?

Being given that under Article 89 of the Law of Execution the Chief Execution Officer of Tel Aviv had to notify the Tulkarm Land Registrar that he was attaching the shares registered at Tulkarm, and in return the Execution Office of Tel Aviv had to be informed of the tenor of the entries in the Tulkarm register concerning the said shares, we must assume that the existence of the provisional attachment was made known to the Tel Aviv Execution Office.

It seems to us important not to under-rate the practical value of registration and to give due weight to the presumption that the Execution Officer of Tel Aviv was aware of the fact that a Court of competent jurisdiction had provisionally attached the shares sought to be sold in execution through the Tel Aviv Execution Office. We would point out, in this connection, that the Execution Officer did not fail to pay attention to the fact that the sale carried out by him was subject to the retention of a lease dated 15.11.43 and registered in the Tulkarm register. It is therefore not clear to us why no importance seems to have been paid to the provisional attachment lodged on behalf of the present Petitioners by order of a competent Court.

The *ratio decidendi* at the present juncture seems to us to be that so long as the provisional attachment is not rescinded by order of a competent Court or by the dismissal of Land Case 13/44, it cannot be erased from the registration of the shares in dispute. To hold otherwise would nullify the value of a provisional attachment granted as a conservatory measure.

It may well be that in the circumstances of this case the effect of the procedure traced out by Article 115 of the Execution Law had been achieved by Petitioners in advance of the execution set in motion by a mortgage creditor at Tel Aviv, inasmuch as the provisional attachment was obviously not to secure the payment of a debt but to stop any further dealing with the property. We must, however, leave this question open for the time being.

We wish to mention that we have given consideration to the argument that the execution creditor in this case had registered the mortgage prior to the beginning of the Land Case, which Petitioners entered before the Nablus Court in 1944, but we have also kept in view the fact that the mortgage creditor must be presumed to have known that he was lending money on the security of recently acquired undivided shares in land which might be claimed by co-owners under Article 41 of the Ottoman Land Code. We again point out that the importance of the land registration system must not be under-rated and that a purchaser or mortgagee cannot plead ignorance of facts which are on record in the land registers.

It is not within our province, in the present case, to elucidate the complications which have arisen or will arise in connection with the transactions which followed the purchase of undivided shares by Respondent No. 4. The only thing we have to decide is whether the provisional attachment may be released, and we have already stated our view in the matter. We therefore make the rule *nisi* absolute.

Petitioners are allowed LP. 10 (ten) inclusive costs to be paid by Respondents 4 and 6.

Given this 25th day of July, 1946, in the presence of Mr. Hamoudeh for Petitioner and Mr. Sharf for Respondents.

Chief Justice.

HIGH COURT No. 107/46.

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

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

IN THE PETITION OF:—

Yitzhak Funt, a member of the Executive of the Jewish Community Council of Jerusalem, Jerusalem. PETITIONER.

v.

1. The Chief Secretary, Government of Palestine, Government Offices, Jerusalem,
2. The General Officer Commanding, Palestine and Trans-Jordan, Force Headquarters, Jerusalem,
3. The Military Commander, Haifa Area, Force Headquarters, Haifa,
4. The Acting Inspector General of Police and Prisons, Police Headquarters, Jerusalem,
5. The Senior Naval Officer, Levant Area, Naval Headquarters, Haifa,
6. The Officer Commanding the s/s "Ocean Vigour", Haifa Port, Haifa,
7. The Officer Commanding the s/s "Empire Heywood, Haifa Port, Haifa. RESPONDENTS.

Order of deportation made by High Commissioner under Reg. 112, Defence Emergency Regulations — Executive actuated by considerations of public security — Powers of High Court to set aside orders even if they are technically legal — Ways and means of execution of deportation orders.

Return to an order *nisi*, issued by this Court on 25th November, 1946, to show cause why a writ of *habeas corpus* should not issue directed to the Re-

spondents to have the bodies of the 1941 persons named in the Schedule attached to the petition and 1409 others now on board the s. s. "Lochita", also known as the "*Knesseth Yisrael*" produced before this Court and to await the further order of this Court; the order *nisi* discharged:—

1. Whenever it should appear that what was really in contemplation was exercise of abuse of power, High Court exercising its power to protect the liberty of the subject will not accept Crown's answer that the custody of the person ordered to be deported is at the moment technically legal.

2. Fact that illegal immigrants can be deported from Palestine under Immigration Ordinance does not preclude High Commissioner from resorting to more drastic alternatives given to him by Legislature.

3. Whenever High Commissioner is convinced by advice of his advisors — though many people may hold that advice to be wrong — that the landing of refugees, however helpless and unfortunate, may prejudice public security in Palestine High Court will not usurp functions of Executive and say which advice was right.

4. High Court has power to make an order to prevent a subsequent illegality.

5. Executive can with all forces at its disposal compel persons against whom a deportation order is made to obey the order and to board any of H. M.'s ships, and, while there is inevitable restriction of liberty of movement, such ship cannot be regarded as a floating prison.

(*M. L.*)

REFERRED TO: Liversidge *v.* Anderson (Appeal Cases 1942) *Ex parte* Venicoff (1920, K. B. Vol. III); R. *v.* Chiswick, Police Station Superintendent (1, K. B. 1918); R. *v.* Brixton Prisons (Governor) (2, K. B. 1916); *In Re* Gooto and Inyokwanwa (Infants) 1891; H. C. 63/46 (1946, A. L. R. 545).

ANNOTATIONS:

1. For grounds upon which High Court will interfere with discretion of public authority see H. C. 63/46 (*supra*) and annotations, see also the English cases referred to.

2. On deportation of aliens see H. C. 100/44 (1944, A. L. R. 824; 11, P. L. R. 431) and annotations in A. L. R. and H. C. 39/45 (1945, A. L. R. 745; 12, P. L. R. 414).

3. On High Court's non interference with discretion of public officer see H. C. 13/46 (1946, A. L. R. 513) and H. C. 23/46 (1946, A. L. R. 511; 13, P. L. R. 290) and annotations in A. L. R.

4. On point that facts not challenged in affidavit of reply stand admitted see H. C. 111/45 (1946, A. L. R. 293) and annotations.

(*A. G.*)

FOR PETITIONER: Goitein and Spaer.

FOR RESPONDENTS: Solicitor General — (Griffin) and Crown Counsel — (Heenan).

O R D E R.

This is a return to an order *nisi* in *habeas corpus* proceedings. The facts are that at about 1.40 on the 26th November a ship known as "Lochita" or "Knesseth Yisrael" docked at a cargo jetty in Haifa

harbour. The ship on arrival was in company with H. M. S. Haydon, H. M. S. Brissenden, H. M. S. Octavia and H. M. S. Espiegle. The ship was boarded by Major Davies, an officer of the General Staff of the 1st infantry Division, and he found that there were aboard approximately 4000 persons.

An Order, which is Annexure B to the Affidavit filed by the Chief Secretary, was prepared in the Chief Secretary's office: The draft Order left Jerusalem at 1 o'clock and was signed by the High Commissioner, who was at Jaffa, some time between 2.15 and 2.30 *p. m.* The Order, purporting to be a Deportation Order, was made under Regulation 112 of the Defence Emergency Regulations 1946. The Order was an Order of Deportation against each and every one of the persons who entered Palestine on board this vessel "Lochita" or "Knesseth Yisrael". It further directed that the said persons be kept in the custody of the General Officer Commanding, British Troops in Palestine and Transjordan, the Commodore of Palestine and the Inspector General of Police, whilst awaiting deportation.

The persons affected have petitioned this Court by way of *Habeas Corpus*. One thousand nine hundred and forty-one of them were identified by name; the remainder were described on the order of this Court, directing the Respondents to show cause, as "other persons aboard the ship".

The case for the Respondents, as the Solicitor General emphasized, was capable of being presented with simplicity. He relied on the Palestine Defence Order-in-Council, 1937, which clearly authorizes the High Commissioner to make in peacetime for the security of Palestine, regulations as drastic as any of those made in England during the recent war. Cloaked with this authority, the High Commissioner promulgated the Defence Emergency Regulations, 1945, and amended them in 1946. Regulation 112 is one of these Regulations. There is no doubt and it was not otherwise contended that these Regulations were *inter vires* the Order-in-Council. There is equally no doubt, the Solicitor General submits, that Regulation 112 empowered the High Commissioner to make the Order complained of, that is the Order marked Annexure B to the Chief Secretary's Affidavit. He referred us to the well known case of Liversidge *v.* Anderson (Appeal Cases 1942) and to *Ex parte* Venicoff, 1920 K. B., Vol. III, which indicate the circumstances in which the High Court will intervene to review an Order made by the Executive under a similar regulation. The Order he submits has been made under the authority of the law and this Court should not seek to look behind or to concern itself with the

reasons why any such Order was made. He emphasised that the Order was not concerned with the status of the persons affected or with the question of immigration; it was issued solely on grounds of public security.

Mr. Goitein, for the Petitioner, advanced his argument under two heads. He says that the making of the Order was a misuse of power similar to that considered in the case of Rex *v.* Chiswick, Police Station Superintendent, (1 K. B. 1918). It was, he says, a mere sham to cover up something totally different from what was contemplated by the Regulations.

Now, in view of certain arguments in this case, we emphasise at this stage that if we were convinced that an Order made by the Executive was what could be described as a sham Order, this Court would intervene in spite of the fact that the order, on the face of it, was valid. To adopt the words of Low, J., in Rex *v.* Brixton Prison (Governor) (2 K. B. 1916) we would not accept as sufficient the answer of the Crown that the custody at the moment is technically legal if we were satisfied that what was really in contemplation was the exercise of an abuse of power. The arm of the law in this country would have grown very short and the power of this Court very feeble if it were subject to such a restriction in the exercise of its power to protect the liberty of the subject as the proposition involves. Indeed, this principle has already been upheld by this Court in High Court Case 63/46.

Having conceded the legal principle, we proceed to examine the facts to which Mr. Goitein seeks to apply it. He says and rightly says, that illegal immigrants can be deported from Palestine under the Immigration Ordinance of 1941, and that in these circumstances to resort to Regulation 112, which is a more drastic legal provision, was an abuse of power. He submits, as he was forced to if his argument was to carry conviction, that the object of the High Commissioner was to deport these persons solely because they were illegal immigrants. He seeks support for this contention in answers by the Chief Secretary in the course of his cross-examination. These answers were — "We were prepared to hold them within territorial waters to give them an opportunity of proving they had certificates or that they have lawful authority to enter Palestine"; and, in reply to a question by Mr. Goitein as to whether, if they were not prohibited immigrants, they would be deported — "No, I would expect them to come forward and claim they were entitled to enter." And, finally, in answer to the question "You are prepared, I think, to hold these persons within territorial waters to give them an opportunity of coming forward, to

use your words, and proving they may enter Palestine" — "Certainly".

Now it is true that if those replies were taken by themselves it could be inferred that the object was to prevent a breach of the Immigration Ordinance. But it seems to us that those replies cannot be taken away from their context; they must be considered in the light of Mr. Gurney's other answers and the whole trend of his evidence. They must also be considered in the light of the unambiguous wording of the Order itself, which is signed by the High Commissioner, and which, when all is said, is the best evidence as to what was in the mind of the High Commissioner.

Mr. Gurney also gave evidence to the effect that for days before this ship entered Palestine it was screened by the Naval and Air Forces of the Crown, and its progress on the high seas towards the territorial waters of Palestine was the cause of constant anxiety to the High Commissioner and his advisers because of the effect its arrival would have on public security.

The evidence of Mr. Gurney as to the background was clear. He, as the principal civil adviser to the High Commissioner, and other officers who were specifically charged with the responsibility for public security in Palestine, advised the High Commissioner that the landing of these unfortunate people would have been prejudicial to public security and the High Commissioner, as he categorically states in his Order, was convinced to this effect. It matters not that, in the opinion, however sincerely held, of many people, that advice may have been wrong. In the light of it, this Court could not say that the Executive acted capriciously and the High Court will not usurp the functions of the Executive and say which advise it thinks was right.

There is the further evidence that it was found necessary, to place this unarmed vessel and its helpless refugees under the control of four warships to prevent the passengers from landing in Palestine. In face of those facts and even apart from the categorical recital in the Order, it seems to us that it would be quite impossible for the Court to accept the submission that the only thing that was disturbing the mind of His Majesty's High Commissioner for Palestine was the possible breach of the statutory provisions of the Immigration Ordinance. The High Commissioner has said definitely in his Order that he was actuated by considerations of public security; the evidence to which we have referred seems to us overwhelmingly to support this averment, and the fact that the persons whom he regarded as prejudicial to public security came also within the ambit of section 10(1)(c) of the Immigration

Ordinance would not preclude him from resorting to the more drastic alternative given to him by the Legislature.

The next argument of Mr. Goitein was that, even assuming the High Commissioner was empowered to proceed under Regulation 112, and we have held that he was, that there was no power in him to make an Order under which these people could be detained outside the territorial waters of Palestine. He submitted that this Court is empowered to issue a writ to prevent an illegality being committed. Here again we entirely agree with Mr. Goitein that we could and would make the Order absolute to prevent a subsequent illegality.

The question then arises, did the Order contemplate an illegality and, if so, what is the illegality? Mr. Goitein alleges that there are two. There is, he says, illegal detention on the high seas between here and Cyprus, and illegal detention in Cyprus. The ships, which are ships under the control of H. M. Navy, are, he says, floating prisons where those persons will be imprisoned. His authority for this is the affidavit of the Petitioner. That the Petitioner, Itzhak Funt, is a citizen of eminence can be conceded from the fact that he is a member of the Executive of the Jewish Community Council in Jerusalem, but this Court could scarcely be expected to accept an opinion of his, however honestly conceived, as conclusive as to the state of affairs prevailing on board ships of H. M. Navy. Every law passed by the Legislature carries with it the legal authority to the Executive to enforce it even, in the last resort, with all the armed forces at the disposal of the Crown. So it is with an Order of Deportation. The Executive can force the person against whom it is made to obey the Order, and, from the legal point of view, we are unable to draw the distinction which Mr. Goitein would draw, between the "Queen Mary" and one of H. M. ships. If the Executive were entitled to force a person against whom a deportation order was made to board the "Queen Mary" to be taken outside territorial waters, as Mr. Goitein would seem compelled to concede, we are unable to see why they could not equally force the person to board one of H. M. ships. Indeed the position seems on all fours with that which arose in Rex *v.* Chiswick Police Station Superintendent where Scrutton, L. J., said: "He" (the Secretary of State) has power to select the ship on which the alien may be placed with the probable result that unless the alien manages to get overboard on to some other ship he will go to the country to which the ship is sailing". Mr. Goitein, again basing himself on Petitioner's affidavit, alleged that those persons will be imprisoned on H. M. ships. There is no sufficient evidence before us that they would suffer any more restraint

than the restriction of liberty incidental on a ship whether it be the "Queen Mary" or a ship of H. M. Navy whilst it is on the high seas proceeding to a definite port, the inevitable restriction on liberty of movement being that the person is compelled to go to that part and that part only. The other illegality he avers is that they will be detained in Cyprus. That may well be so, but here it seems to us that on the principle which we conceive to be embodied in the case quoted to us by Mr. Goitein (*In Re* Gootoo and Inyokwanwa (Infants) 1891), he must adduce evidence to convince us that they will be illegally detained in Cyprus. The fact that the detention may cause hardship, or may be impolitic, is irrelevant as far as this Court is concerned. He must prove that it is illegal. This he was unable to do.

For these reasons the Order *nisi* must be discharged.

Given this 29th day of November, 1946, in the presence of Messrs. E. D. Goitein and A. Spaer for Petitioner and Messrs. L. B. Gibson, K. C., Attorney General and Mr. M. Heenan, Crown Counsel, for Respondents.

Chief Justice.

HIGH COURT No. 77/46.

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

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

IN THE PETITION OF:—

Saber Abdul Aal Abul Khair. PETITIONER.

v.

Director of Land Registration, Jerusalem & 3 ors. RESPONDENTS.

Heir asking registration of his share in accordance with certificate of succession in land registered as mulk — Other heirs alleging land was in fact miri — Onus of proof.

Return to an order *nisi*, issued on 9.9.46, directed to Respondents, calling upon them to show cause why the registration of the inherited shares devolving upon Petitioner by way of inheritance from his testator, the registered owner, Ali Hammad Abul Khair by virtue of the certificate of succession, dated 25.11.45 in parcel No. 139 Block 634 and parcel 13, Block 686 should not be effected in his name at Gaza Land Registry, and/or that Respondents 1 and 2 should register the said inherited share in the name of Petitioner at Gaza Land Registry, order *nisi is* made absolute:—

Land Registrar has to act upon certificate of succession and register the shares as set out therein; any person alleging that registration should be otherwise must prove his allegation before a competent Court.

(*M. L.*)

ANNOTATIONS:

1. *Cf.* H. C. 56/46 (1946, A. L. R. 584) and annotations.

2. On point that the onus of proof is on party seeking to alter registration see C. A. 137/42 (1942, S. C. J. 713; 9, P. L. R. 596) and annotations in S. C. J., see also C. A. 70/45 (1945, A. L. R. 429).

(*A. G.*)

FOR PETITIONER: S. Bseisso.

FOR RESPONDENTS: Nos. 1 & 2 — Absent — served.
Nos. 3 & 4 — S. Zein Eddin.

JUDGMENT.

This is the return to an order *nisi*, directed to the Registrar of Lands, Gaza, and to the Director of Land Registration, calling upon them to show cause why they should not be ordered to register the Petitioner as the owner of certain shares in parcel 139, block 634, and parcel 13, block 686, Gaza.

The facts can be very shortly stated.

The Petitioner is the holder of a certificate of succession showing that he, as the son of a cousin of the deceased, Ali Hammad Abu El Khair, is entitled to be registered as the owner of 3 out of 8 parts in each of the said parcels. The latest entry in the Land Registry describes the land as being land with trees planted before 1331 *A. H.*

It is not disputed that such land is to be regarded as *mulk* and there seems to be no reason why the Petitioner should not be registered in accordance with his certificate of succession. It seems, however, that the third and fourth Respondents, who are daughters of the deceased, approached the Land Registrar alleging that the trees had been uprooted and that the land is therefore now of the *miri* category, and that they accordingly objected to the registration of the Petitioner as an heir to *mulk* property. The Land Registrar thereupon refused to proceed with the registration of the Petitioner's share and on the 16th June, 1946, wrote to the Petitioner a letter informing him that he was holding up registration until "you" (*i. e.* Petitioner) referred the matter to the competent Court. We think that the Land Registrar of Gaza erred in requiring the Petitioner to go to Court as the last entry in the Land Registry clearly shows the land to be of the *mulk* category. The onus was on the party alleging that it should be otherwise to prove such allegation.

The order *nisi* is made absolute and the Land Registrar, Gaza, is

directed to register the Petitioner's shares in the two parcels unless, within a period of one month from to-day, the third and fourth Respondents satisfy him that they have commenced proceedings in the competent Court to have the entry in the land register altered. The third and fourth Respondents will pay the Petitioner's costs, namely fixed (inclusive) costs of LP. 5.

Given this 29th day of November, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 139/46.

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

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

IN THE APPEAL OF:—

Arafeh Salman Ali & an. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Identification parade — Identification by voice.

Appeals from the judgment of the District Court, Jaffa, dated 12th November, 1946, in Criminal Case No. 261/46, whereby Appellants were convicted of attempted murder and attempted house-breaking, *contra* sections 222(a) and 297(a) of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment each respectively; appeals dismissed:—

Identification may be made by voice, not only by looks.

(*A. M. A.*)

ANNOTATIONS: On identification parades *vide* CR. A. 147/45 (1945, A. L. R. 781) and notes.

(*H. K.*)

FOR APPELLANTS: No. 1 — In person.
No. 2 — A. Michaeli.

FOR RESPONDENT: Crown Counsel — (Heenan).

JUDGMENT.

In this appeal the only argument urged in favour of the 2nd Appellant revolved round the question of identification at an identification parade. What happened at this parade is stated by the first witness, and his evidence as to the incidents at the parade was corroborated by Sgt. Smith who was in charge of the identification parade. The only objection made to this parade by counsel was that in the case of the

second Accused the identification was by a voice. I would observe that the witness gave the reasons which were convincing why he could particularly identify this voice.

There is no reason why a person should not be identified by his voice, with equal certainty as he could be identified by his looks. We therefore think there is nothing in the appeal which is dismissed.

The first Accused having withdrawn his appeal the sentence will run from the date of his conviction.

In the case of the second Accused the sentence will run from to day.

Delivered this 18th day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 366/46.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J. (in Chambers).

IN THE APPLICATION OF :—

Dr. Hans Lifshitz. APPLICANT.

v.

Charles Arnold. RESPONDENT.

Setting aside an ex parte judgment — Affidavit as to merits, C. A. D. C., Ja. 155/43 — Default of appearance and default of pleadings — Evans v. Bartlam — Practice.

Application for leave to appeal from the Order of the District Court, Tel-Aviv, dated 30th April, 1946, in Motion No. 159/46, refused:—

Where judgment is given against the Plaintiff for default of appearance, the general rule of practice in regard to filing an affidavit as to merits may be dispensed with when the Plaintiff applies to set the judgment aside.

(*A. M. A.*)

REFERRED TO: C. A. D. C. Ja. 155/43 (1944, S. C. D. C. 249); Evans *v.* Bartlam, 1937, A. C. 473, (1937) 2 All E. R. 646, 106 L. J. (K. B.) 568, 53 T. L. R. 689, 157 L. T. 311.

ANNOTATIONS: See the commentaries in the Annual Practice to O. 27, R. 15, heading "*Regular Judgment*" and to O. 36, R. 33, heading "*Affidavit.*"

(*H. K.*)

FOR APPLICANT: Katzenstein.

FOR RESPONDENT: Apelbom.

ORDER.

In this application it is contended that the learned judge was wrong in re-listing a case under rule 213 of the Civil Procedure Rules because

the Applicant had not filed an affidavit as to merits. The Respondent taking his stand on District Court Civil Appeal No. 155/43, states that the rule in regard to filing an affidavit as to merits does not apply where the judgment involved was given because of the default of appearance at the trial. Now, apart from that judgment, and I do not pronounce one way or another in regard to it, it seems to me that, in spite of the case of Evans *v.* Bartlam, A. E. L. R. 1937 (2), p. 646 quoted by the Applicant, I cannot lay down a rigid rule which applies to every case. It will be sufficient for the purpose of this application if I say that this is one of those appropriate cases where the general rule of practice in regard to filing an affidavit as to merits could be dispensed with.

For these reasons I must refuse leave to appeal. LP. 2 costs.

Given this 21st day of December, 1946.

Chief Justice

SPECIAL TRIBUNAL No. 2/46.

IN THE SPECIAL TRIBUNAL CONSTITUTED UNDER ARTICLE 55 OF THE PALESTINE ORDER-IN-COUNCIL, 1922, AND SECTION 9 OF THE COURTS ORDINANCE, 1940.

BEFORE: FitzGerald, C. J., Edwards, J. and His Eminence the Chief Rabbi (Dr. Herzog).

IN THE APPLICATION OF:—

Della Goldenberg. PETITIONER.

v.

Moshe Goldenberg. RESPONDENT.

Memorandum to Special Tribunal drawn up and signed by Petitioner — Application of sec. 4(2), Religious Community (Change) Ordinance to party opting out of Jewish Community — Scope of provisions re jurisdiction of District Court in matters of personal status affecting foreigners — Effect of notification by proper officer of Vaad Leumi that Applicant's name has been duly added to register of members of Jewish Community — Exclusive jurisdiction of Rabbinical Court.

Application under Art. 55 of the Palestine Order-in-Council, 1922, and section 9 of the Courts Ordinance, 1940, to decide whether the action for divorce brought by the Respondent against Petitioner before the Rabbinical Court, Jerusalem, is one within the exclusive jurisdiction of the Rabbinical Court:—

1. Special Tribunal proceedings are not vitiated by failure of strict ad-

herence to provisions of Rule 354, Civil Procedure Rules, if all relevant matter is set out in memorandum drawn up and signed by Petitioner.

2. Opting out of Jewish Community by husband who at the time of the marriage was a registered member of that Community does not avail him to oust Rabbinical Court's jurisdiction in proceedings subsequently brought by wife against him, whether or not she knew that he opted out.

3. District Court's jurisdiction in matters of personal status regarding foreigners does not extend to cases where only one party is a foreigner while the other is a Palestinian citizen.

4. Where a person applied under Rule 17, Jewish Community Rules, to be added to the register and received written reply from proper officer of *Vaad Leumi* to the effect that his name has been duly registered, he can properly be regarded as member of Jewish Community without awaiting publication of amended list of members.

5. Matrimonial action by wife who is stateless (or a foreigner) and who caused her name to be added to the register of members of Jewish Community against her husband who is a Palestinian citizen and was at the time of his marriage a registered member of that Community is within exclusive jurisdiction of Rabbinical Court.

(*M. L.*)

REFERRED TO: H. C. 105/45 (13, P. L. R. 180; 1946, A. L. R. 546).

FOLLOWED: H. C. 124/43 (11, P. L. R. 54; 1944, A. L. R. 21); C. A. 274/45 (13, P. L. R. 111; 1946, A. L. R. 324); C. A. 44/46 (*post*, p. 42).

ANNOTATIONS:

1. For previous proceedings between the parties see H. C. 105/45 (*supra*) and H. C. 84/46 (1946, A. L. R. 795).

2. On effect of opting out of community see H. C. 124/43 (*supra*) see also C. A. 44/46 (*supra*) and annotations.

3. On point 3 see C. A. 274/43 (*supra*) and annotations in A. L. R.

4. On point how membership of community is to be proved see H. C. 105/45 (*supra*) and annotations in A. L. R. see also H. C. 35/46 (1946, A. L. R. 743).

(*A. G.*)

FOR PETITIONER: Levanon.

RESPONDENT: In person.

JUDGMENT.

These are proceedings under Rule 354 Civil Procedure Rules, 1938, and fall within the last sentence of Article 55 of Palestine Order-in-Council, 1922. The Respondent took the formal objection that, as the memorandum contemplated by Rule 354 was not drawn up and signed by consent of parties, the Petitioner should have asked the District Court of Tel-Aviv to draw it up. The fact is that the Petitioner herself has drawn up and signed the memorandum. Although technically there is something in the Respondent's objection we do not think that it ought to vitiate these proceedings since it is not seriously

contended that the memorandum does not set out all relevant matter. We accordingly dismiss this preliminary objection.

The last sentence of Article 55 is in the following terms:—

> "Whenever a question arises as to whether or not a case is one of personal status within the exclusive jurisdiction of a Religious Court, the matter shall be referred to a Special Tribunal of which the constitution shall be prescribed by Ordinance."

The Petitioner and Respondent, who are husband and wife, were married in Jerusalem on the 9th day of January, 1945, by a Rabbi authorised by the Chief Rabbinate of Palestine.

All the formal requirements of the Rabbinate had been complied with and there can be no doubt that the parties, who are both Jews, were properly married according to the rites of the Jewish Religion. The Respondent is a Palestinian citizen and was at the time of his marriage a registered member of the Jewish Community. The Petitioner is stateless. At the time of the marriage she considered herself to be a member of the Jewish Community; but she later discovered that her name was not on the list of members as provided for by Rule 18 of the Jewish Community Rules as amended by the Jewish Community (Amendment) Rules, 1937. The effect of this omission was fully discussed in High Court No. 105/45 Vol. 13 P. L. R. p. 180, a case between the same parties. Having been unsuccessful in High Court 105/45 the present Petitioner applied to the Jewish Community to have her name added to the register under Rule 17 of the Jewish Community Rules, as amended, and she thereafter brought an action in the Rabbinical Court of Tel Aviv, in which she asked for the final settlement of the matrimonial and financial disputes. The present Respondent on his part brought an action in the District Court asking for a declaratory judgment that the parties be separated and that he be exonerated from paying Petitioner any sum towards her support. Hence proceedings before this Special Tribunal.

We may say that the Respondent in paragraph 2 of his affidavit in reply has sworn that the Petitioner knew long before the date of her affidavit, that is, before 9th August, 1946, that he (the Respondent) had opted out of the Jewish Community and had his name struck off the register. We shall at once deal with the argument of the Respondent that, as he is no longer a member of the Jewish Community, a Rabbinical Court has no jurisdiction. The answer is to be found in section 4(2) of the Religious Community (Change) Ordinance and in High Court 124/43 Vol. 11, P. L. R. p. 54. We accordingly reject the contention of the Respondent on this point. Civil Appeal 274 of

1945 Vol. 13, P. L. R. p. 111 would seem to be an authority for Mr. Levanon's proposition that the District Court does not have jurisdiction in a case like the present.

The next question is whether we are satisfied that at the time when she brought the action now pending in the Rabbinical Court, the present Petitioner was a member of the Jewish Community. The action was brought on the 12th June, 1946. The Respondent contends that there was no publication of the amended list of members until some time in July, 1946. The Respondent states that he opted out in May, 1946, so that on 12th June, 1946, neither party (he contends) was a member of the Jewish Community. We have already stated that the Respondent's action in opting out cannot avail him in these proceedings. The sole question therefore is whether the Petitioner was on the 12th June, 1946, a member of the Jewish Community. She has satisfied us that, prior to the 12th June, 1946, she had applied under Rule 17(2) to be added to the register and she has also satisfied us that she had, prior to the same date received a reply from the proper officer of the *Vaad Leumi* to the effect that her name had been duly registered. We accordingly conclude that, on 12th June, 1946, she could properly be regarded as a member of the Jewish Community.

For these reasons we think that the matter is one of personal status within the exclusive jurisdiction of the Religious Court, namely the Rabbinical Court of Tel-Aviv. We rule accordingly. We think that our decision is in consonance with the spirit of the decision in Civil Appeal 44/46.

Delivered this 7th day of January, 1947, in presence of Mr. Levanon for Petitioner and Respondent in person.

Chief Justice.

HIGH COURT No. 110/46.

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

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

IN THE APPLICATION OF:—

Sheikh Abdel Rahman Dajani. PETITIONER.

v.

The Supreme Moslem Council. RESPONDENTS.

Application to High Court to set aside an order of the Supreme Moslem

Council — Non-interference of High Court as procedure and order complained of not regarded as a denial of justice.

Petitioner for an order *nisi* to issue directed to the Respondents calling upon them to show cause why their Order dated 9.7.46 reprimanding the Petitioner and ordering the non-payment of Petitioner's increment for a period of one year from date of 15th April, 1947, should not be set aside; order *nisi* refused:—

1. High Court will not usurp functions of any statutory body in Palestine nor act as Court of Appeal from such body, though it will interfere where it considers that there has been a denial of justice.

2. Where an employee of a statutory body was asked to answer certain charges, failure to supply him with a copy of the exact complaint made against him cannot be regarded as in any sense a denial of justice.

3. It is for Supreme Moslem Council to lay down the procedure of their own Courts, and if an employee of theirs fails to satisfy them that he adhered to the procedure outlined by them, they are legally entitled to impose such authorised sanctions as they consider necessary.

(*M. L.*)

ANNOTATIONS :

1. For grounds upon which High Court will interfere with discretion of public body see H. C. 63/46 (1946, A. L. R. 545) and annotations, see also H. C. 48/46 (1946, A. L. R. 543) and annotations.

2. For other High Court petitions against the Supreme Moslem Council see H. C. 135/44 (1945, A. L. R. 407; 12, P. L. R. 99) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONER: W. Salah.

FOR RESPONDENTS: *Ex parte.*

ORDER.

This is an application for an order *nisi* calling upon the Supreme Moslem Council to show cause why an order reprimanding the Petitioner and ordering the non-payment of Petitioner's increment should not be set aside.

We reiterate at the outset what has been said on several occasions that this Court will not usurp the functions of the Supreme Moslem Council nor is it a court of appeal from the Supreme Moslem Council. It is true that in our capacity as High Court of Justice we will investigate any act done by any statutory body in Palestine and if we consider that there has been a denial of justice we will intervene.

This Court has on several occasions stressed the desirability of the Supreme Moslem Council making some such disciplinary rules in regard to dismissal of their employees as those contained in the Colonial Regulations. So long as they fail to make those rules, they cannot be surprised if they are called upon to answer writs of this nature.

Now the facts in this case appear to be that the Supreme Moslem

Council acting on a complaint made to them investigated the conduct of the Petitioner in adjudicating a case within the jurisdiction of the Moslem Courts. The first ground of complaint by Petitioner is that when Petitioner was asked to answer several charges he was not given a copy of the exact complaint made against him. Failure to supply him with a copy cannot be regarded as in any sense a denial of justice. It very often happens that charges are made against a person which cannot be substantiated but which do give rise to an enquiry on other grounds. It is clear to us that in this case, while the Supreme Moslem Council may have had suspicion as to the allegations of bribery against the Petitioner, they dropped it for lack of evidence. In so far as that charge is concerned, the Supreme Moslem Council took no action against the Accused.

Now in their letter giving reasons for withholding the Petitioner's increment the Supreme Moslem Council based their decision on 5 grounds. At this stage we find it desirable to add that the Supreme Moslem Council are the custodians of the tradition and procedure of their own Courts. It is for them to lay down the procedure that should be adopted and they are entitled to demand from their Courts that the procedure should be followed. We are not a court of appeal from the Supreme Moslem Council on this point and we will only criticise the procedure if it conflicts with the fundamental principles of justice. In regard to the first 4 reasons we are satisfied that the Supreme Moslem Council were entitled to demand that the Petitioner should follow the procedure outlined in the letter and if he failed to satisfy them that he had adhered to it they are legally entitled to impose such authorised sanctions as they consider necessary. In regard to the 5th ground Mr. Salah has said that the Petitioner had a perfect answer. In fact it is unnecessary to go into this point because we are satisfied that the first 4 grounds alone would be sufficient to justify the Supreme Moslem Council in the action they took. But even in regard to this 5th ground, we find it impossible to accept the argument of Mr. Salah. Apparently the ground of the complaint was that the Petitioner had not followed a certain procedure, which according to the Council was to refer the parties to the competent department so that legal steps might be effected in accordance with procedure." Mr. Salah has suggested that what the Supreme Moslem Council meant was that the Petitioner should have warned the C. I. D. or the Police with a view to criminal proceedings being taken against the parties. We can find no reason for placing this interpretation on the sentence which appears in the decision of the Supreme Moslem Council. We think it means no more

than that he should have followed a certain procedure which is required by the religious law of Islam.

It may well be that there is cause for complaint against the manner in which the investigation was carried out, but we are satisfied that there has been no such denial of justice as would justify this Court in making an order.

The application for the issue of an order *nisi* is therefore refused.

Given this 10th day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 147/46.

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

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

IN THE APPEAL OF :—

Efraim Levitov. APPELLANT.

v.

Tova and Bella Alper. RESPONDENTS.

Action for a declaratory judgment that Plaintiff was a tenant of a terrace and protected by Rent Restrictions (Business Premises) Ord. — Question of jurisdiction — Unroofed places as premises within Rent Restrictions Ordinance.

Appeal from the judgment of the District Court of Haifa, dated 4.4.46 in Civil Case No. 112/44, allowed:—

1. An action for a declaratory judgment that Plaintiff was a tenant of certain premises and therefore protected by Rent Restrictions Ordinance is within jurisdiction of District Court, not of Land Court.

2. Unlike a mere plot of land, an unroofed place such as a terrace or a yard, if used in connection with an adjacent shop, store, warehouse or the like, and even if not absolutely essential for tenant's business, must be regarded as premises within ambit of Rent Restrictions (Business Premises) Ordinance.

(*M. L.*)

DISTINGUISHED: C. A. 215/45 (13, P. L. R. 143; 1946, A. L. R. 182) and C. A. 204/43 (10, P. L. R. 584; 1943, A. L. R. 699).

REFERRED TO: Giddon *v.* Mills, 2 K. B. 1925, p. 713.

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946 Law Reports of the District Court of Haifa, p. 109.

2. On question of jurisdiction of District Court see 215/45 (*supra*) see also C. A. 118/43 (1943, A. L. R. 346); C. A. 17/43 (1944, A. L. R. 498); C. A. 217/44 (1944, A. L. R. 758) and C. A. 422/44 (1945, A. L. R. 166).

3. On 2nd point see C. A. 240/43 (*supra*) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANT: Wittkowski.

FOR RESPONDENTS: Geiger.

JUDGMENT.

Curry, A/J.: The present Appellant brought an action in the District Court at Haifa asking for a declaratory judgment to the effect that he was a tenant of certain premises, and praying that the Respondent be restrained from disturbing his right to the exclusive possession thereof, and be ordered to remove a construction placed thereon.

Briefly the facts are as follows:—

The Appellant in the first instance leased a shop; then the shop and half the terrace. Subsequently he leased a storeroom behind the shop and the other half of the terrace. The last written leases were as follows:—

(a) For the period of 1.1.36 to 1.1.37 in respect of the store and half the terrace and

(b) from 1.2.37 to 1.2.38 for the cafe and the other half of the terrace. Since that period the parties have been before the Rent Tribunal which assessed the rent of the store at LP. 1.750 mils, the passage at LP. 2.— and the shop at LP. 9.— plus 20% making LP. 14.100. That rent was increased by 15% in 1943 and the Appellant used to give the Respondent three promissory notes, one for LP. 3.300 mils in respect of the store and half the terrace, another for LP. 10.800 in respect of a shop and the other half of the terrace, and a further promissory note for LP. 2.150 mils being the 15% increase. The first issue that was raised before the District Court was whether that Court had jurisdiction in this action to give a declaratory judgment or whether it was within the jurisdiction of the Land Court. The District Court held that it had jurisdiction and I have no hesitation in agreeing with the learned judges. The question in this case was whether or not the leases entered into by the parties were in respect of premises coming within the Rent Restrictions (Business Premises) Ordinance. The action was between landlord and tenant and based upon contract. It is clearly to be distinguished from C. A. 215/45 15 P. L. R. 143, which was a pure action of trespass.

The real issue between the parties is whether or not the terrace can

be separated from the cafe and storeroom, and be held as a result not to come within the ambit of the Rent Restrictions (Business Premises) Ordinance. The learned Judges came to the conclusion that the terrace did not fall within the aforesaid Ordinance on the ground that it was not part of the shop or storeroom although adjacent thereto, and further that it was not a necessary and inseparable part or addition to the shop for the business or sale of sausages. The Court further appears to have been influenced by the fact that the terrace was assessed by the Rent Tribunal separately from the shop and the storeroom.

I find myself unable to agree with the decision of the learned Judges. There can be no doubt that the terrace is used by the Appellant for his business only and for no other purpose whatsoever. There can be no doubt that had the shop and half the terrace originally been leased together for one lump sum rent the Respondent could not have claimed back the terrace as not being protected by the Ordinance. This point is of importance in my opinion in view of the judgment in Giddon *v.* Mills 2 K. B. 1925, 713. In England at that time there was an Act protecting the tenants of dwelling houses but not of business premises. The tenant in that case leased a warehouse which he apparently converted into living quarters and a garage. The Court there held that the tenant was protected in respect of the part used by him as a dwelling house but not the part which was used for the business of a garage. In my opinion this terrace, although not perhaps absolutely essential for the business of the Appellant is required by him for the purpose as he apparently now sells drinks and there is nothing to prohibit him from carrying out that additional activity. I cannot agree and that because it is unroofed the terrace is necessarily not premises. I should find it very difficult to hold that an open air swimming bath or a skating rink were not premises. This terrace is not an open piece of ground unbuilt upon. It has a permanent floor and in fact as regards half of the terrace the Appellant appears to have filled in an empty pit and then constructed the terrace. This case must be distinguished from Civil Appeal 240/43 10 P. L. R. 584 where a mere plot of land was leased. Had the shop originally been leased as a cafe and the terrace been mentioned separately in the lease I do not think for one moment it could be contended that the tenant was only protected under the Business Premises Ordinance in respect of the Cafe and not of the terrace. Can it be said that a person who leases a warehouse and also a yard as a garage and workshop is only protected in respect of the warehouse and not the yard? It may be that the yard is not

absolutely essential for his business, but it is essential to the extent that he can run his business more successfully if he has a yard or terrace. The chief point is that in all these cases the yard or terrace is being used in connection with the business and for no other purpose.

It is not entirely clear from the judgment of the Court below whether they found that the Appellant had continued to lease the whole of the terrace or only half. The evidence on this point appears contradictory. It would appear that the same rent is being paid now as was paid when the leases for both halves of the terrace were in existence. On the other hand in D/4 the Appellant refers to the consideration being for the rent of the shop store and half the terrace only. I feel that the decision on this point might affect the decision whether an injunction should be granted or whether damages would suffice.

In these circumstances, therefore, the judgment of the District Court is set aside, and the case remitted for the trial Court to determine whether the Appellant is a tenant in respect of the whole or half of the terrace, and whether in the circumstances he is entitled to an injunction or damages.

Costs to Appellant to be taxed on the lower scale and to include an advocate's attendance fee of LP. 10.—.

Delivered this 11th day of November, 1946, in the presence of Mr. J. Stoyanowsky for Appellant and no appearance for Respondents.

A/British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 54/46.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J. (in Chambers).

IN THE APPLICATION OF —

G. Havkin. APPLICANT.

v.

Attorney General. RESPONDENT.

Conviction and sentence by Court Martial — Application to Chief Justice for special treatment.

Chief Justice has no jurisdiction to entertain application for special treatment in cases tried by Court Martial.

(*M. L.*)

APPLICANT: In person.
FOR RESPONDENT: Crown Counsel — (Heenan).

ORDER.

I am not cloaked with jurisdiction to entertain applications of this nature, as cases tried by Court Martial do not come within the ambit of section 40 of the Criminal Code Ordinance, 1936. I would add that this ruling does not apply to military Courts which function by virtue of local regulations.

Given this 5th day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 345/46.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J. (in Chambers).

IN THE APPLICATION OF :—

Alexander Perlstein & an. — APPLICANTS.

v.

Jacob Abud & 5 ors. — RESPONDENTS.

Eviction sought by one co-owner without consent of others — No leave to appeal where no point of novelty or complexity involved.

Application for leave to appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 14.10.46 in Civil Appeal No. 123/46 from the judgment of the Magistrate, Haifa, dated 28.6.46 in Civil Case No. 328/46, refused:—

Leave to appeal from appellate judgment of District Court will not be granted if proposition does not raise a point of novelty or complexity; question whether one co-owner can evict without consent of others does not raise such point.

(*M. L.*)

ANNOTATIONS :

1. The judgment from which leave to appeal was sought is reported in the Law Reports of the Haifa District Court, 1946, p. 272.

2. On question whether one co-owner can evict without the consent of the others see: C. A. 83/45 (1945, A. L. R. 803); C. A. 329/43 (1944, A. L. R. 809; 11, P. L. R. 414); C. A. 384/43 (1944, A. L. R. 569; 11, P. L. R. 283) and C. A. 282/45 (1946, A. L. R. 48).

(*A. G.*)

FOR APPLICANTS: Scharf.
FOR RESPONDENTS: Nos. 1—4 — Commissar.
Nos. 5 & 6 — No appearance.
— formally cited.

ORDER.

I find it difficult to appreciate that the proposition whether one co-owner can evict without the consent of the others raises a point of novelty or complexity. However, without committing myself on this issue, I must refuse leave to appeal because it is clear that the judgment of the District Court was based not on an examination of this proposition but on the fact which he believed to have been established that there was such a breach of the contract as would preclude the tenants from claiming the protection afforded by the Ordinance.

Given this 21st day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 85/46.

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

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPEAL OF:—

Uthman Abu el-'Ula. APPELLANT.

v.

Ya'qub Abdul Hadi. RESPONDENT.

Arbitration — Award containing a condition of performance by stranger to submission — Award delivered out of time — Points taken only on appeal and proprie motu by Court — Award set aside without special application — Severability.

Application for leave to appeal under section 15(3) of the Arbitration Ordinance and Rule 322 of the Civil Procedure Rules, 1938, from the judgment of the District Court, Nablus, sitting as a Court of Appeal, given on 19th February, 1946, in Civil Appeal No. 31/45, setting aside the judgment of the Magistrate's Court of Nablus, dated 16th October, 1945, in Civil Case No. 432/45, allowed:—

> An award is invalid if it calls upon a stranger to the submission to perform an act as a condition precedent to performance by one of the parties, unless that condition is severable.
>
> (*A. M. A.*)

ANNOTATIONS:

1. See Annotated Laws of Palestine, Vol. 2, p. 150, heading *"Award incapable of execution"* and C. A. D. C. T. A. 114/40 therein cited. *vide* also *o. c.*, p. 63, heading *"Effect of Submission."*

2. An award may only be set aside upon a separate application to that effect: C. A. 365/43 (11, P. L. R. 318; 1944, A. L. R. 561) and note 1 in A. L. R.

3. On severability of awards *cf.* C. D. C. T. A. 33/44 (1945, S. C. D. C. 528) and note 3; *vide* also C. A. 440/44 (12, P. L. R. 147; 1945, A. L. R. 325). (*H. K.*)

FOR APPELLANT: S. Hejab.

FOR RESPONDENT: Y. Hamoudeh, by delegation from A. Khoury.

JUDGMENT.

This is an application for leave to appeal from a judgment of the District Court of Nablus, which had set aside a judgment of the Magistrate of Nablus, who had set aside an award of arbitrators. The matter arose out of a rather complicated transaction which took place about fifteen years ago when one, Jamil Muhammad el Fares, purported to sell to one, Muhammad Abu Shibib, a plot of land. Muhammad Abu Shibib seems to have exchanged the land with the present Respondent, Ya'qub, and in substitution obtained another plot of land belonging to Ya'qub. Shibib then sold the land obtained from Ya'qub to the present Applicant, Uthman, for the sum of LP. 60. Later, Jamil Fares went back on the sale which he had effected to Muhammad Abu Shibib, and took possession of the land which was then in Ya'qub's possession. Ya'qub wanted to return to his land, which was then in the possession of Uthman who had bought it from Abu Shibib as explained above. On the 16th December, 1944, the present Applicant and present Respondent signed a submission to arbitration in which it was stipulated that the award should be given within two weeks. The award was, in fact, not delivered till March, 1945, and so it was clearly out of time. This point was taken by the present Applicant's advocate before the Magistrate, but, for reasons which will shortly appear, the Magistrate apparently did not find it necessary to deal with it. The matter came before the Magistrate on an application by the present Respondent for the confirmation of the award. The present Applicant opposed the application but did not file a separate formal application to have the award set aside. The Magistrate set aside the award mainly on the ground that the enforcement depended on the payment by Muhammad Abu Shibib to Uthman of the sum of LP. 100 and that, as Muhammad Abu Shibib was not a party to the submission, the Magistrate considered that the arbitrators went beyond their terms of reference. The relevant part of the award is in the following terms:—

> "Therefore we adjudge by consent that Ya'qub Eff. should receive his land which is now held by Uthman, provided that Muhammad Abu Shibib pays to Uthman the sum of LP. 100 in lieu of the LP. 60 which the former, Muhammad Abu Shibib received from him at the time of the transaction as remuneration for Uthman in respect of the land on one hand, and the present high cost of living on the other."

From that judgment the present Respondent appealed to the District Court. The District Court set aside the judgment of the Magistrate and remitted the case to him to hear in the light of certain observations which they made in their judgment. They dealt with the question of jurisdiction which, as it so happens, was not dealt with at all by the Magistrate in his judgment. It seems that the question of the value of the land had been raised at the hearing of the appeal. The District Court also took a point of their own motion, a point which we may say had not been taken by either party before the Magistrate or before the District Court, namely, the question whether the present Applicant should not have filed a separate motion to set aside the award, and whether the Magistrate should not merely have refused to enforce the award instead of setting it aside.

We do not feel called upon to deal with either of those matters because we think that the Magistrate was clearly right in that part of his judgment where he referred to the payment by Muhammad Abu Shibib and where he says that the award of the arbitrators was not divisible. We think that no useful purpose would be served by remitting the case to the Magistrate.

We, accordingly, allow the appeal, set aside the judgment and orders of the District Court and restore the judgment of the Magistrate. The Applicant will have his costs here and in the Court below. We certify LP. 3 inclusive costs in the District Court, and LP. 5 inclusive costs of the appeal in this Court.

Delivered this 5th day of December, 1946.

British Puisne Judge

HIGH COURT No. 88/46.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE PETITION OF:—

Ya'coub Zuhdi Touqan. PETITIONER.

v.

Fayyad Touqan in his capacity as *Mutawalli* over the *waqf* of Ibrahim Bey Touqan & an. RESPONDENTS.

Summons returned unserved by Process Server — Order made in absence of person not served.

Return to an order *nisi*, dated the 10th day of October, 1946, directed to the second Respondent, calling upon him to show cause, if any, why he did issue his order of 20th July, 1946, in Execution Case No. 316/46 Magistrates' Court, Nablus and to show cause, if any, why his above-mentioned order should not be rescinded:—

> If process server returns summons and reports that he understood from the indorsement of the son of the person to be served that latter was lying sick in hospital in another city, one cannot say the son was served and make an order in that person's absence.
>
> (*M. L.*)

ANNOTATIONS: For authorities on defective service see C. A. 490/44 (1945, A. L. R. 103; 12, P. L. R. 144) and annotations in A. L. R. See also recent case decided by the District Court of Jaffa — C. A. 137/45 (Mo. 474/45) 1946 S. C. D. C. 581.

(*A. G.*)

PETITIONER: In person.

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

JUDGMENT.

This is a return to an order *nisi*, calling upon the Execution Officer, Magistrate's Court of Nablus to show cause why he issued his order, dated 20.7.46, in Execution Case No. 316/46 of the Magistrate's Court, Nablus, asking the Petitioner to pay LP. 5 *p. m.* to the first Respondent who is the judgment creditor in the said case, and further to show cause why the order should not be rescinded.

Having heard Naim Bey Touqan for the first Respondent, we do not consider it to be necessary to call on the Petitioner to reply.

A summons was issued against the Petitioner for appearance on 20.7.46. This summons was returned with a report, dated 19.7.46, by the Process Server to the following effect:—

> "After investigation it was understood from the endorsement of his son 'Awni, that he is at present sick at hospital in Haifa and therefore I hereby return it unserved."

There was also on the summons a note purporting to be signed by Awni Touqan, son of the Petitioner to the following effect:—

> "My father Ya'coub is at present sick at Haifa since a period of three days. He is now not with us and therefore I have made this endorsement."

At the hearing on 20.7.46, the Execution Officer recorded the following minute:—

> "Judgment debtor did not appear. His son was served."

In view of the report of the process server we are unable to find that the Petitioner had been served with the summons. The process server had stated that he was returning the summons unserved.

In the circumstances, we must hold that the Order dated 20.7.46 was bad and we set it aside, without prejudice, however, to any action that may already have been taken upon it.

The Petitioner must have his costs in the fixed sum of LP. 6 (six Pounds).

Delivered this 3rd day of December, 1946.

British Puisne Judge.

HIGH COURT No. 93/46.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE PETITION OF:—

Hussein Ahmad Salha & 11 ors. PETITIONERS.

v.

1. District Superintendent of Police, Bethlehem Sub-District, Bethlehem,
2. Attorney General, Jerusalem,
3. Officer in charge of the District Investigation Branch, Ramallah Sub-District,
4. Inspector General of Police,
5. Assistant District Commissioner, Ramallah Sub-District. RESPONDENTS.

Order re police supervision made without following proper procedure — Question of alternative remedy — Ineffectiveness of bond where original order bad.

Return to an order *nisi*, dated 11.10.46, directed against Respondents, calling upon them to show cause why they should not refrain from enforcing and/or continuing to enforce the order for Police supervision over Petitioners Nos. 7 and 9 and to keep them away from their homes and further to show cause why the order of the Assistant District Commissioner under the Prevention of Crimes Ordinance, dated 5.9.46 and 7.9.46 should not be set aside and Petitioners Nos. 7 and 9 be allowed to return to their homes in Deir Jarir village and freely to move in and out of Palestine; order *nisi* made absolute:—

1. a) Sec. 10, Crime (Prevention) Ordinance empowering High Commissioner to cancel or modify any bond executed under the Ordinance does not give a person a right to require High Commissioner to apply his mind to any application to cancel or modify such bond.

b) Sec. 10, Crime (Prevention) Ord. does not oust jurisdiction of High Court to enquire into whether proceedings conducted under sec. 5 have been valid.

2. If order made under Crime (Prevention) Ord. regarding supervision and residence is bad because procedure required by sec. 5 thereof has not been followed, bond taken under that sec. cannot stand.

(*M. L.*)

ANNOTATIONS :

1. For other cases under the Crime (Prevention) Ordinance see H. C. 13/45 (1945, A. L. R. 442; 12, P. L. R. 191) and annotations; see also H. C. 23/46 (1946, A. L. R. 511; 13, P. L. R. 290).

2. For cases on point that High Court will intervene if there is no direct alternative remedy see H. C. 28/45 (1945, A. L. R. 646; 12, P. L. R. 455) and H.C. 64/45 (1945, A. L. R. 640).

(A. G.)

FOR PETITIONERS: A. Khouri.

FOR RESPONDENTS: Crown Counsel — (Wicks).

ORDER.

This is the return to an order *nisi* calling upon the Superintendent of Police, Bethlehem and others to show cause why an order made under section 3 Crime (Prevention) Ordinance, requiring the Petitioners to enter into a bond and to be under police supervision and to reside in a particular place should not be set aside. At the hearing of the return learned Crown Counsel (Mr. Wicks) very fairly admitted that, as the proceedings before the Acting Assistant District Commissioner, Ramallah, were not conducted fully in accordance with the proper procedure, he was unable to support the orders requiring the Petitioners to be under police supervision and to reside in a particular place. He contends, however, that, as the Petitioners have signed the bond, the order with regard to the bond should stand. The argument, it seems to us, is twofold, namely, that, as the Petitioners have signed bonds and entered into security, it is too late for them to come to this Court and also, secondly or alternatively, that they had an alternative remedy under section 10 of the Ordinance, which is in the following terms:—

> "The High Commissioner may at any time cancel or modify any bond executed under this Ordinance."

Our reply to this argument is that we do not think that a person has a right to require the High Commissioner to apply his mind to any application made to cancel or modify a bond. We think that what is contemplated is that, at any time after a valid order has been made

under the Ordinance, the High Commissioner may, if it is brought to His Excellency's notice by his advisers, that the time has come when a particular person ordered to give a bond need no longer be under restraint, act under section 10; but section 10 does not oust the jurisdiction of this Court to enquire into whether proceedings conducted under section 5 have been valid. Moreover, it seems to us illogical that, if the order with regard to supervision and residence cannot be sustained, because the procedure required by section 5 has not been followed, it should still be said that the bond can stand. The order to give security flows or stems from the inquiry under section 5 quite as much as the orders regarding police supervision and residence. We are unable, therefore, to uphold the contention of learned Crown Counsel in this regard. It follows that the order *nisi* must be made absolute.

Given this 12th day of December, 1946, in the presence of Mr. I. Nakhleh for Petitioners and in the presence of Mr. J. Wicks for the Respondents.

British Puisne Judge.

CIVIL APPEAL No. 44/46.

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

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

IN THE APPEAL OF:—

Mary Haddad. APPELLANT.

v.

Amin Michael Haddad. RESPONDENT.

Husband and wife changing their religion to Greek Orthodox Church — Order by District Court for payment of maintenance for wife and child — Wife reverting to Greek Melkite (Catholic) Church — Decree of dissolution of marriage issued in absence of wife by Ecclesiastical Court of Greek Orthodox Community — Application by husband to District Court to set aside its orders for payment of maintenance — Order discharged in view of changed position of parties — Date as from which the payments should cease.

Appeal from the judgment of the District Court of Haifa, dated 7th of January, 1946, in Civil Case No. 52/45, dismissed:—

1. a) Jurisdiction of Court of Religious Community to which both parties belonged at time of, or after, their marriage remains unaffected by one party changing his Community.

b) Decree of dissolution of marriage issued by such Court, even if in absence of Defendant, is good, if he has been duly served and has chosen not to appear.

2. A good order for payment of maintenance may not be set aside; it can, however, be validly discharged after a competent Court issues a decree of divorce thus bringing about a change in the position of the parties.

3. Where following a decree of divorce issued by a Religious Court District Court discharges its own order for payment of maintenance, it should do so from date of decree, even if Religious Court ordered cessation of payment from date of application for divorce.

(*M. L.*)

ANNOTATIONS:

1. For previous proceedings between the parties see C. A. 62/37 (2, Ct. L. R. 134; 4, P. L. R. 249; 1937, S. C. J. (N. S.) 249).

2. On change of Religious Community see H. C. 124/43 (1944, P. L. R. 21) and annotations see also H. C. 81/44 (1944, A. L. R. 648); H. C. 7/44 (1944, A. L. R. 192; 11, P. L. R. 128); H. C. 51/45 (1945, A. L. R. 651; 12, P. L. R. 443) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANT: Habibi.

FOR RESPONDENT: Sanders.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa which had, in effect, revoked orders made by the same Court in 1937 and 1939, against the present Respondent and in favour of the Appellant, for maintenance of herself and her male child.

The facts, shortly stated, are that the parties were married about 14 years ago in the Greek *Melkite* (Catholic) Church. On the 7th June, 1935, they both simultaneously registered their change of religion to the Greek Orthodox Church. There was some suggestion in the Court below and before us that the Appellant changed her religion at this time under duress; but there was not the slightest evidence of this and the suggestion cannot therefore be seriously entertained. The position, accordingly is that the religious community of the parties as from 7th June, 1935, was the Greek Orthodox.

On the 24th October, 1935, the Appellant by herself applied to change her religion back to the Greek *Melkite* Church and a certificate was issued accordingly on the 14th November, 1945. It must be noted, however, that the Respondent did not change his religion from the Greek Orthodox after the 7th June, 1935. In 1936, disputes having apparently arisen between the parties, the Appellant sued the Respondent for maintenance for herself and her only child of the marriage (a

son) in the District Court of Haifa. That action was dismissed; but, an appeal to this Court, C. A. 62/37, was allowed, the case being remitted to the District Court to hear evidence as to the present Appellant's means and thereafter to enter judgment on her behalf for a reasonable sum as maintenance. The ground of the judgment of this Court was that an alleged divorce granted by the Greek Orthodox Church at Acre in favour of the present Respondent, which decree the Respondent had pleaded before the District Court in 1936 in his defence, was not valid inasmuch as (according to Greek Orthodox Law) an *ex parte* decree for the dissolution of marriage was not recognised. It is to be noted that in that case the present Respondent had applied to the Greek Orthodox Church for divorce without serving the present Appellant with notice of the proceedings. It is unnecessary, for the purposes of this judgment, to narrate the further steps taken by the present Respondent with a view to obtaining a divorce until we reach last year (1945). It is not disputed that last year the Respondent applied to the Greek Orthodox Religious Court for a decree of divorce nor is it denied that he duly served on the Appellant notice of the intended proceedings. She, however, failed to appear, although duly served. Her advocate has told us that her advisers were afraid that, if she appeared and even disputed the jurisdiction of the Greek Orthodox Religious Court, she would have been taken as consenting to jurisdiction. We cannot believe this to be so. We think that she could have appeared under protest and argued the question of jurisdiction; and, had she failed to convince the Religious Court, she could have appealed to the Religious Ecclesiastical Court of Appeal of the Greek Orthodox Community. We are, therefore, faced with the position that the decree of divorce granted to the Respondent last year is good and has not been impeached. The Religious Court granted decree of dissolution of the marriage as from 19th February, 1945, and ruled that payment of maintenance should cease as from the 16th September, 1944, which was the date of filing of the petition in the Ecclesiastical Court. We think, however, that maintenance should have ceased only as from 19th February, 1945.

The learned A/R/President in the Court below gave judgment setting aside the orders of 1937 and 1939, granting maintenance, on the ground that the marriage had been properly dissolved by the Ecclesiastical Court last year. In so holding we think that he came to a correct conclusion. We think that the wording of section 4(2) of the Religious Community (Change) Ordinance, Cap. 127, is clear. The change of community referred to in line 1 of section 4(2) so far as concerns the Appellant, is her change back to the Greek *Melkite* Church in No-

vember, 1935. The Court which before that change had jurisdiction was the Court of the Greek Orthodox Church by virtue of both parties having become members of that church on 7th June, 1935 and as only one of the parties, namely, the Appellant, changed religion after June, 1935, it is clear that the Greek Orthodox Church had jurisdiction last year to dissolve the marriage.

There remains one other matter to be discussed. The prayer in the statement of claim was that the judgments of 1937 and 1939 be set aside. It is clear that the judgments in 1937 and 1939 were good judgments having regard to the position of the parties at the time. It is, therefore, impossible to set aside those judgments. We think, however, that the matter is highly technical because what, in effect, the District Court did in the case before us was merely to discharge the orders for maintenance made in 1937 and 1939 in view of the changed position of the parties. We, therefore, dismiss the appeal but under Rule 349 Civil Procedure Rules, 1938, we vary the judgment to read as follows:—

"The orders of 18th December, 1937 in C. C. 135/36 and of 1st February, 1939, in C. C. 102/38, requiring the present Respondent to pay maintenance to the Appellant are discharged, no further maintenance to be payable by the Appellant after the 19th February, 1945."

We cannot leave this matter without expressing our agreement with the statement of the learned A/R/President that this is a sad matter. We feel some sympathy with the Appellant who doubtless has suffered and will suffer by reason of her unfortunate matrimonial troubles. We, however, must administer the law as we find it. There will be no costs of this appeal.

Delivered this 29th day of November, 1946.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 359/45.

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

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

IN THE APPEAL OF:—

Israel Hirshprung. APPELLANT.

v.

Joseph Mamelouk. RESPONDENT.

Lease of premises to be used as workshop and private flat — Increase of rent by decision of Rent Commissioner — Breach of terms of lease.

Appeal from the judgment of the District Court of Tel Aviv sitting as a Court of Appeal dated 5.10.45 in Civil Appeal No. 21/45 from the judgment of the Magistrate's Court of Tel Aviv dated 9.1.45 in Civil Case No. 468/44, dismissed:—

1. Rent Commissioner's decision to increase rent cannot annul terms of lease such as what the premises should be used for.

2. Where contract of lease provides that place should be used as business premises and private flat and tenant went to reside elsewhere there is a substantial breach entitling the landlord to terminate lease.

(*M. L.*)

ANNOTATIONS:

1. On point 1 compare decision given under the L. & T. Ord. 1934 and Landlord and Tenant (Extension) Ord. 1935 L. A. D. C. Ha. 15/38 (Northern Law Reports 1938, p. 28, Gorali, Rent Restrictions 2nd Ed. p. 65) L. A. D. C. Ha. 34/36 (Gorali, *op. cit.* p. 63) C. A. D. C. T. A. 129/37 (1937, Law Reports of the District Court of Tel-Aviv, p. 21, Gorali *op. cit.* p. 69).

2. On change of user see C. A. D. C. T. A. 209/39 (Gorali, *op. cit.* p. 83), C. A. D. C. T. A. 171/39 (1939, Law Reports of the District Court of Tel-Aviv, p. 84 Gorali *op. cit.* p. 81), C. A. 29/38 (3, Ct. L. R. 180; 1938, 1 S. C. J. 173), C. A. D. C. Ha. 29/44 (1944, S. C. D. C. 204), C. A. D. C. Ha. 55/44 (1944, S. C. D. C. 214), C. A. D. C. Jm. 15/45 (1945, S. C. D. C. 297), C. A. D. C. Ha. 152/44 (1945, S. C. D. C. 43), C. A. 133/44 (1944, A. L. R. 645; 11, P. L. R. 520).

(*A. G.*)

FOR APPELLANT: Olshan and Rotenstreich.

FOR RESPONDENT: Wiesel.

JUDGMENT.

This is an appeal from the judgment dated 5.10.45 of the District Court of Tel Aviv in Civil Appeal No. 21/45, dismissing an appeal from the judgment dated 9.1.45 of the Magistrate, Tel Aviv, in Civil Case No. 468/44. That was a judgment ordering the eviction of the present Appellant from premises at 66, Allenby Road, Tel Aviv.

The Judges in the District Court disagreed, one taking the view that the appeal ought to be allowed. As a result the appeal stood dismissed. The Appellant now contends that the judgment of the Judge who held that the appeal ought to be allowed was correct, and he asks that that judgment should be substituted for the judgment of dismissal.

The chief point of appeal is that the Respondent (landlord) having elected to approach the Rent Commissioner for an increase of rent, and

the Rent Commissioner having granted an increase of rent in the terms shown in his decision dated 23.3.43 (Exh. P/5), the original agreement Exh. P/1 no longer subsists between the parties.

It is clear that after knowing of the Rent Commissioner's decision dated 23.3.43, the Respondent (Landlord) accepted rent for the year ending 31.1.44.

It has been conceded by Mr. Olshan, who has appeared on behalf of the Appellant (tenant) that, had it not been for the Rent Commissioner's decision and what happened subsequently, and if the lease Exh. P/1 still applied, he could not succeed in this Court. His argument is that the Respondent cannot approbate and reprobate at the same time, that is to say he cannot accept rent on the basis of the Rent Commissioner's decision and thereafter be heard to say that the lease is still binding upon the Appellant. It has also been pointed out that the landlord, having accepted the rent, took no action in Court until he filed this claim on the 18th February, 1944. It is submitted that this delay also shows that he was treating the terms of the lease as if they no longer applied.

We do not consider it necessary in the circumstances of this case to decide whether the Respondent would have been estopped from bringing an action for eviction if the tenant had confined himself to breaches of the type referred to in the decision of the Rent Commissioner, because there is evidence of a later and in our opinion a very substantial breach of the terms of the lease. We will say here that in our judgment the decision of the Rent Commissioner did not and could not annul all of the terms of the lease. As is shown in the lease (Exh. P/1) the premises were to be used as an engraving workshop and private flat, but it is clear from the evidence of the Appellant (tenant) himself that he left the flat in January, 1944, and went to live at another address. In his evidence he said: "The status of my family changed, a son was born to us and because of that I left the place and moved to a more quiet place for my wife and son." It is of interest to observe that one of the terms of the lease was that the lessee should not do anything or allow others to do anything that would cause disturbance or damage to the lessor and other neighbours in the said building or in its vicinity.

It is true that the Rent Commissioner stated in his decision that the whole flat had been altered to a kind of factory, but that statement of fact was clearly not correct.

The fact that the Appellant went to reside in another place was mentioned by Judge Mani as being one of the substantial breaches of the terms of the lease, and in our judgment there is no doubt that that

breach alone affords a ground for the termination of the lease. As we have already observed the action was filed on 18.2.44, that is to say it was filed only about a month after that breach had occurred.

In the result, we find ourselves in agreement with Judge Mani, and we therefore dismiss this appeal. The Respondent will have costs on the lower scale to include an advocate's fee of LP. 10 (ten) for attendance in this Court.

Delivered this 29th day of October, 1946.

British Puisne Judge.

CIVIL APPEAL No. 109/46.

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

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

IN THE APPEAL OF:—

Muhammad Abdul Salam. APPELLANT.

v.

Salem Hajaj Sliman Hajaj Abu Fheid on behalf of the estate of Hajaj Sliman Hajaj. RESPONDENT.

Claim for recovery of possession of undivided shares in land.

Appeal from the judgment of the District Court of Jerusalem in C. A. 44/44, dated 30.1.46 from the judgment of the Magistrate's Court, Jerusalem, in Civil Case No. 1491/43, dismissed:—

1. Art. 24, Ottoman Magistrate's Law does not exhaust all remedies open to a legitimate owner of land to recover possession, nor does it oust Magistrate's power to order recovery under sec. 3(c), Magistrate's Court Jurisdiction Ord.

2. Court may order recovery of possession of *mush'a* shares.

(*M. L.*)

FOLLOWED: C. A. 37/45 (12, P. L. R. 354; 1945, A. L. R. 678) and C. A. 83/45 (1945, A. L. R. 803).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C. at p. 79.

2. On the 1st point see C. A. 37/45 (*supra*) and annotations in A. L. R., see also C. A. 319/45 (1946, A. L. R. 278) and annotations.

3. On recovery of possession of *musha'* shares see C. A. 83/45 (*supra*) and annotations, see also H. C. 117/45 (1946, A. L. R. 662) and annotations.

(*A. G.*)

FOR APPELLANT: H. Atallah.
FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal from a decision of the District Court of Jerusalem in its appellate capacity whereby an appeal from the judgment of the Magistrate's Court, Jerusalem, was dismissed.

The action before the Magistrate's Court was brought by the present Respondent, suing in the capacity of heir of Hajaj Suleiman Hajaj Abu Fheid and as representative of the estate of the said Hajaj Suleiman Hajaj. The Defendant was Muhammad Abdul Salam. Judgment was given in Plaintiff's favour and the District Court refused to set aside the Magistrate's judgment.

Before dealing with the grounds of appeal I will set out briefly the main facts of the case.

In November, 1919, Hajaj and his brother Mohammad Abu Younes, sons of Suleiman Hajaj Abu Fheid, borrowed from Mohammad Abdul Salam (the Appellant) and from one Mustafa Jaber the sum of LP. 300.—. The borrowers signed an agreement whereby they undertook to deliver to their creditors the whole of a plot of land situate at Khirbet Deirel Sayed (near Anata village) for a period of 3 years for the purpose of cultivation but they stipulated that 1/3 of the produce would be handed over to them. The agreement provided that if the loan of LP. 300 was not repaid within three years, the lenders would continue to hold the land and even have the right to grant leases until repayment of the aforementioned sum. There is no dispute regarding the identity of the land mentioned in the agreement of 1919, which was registered in the *Tapu* registers and comprised five plots of land. Mention must, however, be made of the fact that Hajaj and his brother Mohammad were not the sole owners of the land. There were other co-heirs who also had shares. The explanation given to us is that, being the only male heirs, they were in charge of the property and were commonly looked upon as sole owners.

The two creditors, Mohammad Abdul Salam and Mustafa Jaber, took possession of the land in pursuance of the aforesaid agreement. In 1923 Jaber received payment of his LP. 150 from Hajaj Abu Fheid and he then vacated the land.

Mohammad Abdul Salam (hereinafter referred to as the Appellant)

began execution proceedings in 1927 for the recovery of the LP. 150 due to him. The Execution Office took possession of the land in 1930, but the execution proceedings remained in abeyance owing, probably, to the death of the Plaintiffs' father. In 1941, however, the Appellant signed a document (Exh. 3) which recited that the shares of Hajaj Suleiman and Mohammad Abu Younes had been attached through the Execution Office and that, on payment of the amount due, the land would be delivered to them together with the land on which no official transactions have been carried out by way of powers of attorney. The explanation of the reference to powers of attorney is that the Appellant claims that certain co-owners (not Plaintiffs) have executed powers of attorney for the sale to him of their shares. The money was paid into the Execution Office by the heirs of Hajaj Suleiman Hajaj in 1943, but the present Appellant refused to deliver back to them their shares in the land. An action was then begun before the Magistrate's Court for recovery of possession of the five plots of land.

I have already mentioned that the agreement made in 1919 was misleading in that the two brothers Hajaj therein represented themselves as sole owners. In fact they were only entitled to a number of undivided shares in the five plots of land, which shares they had inherited from their father. The learned Magistrate fully understood the position and expressly stated in his judgment that the agreement of 1919 only affected the interest which the debtors derived by inheritance and which they owned as shown in the extracts of registration produced. The learned Magistrate gave judgment for the return to the heirs of Hajaj Suleiman to the extent of their interest in the plots of land which were delivered to Muhammad Abdel Salam (present Appellant) and Mustafa Jabr in 1919, and the Magistrate set out in respect of each of the five plots the shares which were the subject matter of his decision.

Muhammad Abdul Salam appealed to the District Court and the appeal was argued on two points. The first point was that the conditions laid down in Article 24 of the Ottoman Magistrates' law were not present. The learned Relieving President rejected this first ground on the strength of the ruling given by the Supreme Court to the effect that Article 24 does not exhaust all the remedies open to a legitimate owner to recover possession, nor does it oust the power of a Magistrate to order recovery under section 3(c) of the Magistrates' Courts Jurisdiction Ordinance (C. A. 37/45, 12 P. L. R. 354). I would add that it was held in C. A. 83/45 (1945) A. L. R. 803 that a Court may order recovery of possession of *musha'a* shares. I therefore consider

that in the circumstances of this case the learned Relieving President was right.

The other point put forward by the Appellant before the District Court was that there was no evidence in support of the Magistrate's finding that Musa Abdul Salam and the heirs of Issa Abdul Salam had taken possession of shares in the land with the consent of their brother Muhammad (the Appellant).

In order to render this second ground of appeal intelligible, I must explain that the root of the difficulty in this case seems to be that the Appellant is afraid that the Magistrate's judgment may affect his rights (if any) to other shares in the land, which shares he avers he has acquired from other co-owners. The Appellant's fear is, in my opinion, groundless and is the result of the confusion which arises between ownership of undivided shares in land and ownership of a specific piece of land. For the purposes of this appeal it is immaterial whether co-owners of the Plaintiffs-Respondents have sold their shares to the Appellant or to his brothers. What is of importance is that the Appellant has had possession of the Plaintiff's shares as a security for a debt and that he must relinquish his hold on those shares because he has been paid. In view of Exhibit 3, the Appellant cannot dispute the right of the Plaintiffs, and he misconceived the position when he urged before the Magistrate that all the other co-owners had to be joined as Defendants. He, the Appellant, is the only person who has held Plaintiffs' shares and he had no right or power of disposing of those shares (and it is not suggested that he has).

I may now return to the second ground argued on behalf of the Appellant before the District Court and I will dispose of it very shortly by stating that it seems to me of no importance whether or not Appellant's brothers came on the land as owners in their own right of a number of shares or on the strength of the Appellant's rights as temporary holder of Plaintiffs' shares. In the former case they are not affected by the judgment; in the second case they have no more right than the Appellant. It is therefore immaterial whether the finding of fact complained of is correct or not and the learned Relieving President was justified in rejecting this second ground of appeal.

This appeal is therefore dismissed with costs on the lower scale and LP. 15 advocate's attendance fee.

I would recall that the Keren Kayemeth Leisrael Ltd. has acquired through the Execution Officer the shares claimed by the Plaintiffs. The acquisition took place on the 22nd May, 1946, *i. e.* after the District Court had confirmed the Magistrate's judgment. On motion made by

the company before this Court, it was ordered that the company be substituted as Respondents in lieu of the original Respondents. The costs of this appeal will therefore accrue to the Keren Kayemeth Leisrael Co. Ltd.

Delivered this 17th day of December, 1946, in the presence of the Appellant in person and of Mr. M. Scharf for Respondent.

British Puisne Judge.

CRIMINAL APPEAL No. 158/46.

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

BEFORE: Edwards, Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hamed Sharabati. APPELLANT.

v.

The Attorney General. RESPONDENT.

Sentence — Variance between statements made after plea of guilty by defence and prosecution — T. U. I. Ord., sec. 47(3) — Possession of firearms, C. C. O., sec. 66A — Uniformity of sentences.

Appeal from the judgment of the District Court of Jerusalem, in Criminal Case No. 59/46, dated 16th December, 1946, whereby the Appellant was convicted of a charge of possession of firearms and ammunition, contrary to section 66A(a) of the Criminal Code Ordinance, and sentenced to two years imprisonment, allowed and sentence refused:—

> If there is a conflict on a material matter between the statement made on behalf of the accused, after a plea of guilty, and the prosecution statement, evidence should be heard under sec. 47(3) of the Trial Upon Information Ordinance.
>
> (*A. M. A.*)

ANNOTATIONS:

1. On reasons for a lenient sentence *cf.* CR. A. 105/46 (1946, A. L. R. 618) and note 1.

2. On evidence in mitigation *cf.* CR. A. 169/44 (12, P. L. R. 6; 1945, A. L. R. 365) and CR. A. 34/45 (*ibid.*, pp. 209 & 528).

(*H. K.*)

FOR APPELLANT: F. Ghussein.

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

JUDGMENT.

This is an appeal against a sentence of two years' imprisonment passed by the District Court of Jerusalem on the Appellant, who had pleaded guilty to unlawful possession of a pistol and unlawful possession of ammunition, contrary to section 66A of the Criminal Code Ordinance.

It is submitted by Appellant's advocate that the sentence in the circumstances is excessive. The Appellant in the Court below made an unqualified plea of guilty to both counts, whereupon the learned trial Judge heard a statement made by his advocate, and also a statement made by the representative of the Attorney General. The learned trial Judge in his judgment said that he did not choose to believe the Appellant's story but preferred that of the representative of the Attorney General. It seems tolerably clear from the judgment that, because of this belief on the one hand, and disbelief on the other, the trial Judge was induced to pass the sentence which he did pass. As there was a conflict on a material matter, we think that if the trial Judge was going to be influenced one way or the other against the Appellant, he should have required the Attorney General to call evidence under the provisions of section 47, sub-section 3 of the Criminal Procedure (Trial Upon Information) Ordinance. It seems not to be disputed that the Appellant was one of a party who were greeting the King of Trans-Jordan on a recent visit to Hebron. It seems also implicit that the Appellant fired his pistol by way of "*feu-de-joie*". In his judgment the trial Judge said: "Your counsel has not thought fit to challenge the reply by the Attorney General to the effect that when you were passing the Jerusalem Railway Station in a taxi you brandished the pistol and in fact fired a shot from it."

In our view the fact that he publicly brandished the pistol was in his favour as showing that he meant to fire it by way of "*feu-de-joie.*" The Assistant Government Advocate, Mr. Hazou, has frankly conceded that there are no sinister implications in connection with the possession of this pistol and that there was nothing sinister in the action or conduct of the Appellant apart from the fact that he was found in possession of a pistol and ammunition without the necessary licence. Mr. Hazou has further conceded that in the north of Palestine, at any rate for such offences, District Courts are not these days in the habit of passing sentences of more than about one year's imprisonment, and in some cases sentences of only three months. While this Court is always reluctant to interfere with sentences passed by Courts of first instance, we do feel that, in all the circumstances of this case, and

having regard to the plea of guilty and to the admission of Mr. Hazou before us, and to the previous good conduct of the Accused, and in the absence of any suggestion that he possessed this pistol for sinister reasons, the sentence of two years' imprisonment was too severe. We accordingly reduce the sentence to one of six months' imprisonment to date from the date of conviction, namely, the 16th December, 1946.

Delivered this 9th day of January, 1947.

British Puisne Judge.

CRIMINAL APPEAL No. 156/46.

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

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

IN THE APPEAL OF :—

Subhi Naim Abu Sham. APPELLANT.

v.

The Attorney General. RESPONDENT.

Trades and Industries Regulations — Quarrying and stone-crushing machinery, whether part of the same industry — H. C. 3/42, CR. A. 116/44 — Test — Amendment of technical defect in order of lower Court.

Appeal from the judgment of the District Court of Haifa dated 23rd November, 1946, in Criminal Appeal No. 131/46 from the judgment of the Chief Magistrate's Court of Haifa, dated 17.9.46 in Criminal Case No. 8286/46 whereby Appellant was ordered to pay LP. 5 fine or undergo one month's imprisonment; appeal dismissed subject to a correction:—

For the purpose of licensing under the Trades and Industries Regulations Ordinance, stone crushing machinery is not part of the industry of quarrying.

(*A. M. A.*)

REFERRED TO: H. C. 3/42 (9, P. L. R. 75; 1942, S. C. J. 71; 11, Ct. L. R. 41); CR. A. 116/44 (11, P. L. R. 517; 1944, A. L. R. 830).

ANNOTATIONS: For recent decisions on the Trades and Industries (Regulation) Ordinance see CR. A. D. C. Ha. 80/46 (1946, S. C. D. C. 602) and cases cited in the note thereto, and CR. A. D. C. Ha. 81/46 (*ibid.*, p. 652).

(*H. K.*)

FOR APPELLANT: J. Habibi.

FOR RESPONDENT: Weinshall for the Attorney General.

JUDGMENT.

This is an appeal from the District Court, Haifa, which in its appellate capacity confirmed a conviction by the Magistrate for the infringement of the provisions of the Trades and Industries Regulations. It appears that the Appellants operate a quarry at Haifa and in this quarry they have erected a stone crushing machine. The Appellant's argument is that the stone crushing machine is part and parcel of quarrying operations; it is, in fact, he argues, an integral part of those operations within the meaning of H. C. 3/42 and Cr. A. 116/44.

Now in the Schedule to the Trades and Industries Regulations one of the trades and industries for which a licence is imperative is stone crushing by machinery. The question arises whether this is an industry independent of quarrying? On this issue we think that the District Court was right for the reasons given by the learned President when he says: "It is a separate matter altogether for, as admitted by Mr. Habibi, not all the stone quarried is being put through the crushing machine. The machinery is not one for the purpose of or in connection with excavation or quarrying of stones. It is used later for the breaking or crushing of some of the stones excavated." For these reasons the appeal must be dismissed, but there would appear to be a technical defect in the order made by the learned President. His order was to the effect that the stone crushing machine should be sealed so as to prevent it being used at another place on the 1st December next. We amend the order by inserting after the word "on" the words "or from".

Delivered this 15th day of January, 1947.

Chief Justice.

CIVIL APPEAL No. 228/45.

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

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

IN THE APPEAL OF:—

Daniel Weinman. APPELLANT.

v.

Assis Palestine Fruit Products Co.
Bejarano Bros. RESPONDENT.

Expropriation of land — Period of appeal from judgment of Land Court — Effect of Land (Acquisition for Public Purposes) Ordinance regarding expropriation commenced under the Land (Expropriation) Ordinance — Interpretation of statutes.

Appeal and cross-appeal from the judgment of the Land Court of Tel Aviv, dated 15.6.45 in Land Case No. 11/42, dismissed:—

Proceedings commenced under the Land (Expropriation) Ordinance must be completed under that Ordinance up to final appeal. The 1943 repealing Ordinance does not affect such proceedings.

(*A. M. A.*)

ANNOTATIONS: See C. A. 67/44 (11, P. L. R. 313; 1944, A. L. R. 387) for another case on the effect of the second proviso to sec. 26 of the Land (Acquisition for Public Purposes) Ord., 1943.

Note, however, that the proviso in question has been deleted and substituted in May, 1946, by the provisions of sec. 19 of the Amendment Ordinance, No. 34 of 1946.

(*H. K.*)

FOR APPELLANT: Goitein and Karwassarsky.
(CROSS RESPONDENT)

FOR RESPONDENT: Eliash.
(CROSS APPELLANT)

JUDGMENT.

This is an appeal from a decision of the Land Court of Tel Aviv given on the 15th June, 1945, in a case arising under the Land (Expropriation) Ordinance, Cap. 77.

The Appellant was the owner of the land expropriated and was therefore the Defendant in the Court below. An award was made by the Land Court. The Respondent has raised the preliminary objection that the appeal was lodged after the expiration of the period of 15 days fixed by section 11 of the Land (Expropriation) Ordinance, Cap. 77, which lays down that any person who is dissatisfied with the award of the Court shall, if the amount awarded exceeds LP. 200, be entitled, within 15 days of the notification of that award, to appeal to the Supreme Court sitting as a Court of Appeal.

In the present instance the appeal was lodged 21 days after judgment had been delivered in presence of the parties.

These proceedings were commenced before the date of enactment of the Land (Acquisition for Public Purposes) Ordinance, 1943, and we have now to consider the effect of the last proviso to that Ordinance which reads as follows:—

"Provided further that any proceedings commenced before the date

of commencement of this Ordinance under any of the Ordinances hereby repealed may be continued and enforced under the respective Ordinances hereby repealed as if this Ordinance had not been passed."

It seems to us that the meaning of the proviso is that the repealed Ordinance remains in force and is applicable to this land until its various sections are exhausted insofar as this land is concerned. The main provision of the Ordinance is of course the provision in regard to compensation, contained in s. 10. It is, in fact, the only section which at all brings the Court into the picture. It is, however, quite clear that there can be no finality in regard to the matter with which s. 10 deals, that is compensation, until the time limit for appeal under s. 11 has passed because the moment a person expresses his dissatisfaction with the compensation awarded under s. 10 the award cannot be enforced until s. 11 has been exhausted. We are, therefore, forced to the conclusion that since the compensation was assessed under s. 10 of the repealed Ordinance, any appeal against that compensation must be brought under s. 11 of the repealed Ordinance. This being the case, it follows that the appeal is out of time and must be dismissed.

Delivered this 17th day of January, 1947.

Chief Justice

CIVIL APPEAL No. 160/46.

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

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

IN THE APPEAL OF:—

Harry Isaac Gladstone. APPELLANT.

v.

Shalom Greenfeld. RESPONDENT.

Land Settlement — Discretion of L. S. O. to revise Schedule of Rights — Position of member of V. S. C., secs. 26, 33(4).

Appeal from the decision of the Land Settlement Officer of Tiberias, dated 25th March, 1946, in Case No. S/48/21 of Ein Zeitim, dismissed:—

The L. S. Officer has a discretion to allow or refuse an amendment of the Schedule of Rights, a discretion with which the Court of Appeal will not interfere unless it was wrongly exercised.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 455/44 (12, P. L. R. 388; 1945, A. L. R. 525), H. C. 18/45 (*ibid.*, pp. 248 & 563) and H. C. 20/45 (13, P. L. R. 333; 1946, A. L. R. 793) and notes to these cases in A. L. R.

(*H. K.*)

FOR APPELLANT: M. Hochman.

FOR RESPONDENT: A. Rand.

JUDGMENT.

This is an appeal by leave against the discretion exercised by the Settlement Officer under section 33(4) of the Land (Settlement of Title) Ordinance. The Settlement Officer was satisfied to record his decision on the issue in a very few lines which perhaps was the cause of this further litigation. It is to be emphasised in the first place that whether or not the Settlement Officer was prepared to revise the Schedule of Rights is completely within his own discretion. This Court will not interfere with that discretion unless it is satisfied that it was unreasonably exercised.

The facts in this case as they appear from such record as the Land Settlement has furnished are that he refused to exercise his discretion because as he stated, and it is not denied, the Appellant who was a member of the Settlement Committee knew exactly what was going on in this Settlement and if he claimed these extra 25 *dunums* of land he should have done it long before section 33(4) arose. He should in fact have preferred a claim under section 26. The Appellant says that he did submit a claim under section 26 but he was lured into a false sense of security by the Settlement Officer, who told him to hold his hand and apply later under section 33(4). In support of this contention his counsel submitted two letters. We read them because if they were relevant we would have expected the Settlement Officer to refer to them in the course of his ruling. Having perused them, we have come to the conclusion that the Settlement Officer was correct in considering, as we assume he did, that the letters had no relevance to the issue under section 33(4). It is quite clear that all the Appellant asked in his letter was that the land should not be registered as *musha'*. He made no mention of this claim to these extra 25 *dunums*. For these reasons we cannot say that the discretion exercised by the Settlement Officer under section 33(4) was unreasonably exercised and the appeal is therefore dismissed with LP. 5 costs.

Delivered this 3rd day of January, 1947.

Chief Justice.

CRIMINAL APPEAL No. 121/46.

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:—

Abdul Fattah Saleh el-Hussein & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Circumstantial evidence — Circumstances consistent with innocence — Cumulative effect — Inferences of fact —Function of expert witness — Failure to cross-examine.

Appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, dated 17th October, 1946, in Criminal Assize Case No. 36/46, whereby Appellants were convicted of manslaughter, *contra* section 212 of the Criminal Code Ordinance, 1936, and the first Appellant sentenced to 20 and the second Appellant to 7 years' imprisonment; appeal of Appellant No. 1 dismissed:—

In cases based on circumstantial evidence the cumulative effect of the evidence should be considered: It is not necessary that each inference should be inconsistent with the innocence of the Accused.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* CR. A. 9/44 (1944, A. L. R. 90) and notes 3 & 4, CR. A. 140/43 (10, P. L. R. 605; 1944, A. L. R. 96) and note in A. L. R., and CR. A. 97/46 (1946, A. L. R. 685).

2. On the functions of an expert and the scope of his evidence *vide* Phipson on Evidence, 8th ed., pp. 385—6.

3. The appeal as regards the second Appellant is reported *infra*.

(*H. K.*)

FOR APPELLANTS: No. 1 — A. Atalla.
No. 2 — R. Jayoussi.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

In this case the first Accused was convicted by the Court of Criminal Assize at Nablus of the offence of manslaughter, contrary to section 112 of the Criminal Code Ordinance, and he was sentenced to twenty years' imprisonment.

The case before the Court of Criminal Appeal was advanced under two heads. One raised undoubtedly a question of law, but we cannot avoid the conclusion that many of the grounds advanced under the

other head amounted to nothing more than an attempt to persuade this Court of Appeal to retry the case. We will deal with the latter first.

It has been argued by Mr. Atalla that certain inferences drawn by the trial Court were so unreasonable that this Court should intervene. There were three inferences of the trial Court criticised. The first was that on the mere fact that there are many Abdul Fattahs in this country it was an unreasonable inference to connect the name of Abdul Fattah with any particular individual. As to this we need only say that it is analogous to the argument that, because many Smiths happen to live in England, no Court would ever be justified in drawing the inference that a person bearing the name of Smith could be identified as an individual person. We are far from coming to the conclusion that this inference was unreasonable, and any interference with it by the Court would be unjustified.

The second alleged unreasonable inference drawn was that connected with the finding of the pistol in the hen-coop. Undoubtedly at least three persons besides the Accused had access to this hen-coop, but the finding of the Court in this respect amounted to no more than that the Accused was one of four persons who had access to the hen-coop. Mr. Atalla stressed the strange incidents surrounding the finding of this pistol. The Court can agree with him that finding a pistol on the fourth occasion after three searches by the Police was at least, as he has termed it, "fishy". But these facts were before the trial Court. It was not an irresistible inference that the pistol was planted, although it might well be a suspicion. The trial Court were entitled to weigh up this point and reject the theory of planting in favour of the theory of the guilt of the first Accused. For these reasons we cannot say that the inference was unreasonable.

The third inference which it is alleged was unreasonable on the part of the trial Court was the inference drawn from the evidence of the carpenter. It is true, as Mr. Atalla pointed out, that the carpenter did not specifically identify the piece of red wood. All he said was that the red wood was similar. But the Court itself did not say that the carpenter specifically identified the piece of red wood. They fully recognised that all the carpenter said was that the red wood was similar, and from that they drew the inference that it was the same piece of red wood which connected the first Accused with the pistol. Here again that was not an unreasonable inference. It follows that we see no ground for interfering with the inferences as drawn by the trial Court, and in doing so we emphasize once again that issues such as those, are particularly within the province of the trial Court who have

an opportunity, which the Court of Appeal has not, of seeing the witnesses in the box and gauging the credibility of their evidence.

We turn now to what we might call the legal grounds advanced by Mr. Atalla. The first ground concerns the evidence of Inspector Freeman whose evidence purported to be the evidence of an expert. We are in entire agreement with the submission of Mr. Atalla that no expert witness should usurp the functions of the judge and jury. But that does not preclude an expert witness from giving his opinion in regard to the matter in which he is presumed to be an expert. Indeed it is the only reason for which an expert is called to the Court. He can, of course, be cross-examined with a view to shaking him and having his opinion rejected by the judge and jury, as they are quite entitled to do. Now in this case, Inspector Freeman stated on oath, and he was not cross-examined on the point, that he was an expert in what he called "ballistics". His evidence amounted to no more than expressing his expert opinion as to the scientific reaction to certain phenomena. In this case it was the nature of markings left by a bullet fired from a pistol. He stated that in regard to a particular pistol which had been given to him and from which he fired bullets, he could identify other cartridges fired from the same pistol. He never purported to judge the guilt or otherwise of the first Accused. He was never asked, as was the case in the case quoted to us by Mr. Atalla, whether on the evidence he heard at the trial the accused was involved in the issue about which he was giving evidence. He stated the effect of his scientific investigations. The Judges, as they state clearly in their judgment, accepted his scientific conclusions, and they applied those scientific conclusions to the case of the first Accused, and having done so they convicted him, and we think that they were quite entitled to do so.

Now we come to the final plea of the first Accused. Mr. Atalla has argued that each one of the inferences to which we have referred, if taken by itself might be capable of an explanation other than that of the guilt of the Accused. That is quite true. But in cases of circumstantial evidence it is not necessary that every link of the chain should by itself establish the guilt. It is the effect of the whole chain that counts. In this case we think the Court was quite right in coming to the conclusion that the established accumulated facts pointed irresistibly to the guilt of the first Appellant.

In regard to the second Appellant we postpone our decision to the next sitting.

Delivered this 11th day of December, 1946.

Chief Justice.

CRIMINAL APPEAL No. 121/46.

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:—

Abdul Fattah Saleh el Hussein & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Confessions — When admissible — Judges Rules, r. 3 — Statement made by person in custody after questioning, R. v. Best, R. v. Voisin, R. v. Booker — Point not raised by defence.

Appeals from the judgment of the Court of Criminal Assize, sitting at Nablus dated 17th October, 1946, in Criminal Assize Case No. 36/46, whereby Appellants were convicted of manslaughter *contra* section 212 of the Criminal Code Ordinance, 1936, and the first Appellant sentenced to 20 years and the second Appellant to 7 years' imprisonment; appeal of Appellant No. 2 dismissed:—

A person in custody, who has been cautioned, should not be questioned or cross-examined, though a confession following such questioning is not invariably inadmissible.

(*A. M. A.*)

REFERRED TO: R. *v.* Best, 1909, 1 K. B. 692, 78 L. J. (K. B.) 658, 100 L. T. 622, 25 T. L. R. 280, 2 Cr. App. Rep. 30; R. *v.* Voisin, 1918, 1 K. B. 531, 87 L. J.(K. B.) 574, 118 L. T. 654, 34 T. L. R. 263, 13 Cr. App. Rep. 89; R. *v.* Booker, 1924, 18 Cr. App. Rep. 47.

ANNOTATIONS:

1. The appeal as regards the first Appellant is reported *supra*.
2. See the cases cited and the passage in Archbold referred to.

(*H. K.*)

FOR APPELLANTS: No. 1 — A. Atalla.
No. 2 — R. Yayoussi.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

The second Appellant was convicted on a statement made by him when charged and the main ground of appeal is that the statement should not have been admitted. The statement was taken down after the Accused had been duly cautioned.

At the trial, the learned advocate for the Accused, objected to the production of the statement on the ground that it had been obtained

by means of a promise made to the Accused that he would be released.

The learned trial Judges investigated the circumstances which preceded and accompanied the taking down of the statement by Inspector Ismail Omar. We have read the evidence on this point, and were struck by the fact that the Accused did not put forward a consistent story. He tried to blend together several versions. One version was that he was persuaded by a man called Kitani to make a confession designed to implicate another accused and that he would be called as a witness for the prosecution. He also stated that Police Inspector Omar backed the promise made by Kitani. Another version put forward by the Accused was that he did not actually make the confession but was asked to place his thumb mark on a document after being threatened by another Police Inspector who told him that if he did not agree he would be sent to the C. I. D. where he would be tortured.

Being given that the Accused mentioned in his statement the spot where he had hidden his own pistol (which was subsequently found in the spot indicated) it is difficult to believe that the statement was invented or fabricated and we are satisfied that the trial Court rightly rejected this contention.

There is, however, one aspect of the matter to which it seems obvious that the learned Judges' attention was not drawn; we refer to the fact that the Accused was arrested on suspicion and then interrogated. It would appear that the first statement given by the Accused amounted to an *alibi*. On investigation the *alibi* collapsed and Inspector Omar informed the Accused accordingly and the Accused is alleged to have then stated that he would speak the truth provided Kitani was sent for. Subsequently, on the same day, the Accused was charged and made the statement which was produced at the trial.

The practice of putting questions to a person in custody is open to strong criticism and, in several cases, confessions obtained in such circumstances have been rejected. Rule 3 of the Judges Rules lays down that persons in custody should not be questioned without the usual caution being first administered; but, as pointed out in Archbold Ed. 1943 at p. 372: "Rule 3 is not intended to encourage or authorise the questioning or cross-examination of a person in custody after he had been cautioned on the subject of the crime for which he is in custody". Strictly speaking, however, a confession made by a person in custody after questions asked is not necessarily inadmissible (see R. *v.* Best (1909) 1 K. B. p. 692; R. *v.* Voisin 13 Cr. Appeal Reports p. 89; R. *v.* Booker, 18 Cr. Appeal Reports p. 47). The basic reason for rejecting confessions is that a person may be driven to or cajolled

into accusing himself by reason of threats, duress, inducements or promises.

We have reached the conclusion that in this case the learned trial Judges were justified in admitting the statement. We would point out that the defence did not raise the point that the statement was the result of irregular questioning or cross-examination by the police.

Indeed it seems clear from the evidence that this questioning in no way influenced the Accused in his decision to make a statement. We wish, however, to call the special attention of the police authorities to the advisability of adhering closely to the rules drawn up by the Judges.

We find no reason for reducing the sentence and the appeal is dismissed.

Delivered this 18th day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 250/46.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Shimon Farber. APPELLANT.

v.

Ben-Zion Minz. RESPONDENT.

Time for appeal — Succession case — C. P. R. 119, 3, C. A. 172/41 — Estoppel.

Appeal from the decision of the District Court of Tel Aviv, dated 17.5.46, in Probate Case 92/34, refusing to appoint the Appellant as an additional administrator, dismissed:—

The Civil Procedure Rules apply to appeals in succession matters.

(*A. M. A.*)

FOLLOWED: C. A. 172/41 (8, P. L. R. 436; 1941, S. C. J. 568; 10, Ct. L. R. 233).

ANNOTATIONS:

1. The decision of the District Court is reported in 1946, S. C. D. C., at p. 286.

2. In addition to C. A. 172/41 (*supra*) see also C. A. 243/42 (10, P. L. R. 21; 1943, A. L. R. 254) and C. A. 200/45 (12, P. L. R. 424; 1945, A. L. R. 468). (*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: Eliash.

RULING.

Frumkin, J.: A preliminary objection has been taken that this appeal is out of time. It is an appeal from a decision in a succession matter delivered in presence of the parties on the 17th of May, 1946. An application for leave to appeal was made and granted on the 14th of June, 1946. The appeal was filed on the 12th of July, 1946. Under rule 319 of the Civil Procedure Rules, an appeal shall be lodged within 15 days of the order granting leave to appeal. It is therefore submitted by the Respondent that the appeal is out of time. The answer to this objection on behalf of the Appellant is that under rule 3 of the Civil Procedure Rules, these rules do not apply.

This point is covered by authority. In C. A. 172/41 (8, P. L. R. page 436) it was held:—

> "The argument is that since the Civil Procedure Rules of 1938 do not, according to the proviso to section 3, apply to proceedings brought in a District Court under the Succession Ordinance, the Rules, which lay down the time within which the appeal should be brought, equally do not apply. With regard to this we think that whilst the rules do not apply to proceedings of the District Court, there is nothing to prevent them from applying to proceedings in an appeal. That point therefore fails."

Moreover, the Appellant himself admitted the applicability of the rules in applying for leave to appeal for which there is provision only in the Civil Procedure Rules. If the Rules do not apply then he could not have applied for leave to appeal, so that if an appeal lies at all it would in any case be out of time. The preliminary objection is therefore upheld and the appeal dismissed with costs on the lower scale to include LP. 10.— advocate's attendance fee.

Given this 4th day of February, 1947.

Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

HIGH COURT No. 119/46.

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

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

IN THE PETITION OF:—

Julius Gertler. PETITIONER.

v.

Mr. Gutman & 2 ors. RESPONDENTS.

District Court refusing to stay execution of a consent judgment for eviction — Non interference of High Court when they have before them neither motion nor affidavit lodged in District Court.

Petition for an order *nisi*, directed to the 3rd Respondent calling upon him to show cause why he should not cancel his order, dated 4th December, 1946, in Execution File No. 1691/46, Tel-Aviv, and why he should not stay execution of the judgment for eviction in the said file pending the determination of Civil Case No. 479/46 by the District Court, Tel Aviv, and for an order of stay of execution pending final order in this petition; order *nisi* refused:—

High Court cannot interfere with an order of District Court on a motion with affidavit, when neither motion nor affidavit before them.

(*M. L.*)

ANNOTATIONS: *Cf.* H. C. 40/44 (1944, A. L. R. 310; 11, P. L. R. 226) and H. C. 54/45 (1945, A. L. R. 818; 12, P. L. R. 479).

(*A. G.*)

FOR PETITIONER: M. Scharf.

FOR RESPONDENTS: *Ex parte.*

ORDER.

The Petitioner was apparently originally a party to an action for eviction in the Magistrate's Court. A consent judgment was issued whereby present Petitioner agreed to leave the premises after one year. At the end of that period he did not leave the premises but brought an action in the District Court for a declaratory judgment alleging that the consent judgment had been obtained by undue influence and that the Magistrate had no jurisdiction to give such a judgment. The present Petitioner then filed a motion in the District Court asking for a stay of execution. The learned Judge held that neither the motion nor the affidavit showed any ground for granting the stay.

Neither the motion nor the affidavit is before us, and we are certainly not in a position to say that the learned Judge was wrong.

In the result this application must be dismissed.

Given this 2nd day of January, 1947.

A/British Puisne Judge.

HIGH COURT No. 106/46.

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

BEFORE: Edwards and Shaw, JJ.

IN THE PETITION OF:—

Masoud Mohamad Shehadeh & 77 ors. PETITIONERS.

v.

1. Assistant District Commissioner, Safad Sub-District,
2. The Keren Kayemeth Leisrael, Ltd. RESPONDENTS.

Assistant District Commissioner holding enquiry under Land Disputes Ord. — Reliance on a previous order by Deputy District Commissioner in connection with the land under dispute — Order entitling to possession — Failure to give party opportunity of cross-examining or calling evidence.

Return to an order *nisi*, dated 20th November, 1946, calling upon 1st Respondent to show cause why his order dated 14th November, 1946, made under section 2 of the Land Disputes Ordinance (Cap. 76) declaring the 2nd Respondent to be entitled to the possession of certain land should not be set aside; order *nisi* made absolute:—

1. Finding or order made by District Commissioner holding an enquiry under sec. 2, Land Disputes Ordinance, cannot stand, if other party was given no opportunity of cross-examining or of himself calling evidence.

2. A previous order by District Commissioner dismissing claims laid by one of the parties against a person to certain lands neither precludes nor exonerates District Commissioner in subsequent dispute regarding those lands from conducting the enquiry contemplated by sec. 2, Land Disputes Ord. and to give parties opportunity of cross-examining or producing evidence.

(*M. L.*)

REFERRED TO: H. C. 34/45 (12, P. L. R. 365; 1945, A. L. R. 730) and H. C. 23/46 (13, P. L. R. 290; 1946, A. L. R. 511).

ANNOTATIONS: See cases referred to and annotations in A. L. R.; see also H. C. 54/46 (1946, A. L. R. 571).

(*A. G.*)

FOR PETITIONERS: Cattan and Khadra.

FOR RESPONDENTS: Eliash.

JUDGMENT.

Edwards, J.: This is the return to an order *nisi* calling upon the first Respondent to show cause why his order of 14th November, 1946, made under section 2, Land Disputes Ordinance (Cap. 76), declaring the second Respondent to be entitled to the possession of certain land should not be set aside. The short point is whether the first Respondent, at the hearing contemplated by section 2 of the Ordinance, gave the first party to the dispute, namely, seventy nine villagers of Zawiya Village, Safad Sub-District, an opportunity of being heard. It is clear from the record of the proceedings before the first Respondent that he did in fact regard the seventy nine villagers as a party to the dispute. At the hearing, after listening to submissions made by the advocates representing various interests, the Assistant District Commissioner delivered the following ruling:—

"The first party in this case has on a previous occasion before the Deputy D. C. Northern Galilee laid claim to certain lands now the subject of this dispute. This claim was decided on 13th September, 1945, and an order issued on that date accorded possession of the lands to the opposing party, *i. e.* Kamel Hussein, until evicted therefrom in due course of law. The first party in the present case do not claim either to have any documents from Kamel Hussein authorising them to cultivate these lands nor do they allege that they can produce an order from a competent Court evicting Kamel Hussein from these lands. They on the contrary state merely that they have "instituted eviction case in the Magistrate's Court, Safad, No. 257/45". They are therefore estopped from laying claim to possession of this land by virtue of the order of the D. D. C. of 13th September, 1945. The plea in bar must be upheld.

(2) Since both parties before me agree that Kamel Hussein is not a party to this case and since he has not seen fit to appear in person or by representative before me I rule that the second party to this case do now produce formal evidence that they are cultivating the land with the full concurrence of Kamel Hussein and I shall hear *ex parte* evidence from the second party in this connection."

He then proceeded to hear the evidence of two witnesses for the present second Respondents without allowing the present Petitioners, who were the seventy nine villagers already mentioned, an opportunity of cross examining or of themselves calling evidence. Having heard

the examination-in-chief of the two witnesses he proceeded to make the order now complained of. Mr. Cattan, for the present Petitioners, complains, and we think rightly complains, that his clients were never given an opportunity of being heard, or of showing that they themselves had recently been on the land, and in support of his contention has cited H. C. 34/45 Vol. 12 P. L. R. page 365, and H. C. 23/46 Vol. 13 P. L. R. page 290. He has also referred us to the wording of section 2(4) of the Ordinance (Cap. 76), namely, "without any reference to the merits or the claims of any such parties to a right to possess the subject of dispute."

We consider that Mr. Cattan's contention is sound and must be sustained. We deem it unnecessary to touch on the other points raised in argument, *e. g.* the decision of the Commission under the Cultivators (Protection) Ordinance, or the judgment of the Land Court of Haifa of 11th December, 1946, setting aside that decision. In any event, we have been informed at the Bar that an appeal is now pending in this Court sitting as a Court of Civil Appeal from that judgment. In particular, we refrain from dealing with the arguments adduced by Dr. Eliash, for the second Respondents, relating to the position of Kamel Eff. Hussein. For the reasons which we have given we hold that the finding and order of the first Respondent of 14th November, 1946, following as they did on an enquiry at which the Petitioners were not given an opportunity of being heard, cannot stand. In fairness to the Assistant District Commissioner who held the enquiry we might say that he seems to have conducted the enquiry up to the time when he gave the ruling which we have quoted with great care and thoroughness. The order *nisi* is made absolute with fixed (or inclusive) costs in the sum of LP. 10.— against the second Respondents.

This order will not preclude the Assistant District Commissioner from further dealing with this dispute in accordance with law.

Delivered this 24th day of January, 1947, in the presence of Mr. O. Merguerian for Petitioners and Mr. M. Eliash for Respondents.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 335/45.

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

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

IN THE APPLICATION OF:—

Shmuel Ber Mondschein & an. APPLICANTS.

v.

1. Baruch Youda Blau,
2. Moshe Blau,
3. General Talmud Torah School & Grand College Etz-Haim, Jerusalem & 4 ors. RESPONDENTS.

Death of party — C. P. R. 224 — Personal actions.

Application for dispensing with Respondent No. 2, deceased, and his heirs, and for declaring that the above Civil Appeal No. 335/45 now pending before this Court, have become abated as against the said late second Respondent, refused:—

The Court refused to make an order that the action might proceed without certain heirs being served and a declaration that the action against the 2nd Respondent had abated, as such an order would conflict with a previous order given in the case.

(*A. M. A.*)

ANNOTATIONS:

1. Note that r. 224 has by the 1945 amendment been brought more into line with the provisions of O. 17, r. 2 of the R. S. C. J.; see the commentaries to that rule in the Annual Practice.

2. *Vide* C. A. 236/42 (10, P. L. R. 383; 1943, A. L. R. 509) — Court of Civil Appeal bound by its own decision in a previous appeal in the same case.

(*H. K.*)

FOR APPLICANTS: Eliash.

FOR RESPONDENTS: No. 1 — A. Dostrovsky.
No. 2 — Dead.
No. 3—7 — No appearance.

JUDGMENT.

This notice of motion raises the question of the procedure to be followed on the death of a party to an action.

The same parties were before this Court when this appeal was previously listed and we decided that we were not in a position to say that the appeal had become abated against 2nd Respondent, who was dead, on the ground that he was sued in his personal capacity, and

the right of action did not survive. In view of that decision the Registry refused to list the appeal again unless the heirs were served. As far as we can understand it, this motion appears to be an application by Mr. Eliash to dispense with the service on the heirs. He argues that rule 224 of the Civil Procedure Rules can be interpreted in what he calls a negative way so as to permit him to apply to Court for an order, that the case may continue despite the fact that certain heirs have not been served.

We refrain from stating whether such an application can properly be entertained under rule 224, because it appears to us that the application must be refused on another ground. The conclusion seems to us inescapable, that the effect of granting this order would be to reverse the decision given in a previous application in this case. The issue in that previous application was whether on the death of this same Respondent the case could proceed without serving the heirs: the decision was clearly a negative answer to that prayer. The issue in this motion appears to us to be the same.

For these reasons the application is refused.

Delivered this 24th day of January, 1947.

Chief Justice.

HIGH COURT No. 83/46.

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

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

IN THE PETITION OF:—

Mary Ni'meh Saffouri. PETITIONER.

v.

Shukri Salman & an. RESPONDENTS.

Ecclesiastical Court ordering divorce and stopping alimony awarded by earlier judgment — Belated plea against jurisdiction of Religious Court — Non interference of High Court with procedure in Religious Courts — Natural justice.

Return to an order *nisi*, dated the 4th of October, 1946, directed to the second Respondent, calling upon him to show cause why he should not continue the execution of the judgment of the Orthodox Ecclesiastical Court of Appeal, Jerusalem, dated 13th January, 1940, whereby the first Respondent was ordered to pay a monthly alimony of LP. 6 to his wife, and why his order of the 27th July,

1946, dismissing the objections of the Petitioner against the judgment of the Orthodox Ecclesiastical Court of Appeal, Jerusalem, dated the 12th and 25th November, 1942, stopping the alimony, should not be rescinded; order *nisi* discharged:—

1. Person who married in church of certain Religious Community, took action against his (or her) spouse in Court of that Community and during whole period of litigation never raised objection to jurisdiction is estopped from raising this plea at a later stage.

2. Where a person, at times mentally unstable but not insane in the strict sense of the term, defended his case for many years in the Courts and was also represented by a lawyer, it cannot be said that failure to appoint a guardian to defend his interests caused a miscarriage of justice.

3. High Court will not interfere with Religious Court's judgment merely because of some irregularity of procedure not going to root of justice of the case and, not being a Court of Appeal from Religious Courts, will not enquire into procedure of latter Courts except where there have been such errors as to offend against the fundamental principles of justice.

(*M. L.*)

ANNOTATIONS:

1. For cases where Court held that acquiescence estops from raising point of lack of jurisdiction see M. A. 28/44 (1944, A. L. R. 807; 11, P. L. R. 396) see also S. T. 162/45 (1946, A. L. R. 747; 13, P. L. R. 325) and annotations in A. L. R.

It seems though that the majority of recent decisions on point of jurisdiction is in favour of proposition that no amount of estoppel can vest Court with jurisdiction which it does not possess otherwise. See *e. g.* H. C. 105/45 (1946, A. L. R. 546; 13, P. L. R. 180) and H. C. 35/46 (1946, A. L. R. 743; 13, P. L. R. 328) and annotations in A. L. R.

2. For grounds on which H. C. will interfere with judgment of Religious Court see H. C. 48/46 (1946, A. L. R. 543) and annotations.

3. *Cf.* H. C. 7/44 (1944, A. L. R. 192; 11, P. L. R. 128) where it was held that the Court of Community which celebrated a marriage has jurisdiction in matters arising out of that marriage.

(*A. G.*)

FOR PETITIONER: Assal.

FOR RESPONDENTS: No. 1 — W. Salah.
No. 2 — Absent — served.

ORDER.

This is a return to an order *nisi*. It concerns a prolonged matrimonial dispute which has been for some nine years before the Religious Courts of the Greek Orthodox Community. During that time it travelled from the Court of first instance to the Ecclesiastical Court of Appeal, back again to the Court of first instance and twice more to the Ecclesiastical Court of Appeal. It has found its way to this Court on the general

ground that the whole proceedings display such a degree of irregularity that this Court should intervene.

The grounds upon which the Petitioner relies in this petition resolve themselves into three. It was submitted that the Court had no jurisdiction in that the Petitioner was a Protestant and Respondent was a member of the Greek Orthodox Community. Now the Petitioner married in the Greek Orthodox Church; she herself took action in the Court of the Greek Orthodox Community. During all those nine years during which the litigation dragged on, she never once raised this objection to jurisdiction; never once that she alleged that she was a Protestant. Apart from the fact that there is no evidence upon which the Court could come to the conclusion that in fact she is a Protestant, it is immaterial, because we are of opinion that her conduct during all these years clearly estops her from raising this plea now. It emerges that in the course of the proceedings the husband averred that one of the grounds upon which he asked a divorce was the mental instability of his wife. It has been argued that the case should not have been proceeded with in the absence of the appointment of a guardian. Now there is, of course, authority in law and in the *Mejelle* for the proposition that in the case of an insane person guardians must be appointed to defend his legal interests. But we think that the answer to the objection raised in this particular case was given by the Chief Execution Officer. This was really not a case concerning the insanity of the Defendant. It was raised as a subsidiary matter with several others. The lady herself had defended the case for many years in the Courts. She was represented by her lawyer, and as the Ecclesiastical Court itself said, it was not a question of her being insane, in the strict sense of the term, but at times she was mentally unstable. We therefore do not consider that failure to appoint a guardian caused any miscarriage of justice.

The next objection was that the Court was not constituted of three members. As to this we need only say that the record before us was signed by three persons purporting to be members of the Court, that there was nothing on the record to show that any objection on the ground of jurisdiction was taken. It does emerge from the record that the President alone heard the evidence of the doctor which he afterwards submitted to the Court. This would be open to objection in English procedure, but in our opinion it does not go to the root of the justice of the case, and we do not expect those Religious Courts to follow in detail the procedure which long years of experience have dictated as desirable in English Courts.

The next ground of objection was that the issue of divorce was never before the lower Court. In these matrimonial cases before the Religious Courts, it is often difficult to discover the line of demarcation between divorce and separation and a mere claim for alimony. All we can say is that the matrimonial relationship of these people was put in issue before the Courts. It is not denied that the Courts had jurisdiction to enforce any one of the three remedies. The case was sent back from the Court of Appeal to the lower Court with a view to effecting a settlement. The lower Court failed to effect the settlement, and they returned the case to the Court of Appeal with an intimation which clearly indicated that in their opinion divorce was the only remedy. Thereupon the Court of Appeal itself pronounced the divorce. They must have been satisfied that they had authority according to the law that they administer so to do. At all events no sufficient evidence to the contrary has been adduced before the Court. On this occasion it is true that although the Petitioner was served, she did not appear, but she filed an objection to the order, and the Court thereupon sat *de novo* and heard her objections, as that even if it could be said that there was any defect in the first proceedings owing to her absence, it was remedied by the later sitting.

We have repeatedly remarked, this Court is not a Court of Appeal from the Religious Courts of this territory, and we will not enquire as to whether the decisions were legally correct. We will enquire as to whether there have been such errors in procedure as to offend against the fundamental principles of justice. In this case we cannot say that there have, and the rule must therefore be discharged, with inclusive costs of LP. 5.

Delivered this 17th day of December, 1946.

Chief Justice.

HIGH COURT No. 1/47.

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

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

IN THE PETITION OF:—

Ali Abdul Kader. PETITIONER.

v.

The Assistant District Commissioner, Nablus. RESPONDENT.

Dismissal of Mukhtar — Mukhtars Ordinance, 1942.

Petition for an Order *nisi,* directed against the Respondent to show cause why

he should not cancel his order dismissing Petitioner from the office of *mukhtar* of the village of Kafer Qalil and reinstating him to that office; petition refused:—

Where District Commissioner dismissed a village *mukhtar* stating as reason that latter failed to carry out improvements in the village, High Court will not interfere.

(*M. L.*)

ANNOTATIONS: *Cf.* H. C. 17/43 (1943, A. L. R. 190).

(*A. G.*)

FOR PETITIONER: Ghussein.
FOR RESPONDENT: *Ex parte.*

ORDER.

This is a petition for an Order *nisi*. It is true that a *mukhtar* does not, like a public official, hold office during the pleasure of the Crown. The circumstances in which a *mukhtar* can be dismissed are set out in section 5(1) of the Mukhtars Ordinance, 1942. Under the provision of that section he can be dismissed by the District Commissioner for misconduct or neglect of duty or any other sufficient reason.

In this case the District Commissioner in a letter addressed to the Petitioner has stated the reasons, which were that the Petitioner failed to carry out improvements in the village. This failure in our opinion would constitute a sufficient reason, and this petition must be refused.

Given this 23rd day of January, 1947.

Chief Justice.

HIGH COURT No. 114/46.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

'Awad Salem El 'Awadat & 4 ors. PETITIONERS.

v.

The Assistant District Commissioner, Beersheba & an. RESPONDENTS.

Nature of enquiry by District Commissioner under Land Disputes Ord. — Scope of sec. 6 of the Ordinance.

Application for the issue of an order *nisi*, directed to the first Respondent, calling upon him to show cause, if any, why his order, dated 20th November,

1946, purporting to have been given under the Land Disputes (Possession) Ordinance, should not be set aside; order *nisi* refused:—

1. District Commissioner holding an enquiry under sec. 2, Land Disputes Ordinance is not concerned with merits of ownership and should confine his enquiry to the *minima* necessary to enable him to make a decision as to *interim* possession.

2. Whole object of Land Disputes Ord. is to get question of possession settled as soon as possible. Where in the circumstances District Commissioner saw no reason to grant adjournment, High Court will not interfere.

3. Decision of a Criminal Court merely determining guilt or innocence of Accused on a charge preferred cannot be the type of Court order contemplated by sec. 6, Land Disputes Ord.

(*M. L.*)

ANNOTATIONS: *Cf.* H. C. 106/46 (*ante*, p. 67) and annotations.

(*A. G.*)

FOR PETITIONERS: Nazzal.

FOR RESPONDENTS: *Ex parte.*

ORDER.

This is an application for an order *nisi* the object of the Petitioner being to have an order made by the Assistant District Commissioner of Beersheba under the Lands Disputes Possession Ordinance set aside.

The order has been impeached by Mr. Nazzal on behalf of the Petitioner on two grounds.

He says that the provisions of sec. 2(4) of the Ordinance have not been complied with and secondly he submits that under sec. 6 of the Ordinance the Assistant District Commissioner had no power to make the order.

Now as to the first ground the gravamen of his charge is that there was no proper investigation and no proper evidence was taken. I find it difficult to appreciate how this submission could be made in view of the record before me. It must be borne in mind that these are not proceedings in a Court of chancery. With a view to avoiding possible bloodshed the Ordinance provides a rough and ready method of arriving at a standstill order on the question of possession pending the determination of the issue in a Court of law. The District Commissioner is not concerned with the merits of the case in regard to ownership and it is in the best interest of both parties that he should confine his enquiry to the *minima* necessary to enable him to make a decision as to *interim* possession. Each side submitted written statements and provided these were duly considered by the Assistant District Commissioner he would have sufficiently complied with sec. 2(4) of the Ordinance provided

he did not actually prevent either side from tendering other evidence which clearly was relevant to the issue of possession. In this case the record states that when the hearing commenced both sides were represented by advocates. The Petitioner asked for an adjournment which the Assistant District Commissioner saw no reason to grant, and I entirely agree with him on this point because it must be obvious that the whole object of the Ordinance is to get the question of possession settled as soon as possible. Arguments were adduced by each side as to the merits of the statements made by the other side and as to the powers of the Assistant District Commissioner. When he had heard all the arguments he made his order, and I cannot find anything to criticise in the procedure.

Coming now to the second ground that he had no power to make the order under sec. 6 of the Ordinance. Sec. 6 provides that the District Commissioner has no power to make an order which in any way conflicts with an order made by a Court. It is said that this order does conflict with an order made by a Court. Mr. Nazzal argues that the Court order flows from certain criminal proceedings that were taken. The result of the criminal proceedings was the dismissal of the charge. In my opinion such proceedings merely determine the guilt or innocence of the Accused on a charge preferred and the decision of the Criminal Court could not be the type of Court order contemplated by sec. 6.

For these reasons the order *nisi* must be refused.

Given this 21st day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 232/46.

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

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

IN THE APPEALS OF :—

Iskander Tawil. APPELLANT.

v.

Edward Elias. RESPONDENT.

Promissory notes — Illegality — Purchaser for value in good faith — Illegality — Exchange of notes.

Appeal from the judgment of the District Court, Haifa, dated 3rd June, 1946, in Civil Case No. 138/46, dismissed:—

An endorsee of a promissory note for value in good faith cannot be met by a defence that the note was given for illegal consideration.

(*A. M. A.*)

ANNOTATIONS: On bills of exchange given for an illegal consideration see C. D. C. Jm. 16/45 (1946, S. C. D. C. 608) and notes.

(*H. K.*)

FOR APPELLANT: A. Frank.

FOR RESPONDENT: E. Koussa.

JUDGMENT.

This is an appeal from the District Court of Haifa. In our opinion it can be disposed of very briefly. The Appellant signed a promissory note for LP. 600 in favour of Respondent. The note which was Exh. P/1 was in the following terms:—

"LP. 600 six Hundred Pounds Only.

Payment to be effected in Haifa.

After the lapse of three months from the undermentioned date I hereby promise to pay by virtue of this promissory note to the order of Mr. Edwar Elias the abovementioned sum namely six hundred pounds which I had received in cash.

14.11.45.

Bon pour aval

(Sgd.) Edwar Elias guarantor. (Sgd.) Iskander el Taweel."

Stamps for 600 mils.

"Overleaf. On my behalf pay to the order of the Arab Bank. Received the amount in cash.

(Sgd.) Edwar Elias

Haifa 14.11.45.

Paid by Edwar Eff. Elias (written by pencil)."

Now it would be observed that no conditions whatever are attached to this promissory note. It was a clear admission of liability to pay. The Appellant in resisting the claim, states that the note was given in substitution for another note given by the Appellant and honoured by the Respondent and he says that the original note was for an illegal consideration and if that fails, as he argues it should fail, the second note also fails. In our opinion the argument is untenable for the reason given by the lower Court in the following passage of their judgment:—

"While we guard ourselves in the present proceedings from making any findings as to whether the first note was tainted with illegality or not, we are satisfied from the evidence before us in this case that the Plaintiff has taken the note in good faith and for value.

That being so, it is immaterial for the purposes of our decision in this case whether as between Assaf and the Defendant the first note was given in respect of an illegal transaction. It is clear that the Plaintiff has paid in good faith the value of the first note for which the note now sued upon has been substituted. He is fully entitled to recover the amount claimed from the Defendant maker."

We entirely agree with the reasoning and the conclusions based upon it. The appeal must, therefore, be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fees.

Delivered this 23rd day of January, 1947.

Chief Justice.

HIGH COURT No. 13/47.

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

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

IN THE PETITION OF:—

Frank Gruner. PETITIONER.

v.

Commissioner of Prisons, Jerusalem & an. RESPONDENTS.

Death sentence passed by Military Court — Scope of Art. 48, Palestine Order-in-Council, 1922.

Petition for an order commanding the Respondents to refrain from executing the death sentence passed by the Military Court Jerusalem on Dov Gruner on the 1st January, 1947, and confirmed by the General Officer Commanding, Troops in Palestine, and that pending the determination of this petition, an *interim* order be issued by this Court directing the Respondents to stay execution of the said sentence; order *nisi* refused:—

1. Art. 48, Palestine Order-in-Council, 1922, refers only to Criminal Courts of Assize created under that Order in Council, it does not cover Military Courts deriving authority from Palestine (Defence) Order-in-Council, 1937.

2. Procedure visualised by Art. 48, Palestine Order-in-Council, 1922, is inconsistent with procedure specifically set out in Defence Regulations for conduct of Military Courts; operation of that article would be suspended by Art. 6(4), Defence Order-in-Council, 1937, even if Art. 48 of the Palestine Order-in-Council, 1922, could be interpreted as applying to Military Courts, too.

(*M. L.*)

FOR PETITIONER: Kritzman.

FOR RESPONDENTS: *Ex parte.*

ORDER.

There are two grounds which preclude this High Court from accepting the arguments advanced by Mr. Kritzman in support of the grant of this Order. The first is that we are compelled to interpret Article 48 of the Palestine Order-in-Council of 1922 as referring only to the Courts of Criminal Assize which this part of the Order-in-Council sets out to create and for whose procedure it makes provision. The Military Courts which derived authority to sentence Dov Gruner to death are regulated by a different Order-in-Council *i. e.* the Palestine (Defence) Order-in-Council, 1937, which has no similar provision to Article 48 of the 1922 Order-in-Council.

Turning now to the other arguments advanced by counsel, even if we were able to accept that Article 48 of the 1922 Order-in-Council could be interpreted as applying to all Courts, including the Military Courts functioning in this territory, we would be forced to the conclusion that the procedure visualised by Article 48 was inconsistent with the procedure specifically set out in Defence Regulations for the conduct of trials in Military Courts and the carrying out of death sentences imposed by them; this being so, the provisions of Article 6(4) of the Defence Order-in-Council, 1937, would come into operation and suspend, in so far as Military Courts are concerned at all events, the operation of Article 48 of the Palestine Order-in-Council of 1922.

For these reasons the prayer of the Petitioner must be rejected..

Given this 3rd day of February, 1947.

Chief Justice.

CIVIL APPEAL No. 77/46.

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

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

IN THE APPEAL OF:—

Simon Agrest. APPELLANT.

v.

Abdul Kader Shibel & 3 ors. RESPONDENTS.

Brokers — Custom — Whether broker acted for both parties, acquiescence — Contract by conduct.

Appeal from the judgment of the District Court of Haifa in Civil Case No. 57/45, dated 14th of February, 1946, dismissed:—

In order to establish that a person entered into a contract by conduct, it must be clearly established that the inference to be drawn from the conduct of that person is that he knew that he was incurring contractual liabilities and agreed to incur them.

(*A. M. A.*)

ANNOTATIONS: See Annotated Laws of Palestine, Vol. 3, pp. 149 *et seq.*, particularly 2nd paragraph on p. 150 and 3rd paragraph on p. 151.

See also Halsbury, Vol. 1, pp. 257—8, para. 432 and, as regards contracts implied by conduct generally, *l. c.* Vol. 7, p. 69, second paragraph of para. 88 and p. 261, para. 361.

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENTS: H. Atalla.

JUDGMENT.

FitzGerald, C. J.: The Appellant in this case claims a commission of LP. 369.500 in respect of the sale of land. It appears that he is a landbroker in Haifa. The Respondents had land which they wished to sell. It is admitted that in a previous transaction the Appellant did act as landbroker for the Respondents. This transaction arose out of the sale of land for the sum of LP. 19,480.— to the Haifa-Acre Bay Company through the medium of Mr. Baruch Ram. For the purposes of this appeal it seems to us immaterial whether Mr. Baruch Ram was acting in a personal capacity or on behalf of the Acre-Haifa Bay Company. Undoubtedly Mr. Baruch Ram know that the Respondents had land to sell and so did the Appellant. Mr. Baruch Ram conveyed an invitation through the Appellant to Respondents to come and see him regarding this land. The Appellant did go to the Respondents and eventually the Respondents did sell the land. The Appellant was paid his commission by Mr. Baruch Ram. He alleged in this appeal and in the Court below that he was in addition entitled to a commission from the Respondents as he was also their broker.

It appears to have been established that there is a custom in this territory whereby a broker, if he acts in the capacity of broker for each party, is entitled to a fee of 2% of the purchase price from each party. The question therefore arises — was the Appellant acting in the capacity of broker for the Respondents? He argues that he was by reason of their acquiescence which was evident from the fact that they accepted the invitation and accompanied the Appellant to Mr. Baruch Ram.

Now it is quite true that contractual relations can arise from conduct, but before the obligations of a contract can be foisted on to a person

by this means, it must be clearly established that the inference to be drawn from the conduct of the person is that he intended to enter into contractual relations, that he knew or must have known that he was incurring contractual liability and that he was prepared to accept the consequences of that contractual liability. The evidence to this effect, as we have said, must be definite.

Now what were the facts? It seems to us that the Appellant did little more than act as the messenger or perhaps agent, of Mr. Baruch Ram. The mere fact that the invitation from Mr. Baruch Ram conveyed by the Appellant, was accepted by the Respondents could not of course give rise to any contractual liability. The other acts performed by the Appellant, that is accompanying the Respondents to the residence of Mr. Baruch Ram, or even persuading them, as he said he did, to close the deal with Mr. Baruch Ram, amounted to nothing more than carrying out the duties for which Mr. Baruch Ram employed him and for which he intended to pay him. In any case these incidents fell far short of what would be necessary to impose a contractual liability on the Respondents towards the Appellant in respect of brokerage. The appeal is therefore dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 3rd day of February, 1947.

Chief Justice

Curry, A/J.: I agree.

A/British Puisne Judge.

CIVIL APPEAL No. 253/46.

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

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

IN THE APPEAL OF:—

Awad Hassan Sanad. APPELLANT.

v.

Said Abdel Aol & an. RESPONDENTS.

Awlawiyeh — Land Code, Art. 41 — Amount of equivalent value — Value stated in kushan.

Appeal from the judgment of the Magistrate's Court of Ramleh sitting as a Land Court dated 18.6.46, in Land Case No. 976/45, dismissed:—

The equivalent value payable by a person who exercises a right of prior purchase is best taken from the value appearing in the *kushan* as considera-

tion for the sale, unless the entry in the *kushan* can be shown to have been made fraudulently or fictitiously.

(*A. M. A.*)

ANNOTATIONS:

1. On assessment of value in *awlawiyeh* cases see L. C. Ha. 11/44 (1946, S. C. D. C. 279) and cases cited in note 1 thereto.

2. As regards the evidential value of the price stated in the *kushan cf.* C. A. D. C. Jm. 68/45 (1946, S. C. D. C. 707) and note 3 thereto.

(*H. K.*)

FOR APPELLANT: J. Kazimi.

FOR RESPONDENTS: R. Maswadi.

JUDGMENT.

This case concerns a claim under Art. 41 of the Ottoman Land Code. The Appellant in the Court below successfully established his claim under the article and his appeal is solely on the question of the amount of equivalent value under the article. The purport of the article is quite clear. In certain circumstances it gives an option to an owner of an undivided share to buy in the other owners on payment of equivalent value. In this case the Magistrate in the Land Court assessed the equivalent value at LP. 190 *per dunum* which was the amount set out in a registered *kushan* as the actual amount paid for this land on its transfer. The Appellant's case is that he adduced expert evidence to prove that the value of the land was much less than LP. 190. The issue before the Magistrate therefore was one purely of fact. In the result the Magistrate accepted the evidence of the registered *kushan* as against that of the experts summoned by the Appellant. In our opinion not only was the Magistrate entitled to accept the amount stated in the *kushan* as against that estimate made by the experts, but it is difficult to appreciate how he could have avoided doing so as, in the absence of proof that the entry in the *kushan* was either fraudulent or fictitious, it would be a more trustworthy indication of the actual market value of the land than any estimate made by experts.

In this case the Appellant was unable to satisfy the Magistrate that the amount stated in the *kushan* as having passed in consideration of the sale was either a fraudulent or fictitious sum. Moreover, there was further evidence that other land in the neighbourhood was sold at prices of more than LP. 190.—.

It follows that the appeal must fail. Costs on the lower scale to include LP. 10.— advocate's attendance fees.

Delivered this 13th day of January, 1947.

Chief Justice.

CRIMINAL APPEAL No. 127/46.

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

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

IN THE APPEAL OF:—

Arieh Zvi Lifshitz. APPELLANT.

v.

The Attorney General. RESPONDENT.

Food Control — Food Control (Dairy Products) (Manufacture and Maximum Prices) Order, Order 3(2) *— Whether Public Health Ordinance imported — Public Health (Standard of Foodstuffs) Rules — Construction of statutes.*

Appeal from the judgment of the District Court of Jerusalem in Criminal Appeal No. 57/46, dated 11th October, 1946, whereby Appellant's appeal against the judgment of the Acting Chief Magistrate of Jerusalem in Criminal Case No. 3947/46, dated 20th May, 1946, convicting Appellant under paragraph 3(1) of the Food Control (Dairy Products) (Manufacture and Maximum Prices) Order, 1943, and section 10(1)(a) of the Food Control Ordinance, 1942 (as amended), and sentencing him to a fine of LP. 30 or six weeks' imprisonment, was dismissed; appeal dismissed:—

Rules under one Ordinance may be made applicable by another enactment, without importing the constating rules.

(*A. M. A.*)

ANNOTATIONS: *Cf.* Maxwell on Interpretation of Statutes, 8th ed., p. 31 and footnote (*h*), Halsbury, Vol. 31, pp. 571—2, para. 787, and Stroud's Judicial Dictionary, Vol. 1, p. 100, *sub verbo* "applicable."

(*H. K.*)

FOR APPELLANT: G. Rosenbaum.

FOR RESPONDENT: G. Stulz.

JUDGMENT.

This is an appeal from the District Court, Jerusalem, which sitting in its appellate capacity confirmed the decision of the Magistrate, Jerusalem, convicting the Appellant, under an Order made under the Food Control (Dairy Products) (Manufacture and Maximum Prices) Order, 1943. It appears that the Appellant was convicted for selling in a café milk which did not contain a certain specified amount of fat.

In regard to the first argument of Mr. Rosenbaum, that the Order did not apply to a café owner, we think that the reasoning of the Magistrate is not open to criticism. But the main argument of Mr. Rosenbaum centred round the meaning of Order 3, paragraph 2, which reads as follows:—

> "As far as applicable, the definitions and provisions contained in the Public Health (Standard of Foodstuffs) Rules, 1935, shall be deemed to be part of this Order."

The Appellant has argued that those Rules cannot be imported without importing with them the Ordinance on which they are founded. We are unable to accept this contention. It appears to us that the Order itself is unambiguous. It does, of course, suffer from the defect inherent in all war legislation, in that there is cross-reference to some previous legislation.

The previous legislation referred to in this particular paragraph seems to us to be set out in such precise terms as not to leave any room for doubt. It is the Public Health (Standard of Foodstuffs) Rules. We would observe that those Rules deal with matters other than the particular matter dealt with in the Order for the infringement of which the Appellant was convicted. The relevant words in the Order in this connection are the opening words of sub-paragraph 2, which are "as far as applicable". These can only be interpreted as meaning that the Public Health Rules dealing with the subject-matter of the Order — that is milk — are the Rules which are applicable, and are the only Rules which are applicable. The Public Health Rule which deals with milk is 8(1), which regulates the standard of milk that can be sold unler the name of "milk". It follows, by virtue of Order 3, paragraph 2, that for the purpose of the Schedule to the Order, that standard must be maintained. It was established to the satisfaction of the Magistrate, and indeed it has not been denied by the Appellant that the milk sold did not conform to that standard. It clearly then came within the ambit of this Order, and the Appellant was liable to the penalties provided in the Order.

For these reasons we think the appeal must be dismissed and the judgments of the Magistrate and the District Court confirmed.

Delivered this 8th day of January, 1947.

Chief Justice.

CIVIL APPEAL No. 292/46.

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

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

IN THE APPEAL OF:—

Fawzi Saleh. APPELLANT.

v.

Zakeh Hasan Muhammad el Ali. RESPONDENT.

Land Settlement — Case remitted for retrial — Effect of notification of settlement — L. S. Ord., sec. 6 — Case already begun.

Appeal from the judgment of the Magistrate's Court, Jerusalem, in Land Case No. 3/43, dated 31st July, 1946, allowed and case remitted:—

1. When settlement is notified, cases concerning lands affected by the notice may be stayed or remitted to the Settlement Officer if there is not sufficient time to determine them before the beginning of settlement. But cases already begun may be concluded.

2. A case remitted for re-hearing is not a part-heard case before the first hearing thereof after remittal.

(*A. M. A.*)

ANNOTATIONS: On the effect of sec. 6 of the Land (S. of T.) Ordinance *cf.* C. A. 233/45 (13, P. L. R. 199; 1946, A. L. R. 487) and note 3 in A. L. R.

(*H. K.*)

FOR APPELLANT: Abramovsky and S. T. Cohen.

FOR RESPONDENT: F. Atallah.

JUDGMENT.

This is an appeal from a decision of the learned Magistrate of Jenin, by which he dismissed an action brought by the present Appellant. The statement of claim was filed in January, 1943, and the case was first heard and decided in June, 1945. An appeal was then lodged by the Plaintiff (who had lost his case) and, on the 28th March, 1946, the Court of Appeal allowed the appeal, set aside the judgment, and remitted the case for retrial before another Magistrate. When the new trial was due to begin the learned Magistrate was informed that the land which is the subject-matter of the dispute formed part of an area in respect of which a notification of settlement had been given under section 5 of the Land (Settlement of Title) Ordinance, Cap. 80. The learned Magistrate, after hearing evidence establishing that settlement operations had begun, decided that it was just to hear the case.

The case was then proceeded with and judgment given dismissing the claim.

Several grounds of appeal have been formulated against this last mentioned judgment, but the only ground argued before us today is the one touching upon the interpretation of section 6 of the Land (Settlement of Title) Ordinance, as amended by Ordinance No. 48 of 1939. The Appellant's contention put shortly is that the Magistrate had no power to hear the case, and should either have stayed it and deferred judgment until the publication of the Schedule of Rights, or should have ordered that the matter be determined by the Settlement Officer.

We are of opinion that this submission is correct. The effect of the decision of the Court of Appeal ordering a retrial was to do away completely with the original hearing; therefore, on the 17th of May, 1946, when the case came up for retrial, it had to be treated as a case entered prior to notification of settlement but the hearing of which had not begun. In our opinion section 6 makes it quite clear that where an action has been entered before the notification of settlement, but where the hearing has not actually started, the Magistrate has the choice of the following courses: If it is possible for him to hear and determine the case before the settlement operations begin, he should do so; if there is not enough time for hearing and determining the case prior to the start of settlement operations, the Magistrate should either stay proceedings or order that the matter be determined by the Land Settleement Officer. Where, however, the hearing of an action has actually begun when notification of settlement is published, there is nothing to prevent the Court from completing the hearing. In the present case, as already mentioned, the hearing had not begun when the notice of settlement was published. On the 17th of May, 1946, settlement operations had arleady begun, so that it was not possible for the Magistrate to hear and decide the case before the settlement operations began in the village. The Magistrate, therefore, had only the choice of staying proceedings or referring the matter to the Land Settlement Officer. For the above reasons, the learned Magistrate should not have proceeded with the hearing.

The judgment is therefore set aside, and as we have been informed that the settlement proceedings are still in progress, we hereby order that the case be referred to and determined by the Land Settlement Officer.

Delivered this 28th day of January, 1947.

British Puisne Judge.

CIVIL APPEAL No. 261/46.

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

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

IN THE APPEAL OF:—

Nafisa Ahmad A'mar & 4 ors. APPELLANTS.

v.

Latifa Deeb Nasrallah. RESPONDENT.

Partition by consent — One of co-owners failing to agree to partition — C. A. 238/45 — Partition not invalidated if dissentient co-owner may receive his share.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated 15.6.46, in Case No. 61/Ijzim, dismissed:—

The proceedings in C. A. 238/45 are concluded in this case, the purchaser agreeing to give to the co-owner who had not agreed to the partition her share in the property acquired by him.

(*A. M. A.*)

ANNOTATIONS: See the previous judgment in this case, *i. e.* C. A. 238/45 (1946, A. L. R. 15) and the note thereto.

(*H. K.*)

FOR APPELLANTS: F. Atallah.

FOR RESPONDENT: W. Salah.

JUDGMENT.

In this case five brothers and sisters own property in common having derived it from a common ancestor. One of the brothers, Najib, desired to realise his share as he wanted to get married. A partition was agreed upon. Najib took his share which he sold for a valuable consideration to the Respondent. This was a voluntary act on Najib's part. He parted with his property, he got what he wanted and one would have considered that he had no further interest. Later, however, it emerged that one of the joint owners a woman named Hind did not sign the deed to partition although it was alleged that her father signed it for her. On this ground it was urged that the partition was a nullity. The case came before this Court as Civil Appeal 238/45. In that case the Court decided that Hind could not thus be deprived of her share of the property and the case was remitted for the Settlement Officer to decide whether the partition could be effected against the other four consistently with Hind getting her share. That was the only issue upon which the case was sent back.

Fuad Bey Atallah now argues that the partition was a nullity *ab initio* but the appeal Court in case 238/45 could not have considered that this was so because they sent it back to the Settlement Officer to determine as we interpret the judgment, whether it was a practical proposition to give Hind her share and enforce partition against the other four. In case No. 61/Ijzim, this case now appealed against, the Settlement Officer decided that it was a practical proposition to give Hind 45 shares out of 384 shares and to enforce the partition against the other four. He was able to come to this decision presumably because the Respondent was quite agreeable to have the 45 shares of Hind deducted from the full amount of land for which he has originally bargained and for which he had paid. He in fact appears to have been the only sufferer. In these circumstances we consider that the Settlement Officer carried out the directions of this Court and we see no grounds to criticize the scheme by which he arrived at the settlement of this land as between the parties concerned. Costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 28th day of January, 1947.

Chief Justice.

CIVIL APPEAL No. 231/46.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Muhammad Awad Samour & 3 ors. APPELLANTS.

v.

Hafez Hamad Shurrab & 2 ors. RESPONDENTS.

Fraud — Allegation that sale made in fraud of Plaintiff's rights of possession and prior unauthorised sale — Vendor a necessary party — Alteration of claim — Addition of party on appeal.

Appeal from the judgment of the District Court, Jaffa, sitting as a Land Court, dated 28th May, 1946, in Land Case No. 64/44, dismissed:—

If a plaintiff seeks to upset the title of a purchaser of land on the ground that the sale was made in fraud of the plaintiff's rights over the land, the vendor is a necessary party to the action.

(*A. M. A.*)

FOR APPELLANTS: S. Abu Ghazzaleh.

FOR RESPONDENTS: Nos. 1 & 2 — Michaeli.
No. 3 — not served.

JUDGMENT.

We find that it is unnecessary to call on the advocate for Respondents 1 and 2 to reply.

This is an appeal from the judgment dated 28th May, 1946, of the District Court, Jaffa, in Land Case 64/44.

The Appellants were the Plaintiffs in that action. They alleged that the transfer of his shares by the third Respondent, Awad Abdul 'Ati Sammour, to Respondents Nos. 1 and 2 was fraudulent because those shares had already been sold by Awad outside the *tabu,* to the Appellants. The prayer of the Appellants, as shown in the statement of claim, was that the registration should be effected in their (Appellants') names.

Three issues were framed, and they read as follows:—

1. Did the sale take place with bad intention and by way of fraud, and is it legally null and void.
2. The possession by the Plaintiffs of the parcels, if established, and its effect on the sale.
3. In view of all the circumstances of the case, is it possible to decree specific performance or otherwise.

It is difficult to see how these issues were arrived at without any alteration in the statement of claim. However, the action came on for hearing, and the Appellants' advocate told the Court that he dispensed with the third Respondent (Awad) who had not been served. The case then went on as between the Appellants and Respondents 1 and 2. The advocate for Respondents 1 and 2 (*i. e.* Defendants 1 & 2) submitted to the Court, as well he might, that the cause of action was not clear, and the Appellants' advocate made a statement of the facts alleged by him, and ended by saying that he was ready to prove that Respondents 1 and 2 knew those facts, and to prove further that the Appellants were in lawful possession before Awad sold to Respondents 1 and 2. He also said that he was prepared to prove a prescriptive title.

Suleiman Eff. Abu Ghazzaleh, for Appellants, has told us that he is not, at present, making a claim for specific performance, and it is quite clear that as against Respondents 1 and 2 he could have no such claim, as his clients had no contractual relations with Respondents 1

and 2. Suleiman Eff. has further said that he is not relying, at present, on prescription. His submission is that the Court below erred in not hearing the evidence which he was prepared to lead with a view to showing that the transfers to Respondents 1 and 2 were fraudulent to their knowledge. Assuming that he was able to prove fraud, he would then have expected the Court below to annul the *kushans* of Respondents 1 and 2, and to order registration in the names of the Appellants.

It appears to us that Awad was a necessary party to the action, and that the Appellants could not dispense with service of Awad and still ask the Court to find that fraud had been proved. Such a finding would affect Awad's rights, and he might wish to call evidence with a view to showing that the transaction was not fraudulent.

In these circumstances we find that the Court below rightly held that the case could not be proceeded with.

Suleiman Eff. has now asked us to join Awad once more as a Defendant to the action, but we are unable to see any grounds upon which we could do so.

In the result the appeal must be dismissed with costs on the lower scale, to include an advocate's attendance fee of LP. 10 (ten pounds).

Delivered this 13th day of January, 1947.

British Puisne Judge.

CIVIL APPEAL No. 70/46.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Nasri Samara. APPELLANT.

v.

Ceovannia Saadeh & 2 ors. RESPONDENTS.

Will allegedly made in civil form by a Palestinian citizen and member of Greek Orthodox Community — Jurisdiction of Civil and Religious Courts — Scope of sec. 12, Succession Ordinance — Revision of previous decisions of Supreme Court — Effect of practice of Courts over a long period — Reference to Special Tribunal.

Appeal from the judgment of the District Court of Jaffa in Probate Case No. 29/45, dated 16th of February, 1946, dismissed:—

1. Although legislator is competent under Art. 57, Palestine Order-in-Council to vary jurisdiction of Religious Courts, such variation can only be enacted by Ordinance or Order of High Commissioner showing in clear terms intention to vary the jurisdiction.

2. a) Sec. 12, Succession Ordinance, does not provide that a testator can avoid restrictions of his personal law by making a will in civil form.
b) Confirmation of all wills of members of recognised Religious Communities in Palestine other than foreigners is within exclusive jurisdiction of Religious Courts of those communities.

3. There is no indication in Succession Ordinance of any intention that a will should ever have to be both confirmed in a Religious Court and found valid in civil form in a Civil Court.

4. Supreme Court is not precluded from overruling its previous decisions unless they have remained unchallenged for a considerable length of time.

5. Court of Appeal is bound by previous decision confirming the practice of District Courts for several years to grant probate of wills in civil form, irrespective of fact that testator was a Palestinian and a member of a Religious Community.

6. Whether probate of a will purporting to be made in civil form by a Palestinian citizen and member of a Religious Community is within jurisdiction of District Court or Religious Court is for Special Tribunal to decide.

7. It is for the Court seized with a matter of personal status to decide whether or not a question such as contemplated by Art. 55, Palestine Order-in-Council, (*re* Special Tribunal) has genuinely arisen.

(*M. L.*)

REFERRED TO: C. A. 120/31 (1, P. L. R. 776, 4 C. of J. 1596); L. A. 52/35 (4, P. L. R. 21, 8 C. of J. 740); C. A. 87/36 (4 P. L. R. 196, 1 Ct. L. R. 90, 9 C. of J. 779); C. A. 4/37 (4 P. L. R. 165, 2 Ct. L. R. 146, 1937 S. C. J. (N. S.) 110); C. A. 158/38 (5 P. L. R. 488, 4 Ct. L. R. 169, 1938(2) S. C. J. 126); C. A. 55/40 (7 P. L. R. 291, 1940 S. C. J. 483); C. A. 106/40 (7 P. L. R. 310, 7 Ct. L. R. 51, 1940 S. C. J. 229); C. A. 246/40 (8 P. L. R. 55, 9 Ct. L. R. 54, 1941 S. C. J. 17); C. A. 131/42 (9 P. L. R. 752, 12 Ct. L. R. 257, 1942 S. C. J. 728); C. A. 236/42 (10 P. L. R. 383, 1943 A. L. R. 509); C. A. 279/42 (10 P. L. R. 96, 1943 A. L. R. 88); H. C. 42/43 (10 P. L. R. 239, 1943 A. L. R. 257); S. T. 3/45 (13 P. L. R. 133, 1946 A. L. R. 306); C. A. 229/45 (13 P. L. R. 175, 1946 A. L. R. 359); Maxwell On the Interpretation of Statutes, 7th Edition pp. 37 and 136; Fr. Goadby, International and Interreligious Private Law in Palestine pp. 124 and 125.

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C. at p. 34.

2. On point 1 see C. A. 4/37 and C. A. 279/42 (*supra*), see also Maxwell on Interpretation of Statutes (7th Ed.) p. 136.

3. On point 2(a) see cases referred to (C. A. 87/36, C. A. 106/40 and C. A. 131/42). In addition to the judgments referred to see also C. A. 85/28

(5 C. of J. 1870) where it was also argued that the provisions of a will made in civil form are valid irrespective of the national law of the testator and the Court of Appeal rejecting this argument decided that a will made in civil form must be held to be valid in form, but all other questions must be decided by the personal law of the testator.

4. On point 4 see cases referred to (L. A. 52/35, C. A. 158/38, C. A. 236/42, *In re* Shoesmith) and annotations to C. A. 236/42 in A. L. R.

(*A. G.*)

FOR APPELLANT: Elia.

FOR RESPONDENTS: No. 1 — Berouti.
Nos. 2 & 3 — Nakleh.

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 16.2.46 of the learned President of the District Court, Jaffa, in Estate Case No. 29/45. In that case the Appellant, Nasri Sammara, asked for probate of the will of the late Zaki Saadeh who was, at the date of his death, a member of the Greek Orthodox Community and of Palestinian nationality. The petition was opposed by three persons having an interest in the estate.

An objection to the jurisdiction of the District Court was raised by three opposers. George Eff. Elia, advocate for the Petitioner, alleged that the will was in civil form, and he admitted that if it were not, then the District Court would have no jurisdiction. The learned Judge did not decide whether or not the will complied with section 12 of the Succession Ordinance, and he observed that this would be a matter for hearing on the merits if the case proceeded.

The objections were based on either of two propositions. That is to say:—

(1) that by virtue of section 7(1) of the Succession Ordinance the will must be confirmed by the Greek Orthodox Court, with the arguable possibility that, if it is in civil form, it can or must be subsequently proved in the District Court under the provisions of Part IV of the Ordinance, or

(2) that if the Succession Ordinance does in fact allow a person in the position of the testator to make a will in civil form, and bring it to the District Court for probate without prior confirmation by the Religious Court, then to that extent the Ordinance is *ultra vires* Article 54 of the Palestine Order-in-Council, 1922.

The learned Judge, referring to Civil Appeal 106/40 (7 P. L. R. 310) and Civil Appeal 131/42 (9 P. L. R. 752), held that it could not

now be disputed in the District Court that, apart from Moslems, any testator, whether or not he is a Palestinian citizen or a member of a religious community, who makes a will in civil form in accordance with section 12 of the Succession Ordinance, may, in an appropriate case, be granted probate of it. He observed, however, that as far as his information went the question whether the Succession Ordinance was *ultra vires* Article 54 of the Palestine Order-in-Council had never been expressly dealt with by the Court of Appeal. The Judge considered that the matter was one which should be referred to a Special Tribunal as provided in Article 55, but in case it should be held on appeal that this was not a proper case for such a reference, he indicated his views on the question of *ultra vires*. In doing so he expressed the opinion that the words "confirmation" and "probate" mean substantially the same thing, the former being the appropriate technical term in a Religious Court and the latter in a Civil Court. After further argumentation the learned Judge came to the conclusion that it was not a tenable proposition that a will in civil form, made by a member of a religious community, should be first confirmed by the Religious Court and then subsequently taken for probate in the District Court.

With regard to the question of *ultra vires*, the learned Judge said:—

> "As regards the question of *'ultra vires'*, Article 54 speaks in general terms of 'confirmation of wills of members of their community other than foreigners', and in my view to enact by Ordinance that such members of a religious community may, by following a prescribed form of will, escape the obligation of having it confirmed by the Court of their community, is to enact something which is directly contrary to the provisions of Article 54."

And finally he said:—

> "In the result, therefore, I am of opinion that the relevant part of Part IV of the Succession Ordinance, as interpreted by the Court of Appeal, is *ultra vires* Article 54 of the Order-in-Council, and that the will in this case must be confirmed by the Court of the Greek Orthodox Community."

It will be convenient, I think, at this point to set out the provisions of the relevant part of Article 47, and of the whole of Article 57 of the Palestine Order-in-Council. Article 47 provides as follows:—

> "The Civil Courts shall further have jurisdiction subject to the provisions contained in this Part of this Order, in matters of personal status as defined in Article 51 of persons in Palestine. Such jurisdiction shall be exercised in conformity with any law, Ordinance or Regulations that may hereafter be applied or enacted, and subject thereto according to the personal law applicable ..."

Article 57 reads as follows:—

> "Subject to the provisions of any Ordinance or Order establishing a Supreme Council for Moslem Religious Affairs, the constitution and jurisdiction of Religious Courts established at the date of this Order may be varied by Ordinance or Order of the High Commissioner."

In Civil Appeal 106/40 (7 P. L. R. 310) the Court said (see page 313 of the report):—

> "In our opinion, section 12 is intended to provide an alternative method of making a will to that provided under the law governing the personal status of a testator; in other words, to enable a testator if he so wishes, to avoid the restrictions of his personal or religious law, with regard to the dispositions which he may wish to make, that is to say, a person can make a will according to his personal law or his religious law, but, on the other hand, if he makes a will according to the provisions of section 12, that is equally valid, and is an alternative method of testamentary disposition. And we do not think that section 11 in any way limits or restricts the provisions of section 12. And section 12 contains no restriction as to the dispositions which a testator may desire to make."

In Civil Appeal 131/42 (9 P. L. R. 752) the learned Judge who tried the case was one of those who had given the judgment in Civil Appeal 106/40. After quoting the passage set out above, the learned Judge says:—

> "It is urged by counsel for the Appellant that although these words are in the widest form they should nevertheless be limited to the facts of that particular case, where a testator was a 'foreigner' within the meaning of Article 59 of the Palestine Order-in-Council, 1922, and that the point is still open as regards a Palestinian citizen who is also a member of the Jewish Community. I consider this to be a sound contention, and the Court in the earlier case did not have the advantage of listening to the very full arguments which have been addressed to me on this point in the present appeal."

Later on the learned Judge says:—

> "Dr. Bernard Joseph has referred to a number of District Court cases extending over several years and it is in my opinion clear from these authorities that in practice the Courts have regarded themselves as being entitled to grant probate of a will in civil form irrespective of the fact that the testator was a Palestinian citizen and a member of the Jewish Community, and I was referred to no authority of either a District Court or the Court of Appeal to the contrary. This point itself, of course, is in no way conclusive, but in my opinion Dr. Joseph is right when he says that if the Succession Ordinance is open to alternative constructions then the construction which is supported by practice should prevail."

Finally the learned Judge says:—

> "..... but after careful consideration of all the arguments adduced before me I am of the opinion that, at the least, Dr. Joseph's argument can reasonably be supported by the wording of the Ordinance; and that the intention of the legislature, adequately implemented by the terms of the Ordinance, is that, apart from Moslems any testator whether or not he is a Palestinian citizen or a member of a religious community, who makes a will according to the civil form prescribed in section 12 may, in an appropriate case, be granted probate in respect of it. This conclusion seems to me to be supported by section 20 of the Ordinance which provides that the provisions of Part IV (*i. e.* sections 11 to 20 inclusive) shall not apply to successions to Moslems, there being no such exclusion in the case of members of the Jewish Community."
>
> The matter as I have already said is one of complexity and I have come to my result with considerable hesitation."

In Civil Appeal 131/42 the question whether the restrictions of his religious law upon a testator's power of disposition are applicable in the case of a will made in civil form was not specifically decided. But Civil Appeal 131/42 did not overrule Civil Appeal 106/40 in this respect.

Before dealing further with Civil Appeal 106/40 and Civil Appeal 131/42, I would like to express my views on certain preliminary matters. The starting point in all cases in regard to the jurisdiction of the Courts of the religious communities is the Order-in-Council, 1922, Article 54 of which provides that the Courts of the several Christian communities shall have "exclusive jurisdiction in matters of ..... confirmation of wills of members of their community other than foreigners as defined in Article 59."

The first thing to be observed is that the word "wills" is not limited in any way and, in my judgment, it follows that the confirmation of *all* wills of members of their community other than foreigners is within the exclusive jurisdiction of the Religious Court of that community, unless the jurisdiction of that Court has been varied as provided in Article 57. The Order-in-Council does not make any exception in regard to a will in civil form. A will in civil form might also happen to be a will in the form required by the law of a particular religious community, but if it were not, I apprehend that the Religious Court would refuse to confirm it.

I also hold the view that although it is competent to the legislator, under the powers conferred by Article 57 of the Order-in-Council, to vary the jurisdiction of a Religious Court, such variation could only be enacted by Ordinance or Order of the High Commissioner showing

in clear terms an intention to vary the jurisdiction.

Maxwell, on the Interpretation of Statutes (7th Ed.) at page 136, says:—

> "An author must be supposed to be consistent with himself and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction where the words may be capable of proper construction without it."

I have not overlooked the Palestine (Amendment) Order-in-Council, 1923, dated 4.5.23 (Vol. 3, Laws of Palestine, p. 2590). Article 4 of that Order-in-Council in explicit terms validated Ordinances, *etc.*, which had been issued on or after 1.9.22. The Succession Ordinance was enacted on 8.3.23, so it was enacted within the period covered by the Palestine (Amendment) Order-in-Council, 1923. In Civil Appeal 4/37 (4 P. L. R. 165) it was, however, held:—

> "That the Palestine (Amendment) Order-in-Council, 1923, did not validate any inconsistencies between the Succession Ordinance and the Palestine Order-in-Council, 1922, because there could be no doubt that the intention of the legislator was to validate the enactment of the various Ordinances and other measures which had been issued between the 1st of September, 1922, and the 29th of May, 1923, regarding the regularity of which enactment doubts had arisen, but the main principles and limitations in the principal Order-in-Council remained unaffected."

I must be guided by this decision, and I would also say that I am in full agreement with it. But the point does not appear to me to be important in view of the fact that, by virtue of Article 57, the jurisdiction of Religious Courts can be varied by Ordinance, and the Ordinance which introduces a variation does not require to be validated.

This brings me to a consideration of the question — what does confirmation mean? The learned Judge in the Court below considers that this term has substantially the same meaning as probate, the former being the appropriate technical term in a Religious Court, and the latter in a Civil Court. I cannot altogether agree. In the first place it must be observed that the Civil Courts too, as shown in section 3 of the Succession Ordinance, have jurisdiction to confirm certain wills. Secondly, it appears to me possible that a Religious Court may have jurisdiction to confirm a will while the testator is still alive. That

would depend on the law by which that particular Religious Court is governed. Probate, on the other hand, is never granted until the testator is dead. There appears to me to be a very close analogy, however, between the act of a Civil Court when it holds that a will is valid in civil form, as provided under section 12 of the Succession Ordinance, and the act of a Religious Court when it confirms a will. The provisions of section 7(2) of the Succession Ordinance support me in this view. That sub-section provides that:—

> "(2) A certificate of the Court of the community confirming a will shall be deemed to be conclusive evidence that the will is valid in form and that the testator had the capacity to make the will and was not affected by mistake, fraud or undue influence, but confirmation by the Court shall not make valid any disposition of property thereby which is contrary to law."

If this wording is compared with the wording of section 12 the analogy will be obvious.

I can find in the Succession Ordinance (Cap. 135) no indication of any intention that a will should ever have to be both confirmed in a Religious Court and found valid in civil form in a Civil Court. If a will is confirmed in a Religious Court, and provided that the testator is dead, I would expect a certificate, similar in effect to an instrument granting probate as defined under section 2 of the Succession Ordinance, to issue to the executor on his application, and that certificate would be the executor's authority for administering the estate. I am supported in this view by the terms of section 9 of the Succession Ordinance. The words "or from dealing further with", and the first proviso to that section, clearly show that the legislator visualized a dealing with the estate other than the mere confirmation of the will. So also section 3(iii) provides that the Religious Courts have jurisdiction in such matters concurrently with the Civil Courts. In so dealing with the estate the Religious Court would of course be bound by its own law. Any person interested in the estate could if he so desired apply, under section 9, for the removal of the proceedings into the District Court.

As I have previously observed, in view of the provisions of Article 57 of the Palestine Order-in-Council there can here be no true question of *ultra vires*. The only question is whether the legislator intended to vary the jurisdiction of the Religious Courts, and whether he used words which are capable of being construed as giving effect to that intention. In my judgment the legislator had no such intention. The guiding section with regard to the "form" of a will is section 4 of the Succession Ordinance and not section 12. Mr. Elia has submitted that

the first proviso under section 4 should be read as if it applied to paragraphs (i), (ii) and (iii) of that section, whereas it is to my mind perfectly clear that it applies only to paragraph (iii)(b). It could not possibly have been inserted between paragraphs (iii)(b) and (iii)(c) in the way in which it is inserted, if it had been intended to apply to persons of the classes referred to in paragraphs (i) and (ii). Strong support for this view is afforded by the manner in which the proviso was originally printed when the Ordinance (No. 4 of 1923) was originally published (see page 129 of the Official *Gazette*, dated 1.4.23). There the proviso forms part of section 2(ii)(b) which has now become section 4(iii)(b). The effect of this proviso is that a foreigner can make his will either in accordance with his national law or in civil form. If he were, for example, a foreign Jew, and if his national law provided that his will should be in Jewish form, he could make it in that form. But it would also be valid in form if he made it in civil form.

The first proviso to section 4 clearly means that if the will is made in civil form it shall be held to be valid *in form*.

With great respect to the learned Judges who sat in Civil Appeal 106/40, I feel bound to express the strongest dissent from their decision so far as the passage previously quoted is concerned. In the first place section 12 does not provide that a testator can avoid the restrictions of his personal law by making a will in civil form. It only sets out the conditions which must be satisfied before a Civil Court will hold the will to be, not valid in law as regards the dispositions which it makes, but merely "valid in civil form". That is what the section says, and that is what it means. It may be observed that section 12 is in Part IV of the Succession Ordinance, and the heading of Part IV is "Estates administered and distributed by Civil Courts". Part IV does not purport to deal with the exclusive jurisdiction of a Religious Court to confirm wills of members of their community other than foreigners. The preamble to the Succession Ordinance (Cap. 135) is of interest in this connection. That preamble reads as follows:—

> "An Ordinance to provide for the succession on death of persons in cases where the Courts of the Religious Communities do not exercise such jurisdiction and otherwise to provide for the succession to persons dying possessed of immovable or movable property in Palestine."

There is, in this preamble, no suggestion of an intention to vary the exclusive jurisdiction of Religious Courts in regard to the confirmation of wills. And section 7 expressly reserves that jurisdiction.

In Maxwell on the Interpretation of Statutes (7th Ed.) the following appears at page 37:—

> "The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it; and, as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt."

In Civil Appeal 279/42 (10 P. L. R. 96) the following quotation appears:—

> "Now there is a presumption that the legislator does not intend to make any substantial alteration in the law beyond what it explicitly declares either in terms or by clear implication; or, in other words, beyond the immediate scope and object of the statute."

If the Court had considered and correctly appreciated the effect of the first proviso to section 4, and if its attention had been drawn to the provisions of section 16, I am unable to believe that the learned Judges would have come to a conclusion so revolutionary. I refer to section 16 because of the following words which appear in sub-clause (c):—

> "..... reducing legacies and bequests proportionately, if it appears that the testator affected to dispose by will of property belonging to him in excess of the limits allowed by the law applicable to him ....."

If it had been the intention of the legislator to provide a means of escape from the restrictions of a testator's personal law a proviso to this effect must assuredly have been added to this sub-section. Furthermore, if section 12 meant what the learned Judges in Civil Appeal 106/40 held it to mean, I am unable to believe that this meaning could have remained hidden for so many years. The Succession Ordinance was enacted in 1923, that is to say, some seventeen years before the judgment in Civil Appeal 106/40 was delivered. If the legislator had intended to provide a means of escape from personal law he would have expressed his intention in clear terms. He could not have left it to be deduced from a section which only deals with the validity *in form* of a will.

It would be entirely contrary to the normal rule of construction to hold that a legislator, whose intention to preserve the personal law is so clearly shown in sections 7(2), 11 and 16(c), had provided a means of escape from that personal law in a manner so oblique and so calculated to conceal that intention.

In Civil Appeal 87/36 (4 P. L. R. 196) the following appears at page 199 of the judgment:—

> "I shall deal briefly with this last argument first. Under the Succession Ordinance I think a District Court, in matters relating to wills, is invested not only with probate jurisdiction, but also with all matters relating to succession. Even if a will has been admitted to probate, a District Court has jurisdiction to declare that notwithstanding any testamentary disposition, the property is to descend in a certain way. That is, it combines the jurisdiction of the Probate, Divorce and Admiralty Divisions in England (so far as probate and administration are concerned) with that of the Chancery Division. As regards this part of the case the Appellant is in effect seeking a declaration that, despite the dispositions in the will, the minor grandchildren of the testatrix are entitled to two thirds of her property. A District Court exercising jurisdiction under the Succession Ordinance has jurisdiction to make such a declaration."

There is no suggestion in that passage that the testator can escape from his personal law by making his will in civil form. So I am faced with two conflicting decisions.

In Civil Appeal 158/38 (5 P. L. R. 488) Copland, J., says (at page 496):—

> "I am very far from saying that this Court can never overrule its own decisions. There are certain cases where it undoubtedly can and should do so. One such instance I have already mentioned, namely where one decision appears to be inconsistent with previous decisions on the same point. Another instance, which could never occur in an English Court, and is therefore not to be found in any of the text books, but of which there are certain unhappy examples to be found in the records of this Court, is where no reasons are given in the previous judgment. It is then impossible to know upon what principle or principles the case has been decided: one cannot be certain if the facts or the circumstances are reasonably the same, and the matter must then be considered on its own merits. Another example would be where it was obvious that the decision was wrong, as where the law had been completely disregarded and it was generally agreed that this was so."

And Trusted, C. J., in the same case (at page 493) says:—

> "I have had the advantage of reading the judgment which my brother Copland is about to deliver. I agree with him that Courts of Appeal generally follow their own precedents and those of other divisions of the same Court. Where, however, despite this principle, there are, or may be thought to be, conflicting judgments, they must enquire into the whole question, and in my view are not necessarily bound by the latest judgment."

In the case of *In re* Shoesmith (1938, 2 K. B., p. 637) the following appears in the judgment of Slesser, L. J. (at page 645):—

> "I start with the opinion expressed by Lord Ellenborough, in the case of Moorsom *v.* Kymer, that 'It is extremely dangerous to shake the authority of decided cases', more particularly when they deal with questions of jurisdiction, although I respectfully agree with

> my Lord that there is no rule of law that prevents this Court, either sitting with a full compliment of its members, or with a *quorum* of its members, from reviewing its own decisions."

I have not overlooked Civil Appeal 236/43 (10 P. L. R. 395) in which the question whether a Court of Appeal is bound to follow its earlier decisions was discussed at some length (see pp. 390 and 391) by Gordon Smith, C. J.

In Land Appeal 52/35 (4 P. L. R. 21) the Court stated (at p. 26):—

> "A perusal of decided cases shows that this Court has not always regarded itself as bound by its own decisions. I agree in principle that this Court ought to follow its own decisions. But the law of Palestine may be said to be still in its infancy, and I think that this Court is not precluded from overruling its previous decisions, unless they have remained unchallenged for a considerable length of time."

Having given the matter the most careful consideration, and with the greatest respect to the learned Judges who gave the judgment in Civil Appeal 106/40, I find myself unable to accept that judgment as a binding authority.

I come now to the point which was decided in Civil Appeal 131/42. In that case the Court was constituted of a single Judge who happened to have been one of those who formed the Court in Civil Appeal 106/40, and that Judge said that he had come to his result "with considerable hesitation", that result being a finding that "any testator, whether or not he is a Palestinian citizen or a member of a religious community, who makes a will according to the civil form prescribed under section 12 may, in an appropriate case, be granted probate in respect of it."

I have been referred to High Court No. 42/43 (10 P. L .R. 239) in which the Court held (see p. 241) that:—

> "..... practice and convenience cannot alter the law, and if the law lays down one system of proceedings, practice, even if more convenient than the law, when challenged, cannot override the provisions of the law."

Although in my judgment the legislator did not intend to take away from the Religious Courts their exclusive jurisdiction to confirm wills, I do not think that sufficient reason exists for my not being bound by the decision in Civil Appeal 131/42, the more so since the learned Judge found that in practice District Courts have for several years regarded themselves as being entitled to grant probate of wills in civil form, irrespective of the fact that the testator was a Palestinian citizen and a member of the Jewish community. The learned Judge observed that he had been referred to no authority of either the District Court or the Court of Appeal to the contrary. To upset such a well-establish-

ed practice might result in grave injustice to testators who made their wills in civil form, having every reason to believe that if they did so their wills would not be held to be invalid in form. The form of a will is obviously of far less importance than its substance, provided that such form is designed adequately to provide against mistake, fraud, *etc.* and there is no reason why a will in civil form should be less adequate in this respect than a will in religious form would be.

I have remarked above that a will in civil form might also happen to be in religious form. In that case the Religious Court would presumably confirm it. But if it is not in religious form the Religious Court is not bound by law to confirm it. Goadby, in his book entitled "International and Inter-Religious Private Law in Palestine", says at pages 124 and 125:—

> "The confirmation of a will by a Religious Court is conclusive as to form, capacity and absence of fraud, *etc.* ... The Religious Courts will presumably decide the question according to their own law. It would be convenient if wills made in 'Civil' form set forth in the Ordinance should be treated as valid in the Religious Courts, even though this form be unknown to the Communal Law. But though the Civil Courts are directed ..... to treat a will in that form as valid in form where the case is within their jurisdiction, this direction does not bind the Religious Courts."

I have still, however, to decide whether this is a matter which should be referred to a Special Tribunal. Article 55 of the Palestine Order-in-Council, 1922 (Vol. 3, Laws of Palestine, p. 2582) provides that:—

> "..... Whenever a question arises as to whether or not a case is one of personal status within the exclusive jurisdiction of a Religious Court, the matter shall be referred to a Special Tribunal of which the constitution shall be prescribed by Ordinance."

So the position is that if such a question does arise the matter must be referred to a Special Tribunal, that being the only Tribunal clothed with authority to decide it. Now, if it appeared that a Special Tribunal had already decided this precise question, I think that the Court below might properly have held that no question arises. It is certainly for the Court to rule on that point. In this connection we have been referred to Civil Appeal 246/40 (8 P. L. R. 55) where the District Court, Haifa, held that the question whether a person was or was not a member of the Jewish Religious Community, which arose on an application for probate of his will in civil form, was a matter to be decided by a Special Tribunal. The Supreme Court held that it was clear that the deceased was not a member of the Jewish Community, and therefore the only Court having jurisdiction in the matter of the probate of his will was the District Court, and that Court came to a wrong conclusion in declining jurisdiction and referring the matter to

a Special Tribunal. See also Civil Appeal 120/31 (1 P. L. R. 776).

We have also been referred to analogous cases which arose under the Palestine (Holy Places) Order-in-Council 1924 (Vol. 3, Laws of Palestine, page 2625). In Article 3 of that Order the words "If any question arises" appear. In Civil Appeal 55/40 (7 P. L. R. 291) it was held that it was for the Court of Trial to make up its mind whether a question has genuinely arisen within the meaning of Article 3, and that the Court would be right to reject a mere allegation by one party which was unsupported by any show of reason. It was further held (see p. 294) that it is for the Court of Appeal to interfere if it thinks that the Court of Trial has come to a mistaken view on this matter.

In Civil Appeal 229/45 (13 P. L. R. 175) it was held that there was no need to submit the question to the High Commissioner since there was not even a *prima facie* case for argument that the shrine in question was a holy place within the meaning of the Order-in-Council.

But the question in issue in this case does not appear to have been specifically decided by the Special Tribunal. In Special Tribunal No. 3 of 1945, although the matter was referred to a Religious Court this was not the only issue, since the testator had made an earlier will which purported to be irrevocable.

Here we have a case in which one party argues that because a will is in civil form it does not require to be confirmed by a Religious Court but can be taken straight to a District Court for probate, while the other party submits that by reason of the provisions of Article 54 of the Order-in-Council the will must be taken to the Religious Court for confirmation. Clearly then a question does arise as to whether or not this case is one of personal status within the exclusive jurisdiction of a Religious Court. That being so I find that the learned President rightly ordered the matter to be referred to a Special Tribunal.

In the result the appeal must be dismissed with costs on the lower scale to include an attendance fee of LP. 15 for the advocate of the first Respondent, and a similar fee for the advocate of the second and third Respondents.

These costs will be paid out of the estate.

Delivered this 24th day of January, 1947, in the presence of George Eff. Elia for the Appellant, and Mr. G. Berouti for the first Respondent, and Mr. I. Nakhleh for the second & third Respondents.

British Puisne Judge.

Edwards, J.: I have had the advantage of perusing the judgment just delivered by my brother Shaw. I agree with the reasons which he gives why the appeal should be dismissed. I only wish to guard myself

against being thought to have any definite views as to what is the nature of confirmation of a will in Palestine. That is by no means clear. So far as I know, confirmation of a will in Scotland is more or less analogous to the grant of probate of a will in England; but whether or not there can be by any of the Religious Courts of Palestine confirmation of a will before the death of the testator is a matter which, to my mind, is certainly not clear. Subject to these remarks, I concur in the judgment just delivered by my brother Shaw.

Delivered this 24th day of January, 1947.

British Puisne Judge.

CIVIL APPEAL No. 88/46.

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

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

IN THE APPEAL OF:—

Clara Levy. — APPELLANT.

v.

Yitzhak Klein & an. — RESPONDENTS.

Res judicata — Proof that same matter was in issue and that it was definitely decided — C. A. 226/44 — Cases for awlawiyeh involve findings as to ownership.

Appeal from the order of the Land Court of Haifa in Land Case No. 41/45, dismissed:—

1. To establish the plea of *res judicata* the same matter must be shown to have been in issue and to have been decided in former proceedings.
2. In order to make a declaration in a claim for *awlawiyeh* the Court is forced to decide the question of ownership — whether it is joint or several.

(*A. M. A.*)

ANNOTATIONS:

1. See the previous proceedings referred to; C. A. 226/44 (12, P. L. R. 10; 1945, A. L. R. 30); for other proceedings in this matter see Mo. L. C. Ha. 365/45 (1945, S. C. D. C. 685).

2. *Cf.* C. A. 214/45 (1946, A. L. R. 61) and note 2; see also L. C. Ha. 21/43 (1946, S. C. D. C. 215), C. D. C. Ha. 4/46 (*ibid.*, p. 464) and C. A. 248/46 (1946, A. L. R. 825) and notes to these cases.

(*H. K.*)

FOR APPELLANT: Schaal.

FOR RESPONDENTS: No. 1 — Eliash.

No. 2 — Weinshall.

JUDGMENT.

This is an appeal from a decree of the A/Relieving President, Land Court, Haifa, dismissing the action of the Appellant against the Respondents on the ground that the issue between them was *res judicata*.

It is common ground that in order successfully to plead a defence of *res judicata* it must be established that the matter was an issue in the case upon which the plea of *res judicata* is founded, and it was definitely decided.

Now the case on which the present Respondents relied in support of the plea of *res judicata* was Land Case No. 11/43 in the Land Court of Haifa which went to appeal as Civil Appeal No. 226/44. That case was a claim for *awlawiyeh* under Article 41 of the Ottoman Land Code, the first paragraph of which is as follows:—

> "The owner of an undivided share in state land cannot transfer his share by way of gift or in consideration of payment without the leave of the persons jointly interested."

Dr. Schaal based his appeal on the submission that in that case the only issue was the right of prior purchase. The Court did not, he says, concern itself with the ownership of the staircase which admittedly forms part of the land in respect of which *awlawiyeh* was claimed under Article 41.

It seems to us that in order to give a declaration under Article 41, the Court is forced to decide the question of ownership; in a word, it must decide whether the ownership is joint or several. We come therefore to the conclusion that the matter of the ownership was an issue in the previous case. We turn now to consider whether the question of ownership was definitely decided.

We refer in the first instance to the judgment of the President, Land Court, Haifa. Before actually quoting from it we might mention that Rabinovitch, who is the father-in-law referred to in the judgment, was admittedly the predecessor in title of the Respondents. Judge Curry's decision was as follows:—

> "Those buildings were erected in 1936. Exhs. P/5 and P/6 are the plans of the two floors of the houses. Being semi-detached there is actually a wall common to both; there is also an outside staircase (this is the staircase in dispute) going up to the roof. This staircase belongs to the owners of plot 194(130). It must be appreciated that the original owners of the two houses were father-in-law and son-in-law. They were on good terms and therefore arrangements in various matters were made to suit the convenience of both....."

That seems to us to be as clear a finding as one could well imagine on the question of the ownership of the staircase. Turning now to the

judgment of the Court of Appeal in Civil Appeal No. 226/44, the following is an extract from the decision of the Chief Justice:—

> "But it is clear from the evidence and it has been so found by the learned President that in fact the stairway originally belonged to Rabinovitch's house and that his son-in-law only used it with his consent. It follows that this cannot be regarded as a joining link."

It seems to us clear from this extract that the Chief Justice must have considered it relevant to the issue to decide the question of the ownership of the staircase, and it was because he came to a definite conclusion that the ownership was vested exclusively in Rabinovitch, that he could not regard it as a joining link.

We cannot therefore resist the conclusion that in both the trial Court and the Court of Appeal the matter of the ownership of this staircase was an issue and it was definitely decided.

It follows that the defence of *res judicata* must prevail. The appeal is dismissed, costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 25th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 201/46.

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

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

IN THE APPEAL OF:—

Madiha Salib Abu Einein. APPLICANT.

v.

Ahmad Ibrahim Izz & 3 ors. RESPONDENTS.

Attachments — Inherent jurisdiction of appellate Court.

Application for an order of provisional attachment refused:—

Apart from the provisions in the specific rules of Court dealing with attachments, the Court of Appeal has inherent jurisdiction, if an action is pending before it, to make an order preventing such *interim* dealing with the subject matter of the action as would nullify any judgment which might be given.

(*A. M. A.*)

ANNOTATIONS:

1. Previous proceedings in this case are reported in 13, P. L. R. 365 & 1946, A. L. R. 387 and the appeal itself in 1946, A. L. R. 767.

2. *Cf.* C. A. 194/46 (13, P. L. R. 370; 1946, A. L. R. 383) and note 2 in A. L. R.; see also notes 1 & 2 to the previous order in 1946, A. L. R. 387.

(*H. K.*)

FOR APPLICANT: Gavison.

FOR RESPONDENTS: Tscherniak.

ORDER.

This, in fact, is a request for an order of provisional attachment. Apart from the specific rules of Court dealing with provisional attachment there is in our opinion inherent jurisdiction in this Court, if an action is pending before it, to make an order to prevent such *interim* dealing with the subject matter of that action as would nullify any judgment which might be given. To this extent we agree with the submissions made by the Applicant. It is, of course, a discretionary power and as to whether it should be exercised must depend on the facts. The facts in this case are such that even if this provisional attachment were not granted the Applicant would be in no worse position than the position in which she acquiesced for so many years.

In these circumstances we would not grant provisional attachment and the application is refused.

Delivered this 24th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 238/46.

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

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

Joseph Zenober. APPELLANT.

v.

Elijahu Oskarn & 11 ors. RESPONDENTS.

Action for recovery of possession under allegation of trespass — Unilateral declaration taken for a revocable lease — Eviction of licensee.

Appeal from the judgment of the District Court of Haifa, dated the 28th day of May, 1946, in Civil Appeal No. 171/44 whereby the judgment of the Magistrate's Court of Haifa, dated the 3rd November, 1944, in Civil Case No. 2800/43 was set aside, allowed:—

1. Where occupier is merely a licensee, landlord is entitled to recover possession of his property after revoking the licence.

2. A unilateral written statement by occupier of premises setting out certain conditions to be observed by him cannot be regarded as a revocable lease within meaning of Arts. 460, 462 of *Mejelle*.

(*M. L.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in the 1946 Haifa Law Reports, p. 180.

2. On point 1 see: C. A. 61/36 (1 Ct. L. R. 3; 7, C. of J. 356); C. A. D. C. Jm. 52/42 (Gorali Rent Restriction 2nd ed. p. 185); C. A. D. C. Ha. 64/42 (1942 Law Reports of the District Court of Haifa 134); C. A. D. C. T. A. 54/46 (1946 *Hamishpat* 181).

3. On point whether licensee whose licence is revoked is to be considered a trespasser see: C. A. D. C. Ha. 103/43 (1943 Law Reports of the District Court of Haifa 373); C. A. D. C. Jm. 11/44 (1944 S. C. D. C. 68) and C. A. D. C. Jm. 50/44 (1944 S. C. D. C. 299).

(*A. G.*)

FOR APPELLANT: Werner.

FOR RESPONDENTS: Ben-Haviv.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa sitting as an appellate Court. The learned President allowed an appeal from a judgment of the Magistrate's Court of Haifa whereby certain parties (now Respondents) were ordered to vacate premises situate at Kfar Atta.

The present Appellant (hereinafter referred to as Mr. Zenober) was Plaintiff before the Magistrate and he sued in his capacity as owner of the immovable property occupied by the then Defendants. The Plaintiff made a double averment in his Statement of Claim, namely, that the Defendants entered into the premises without his knowledge and consent, and also, that they were occupying the said premises without his consent and against his will. The Defendants denied that they were trespassers and (after being ordered to furnish particulars of their defence) they averred that an agreement between themselves and Plaintiff had been arrived at with regard to the rent of the premises.

We wish to state that there is no doubt that the Defendants (now Respondents) were not trespassers. The learned Magistrate found accordingly and we agree with him. The learned Magistrate also held that the Defendants were merely licensees and this finding is the crux of the case. If the Defendants were merely licensees we consider

that the Magistrate's judgment ordering eviction was correct because the landlord is entitled to recover possession of his property after revoking the licence. If, however, there was a tenancy agreement or lease, the Magistrate would have had to consider, *inter alia*, whether the Rent Restrictions legislation applied before ordering eviction; this he did not do, because he held that the Defendants were licensees.

We must, at this stage, give a brief summary of the main features of the facts of this case.

Mr. Zenober is undoubtedly the owner of a piece of land at Kfar Atta and of a building erected thereon. In 1940, that building was almost completed and needed only a few final touches in order to be fit for use. The building is divided into flats. At that time, *i. e.* in 1940, Mr. Zenober was involved in a dispute with a certain Mr. Tennenbaum who was then before the bankruptcy Court. It seems clear that there was ground for apprehension on Mr. Zenober's part that the fate of the building was in jeopardy and that it might be considered as part of Mr. Tennenbaum's estate. At that juncture, the Committee of the colony of Kfar Atta stepped in. Accommodation was wanted for schools and other public institutions, and members of the Committee seem to have had the clever idea of making use of some of the flats in Zenober's building. At the time it is pretty obvious that neither Zenober nor Tennenbaum was in a position to resist the public spirited scheme of the Committee to use a few of the flats (after putting in doors and windows *etc.*) on condition that the public institutions concerned would remain quite neutral and would not make any lease with either parties to the dispute and would not allow any other persons to occupy the building.

In August, 1940, part of the building began to be occupied in accordance with the above mentioned scheme and it is clear that Mr. Zenober was aware of the fact.

In 1941, Mr. Zenober was on firm ground again as regards his ownership of the building and he avers that he offered to come to an agreement with the present Respondents about a lease of the flats occupied by their respective schools and that such offer not having been accepted he decided to recover possession of the flats.

We would mention that Mr. Zenober averred in his statement of claim that the Defendants were trespassers. This averment is untenable and was not pressed before us by Dr. Werner. There remained, however, the averment that the Defendants were holding the flats without his consent and against his will.

The learned President set aside the Magistrate's judgment on the ground that the Defendants were in occupation by virtue of "an agree-

ment (Exhibit D/1) which does not constitute a complete and valid lease but one which is revocable and therefore the *Mejelle* 460 and 462 apply; the Defendants were therefore in possession with a colour of right (Exhibit D/1) until this was terminated by revocation by definite notice (Article 494 *Mejelle*)."

We consider that Exhibit D/1 does not bear out the interpretation placed upon it by the learned President. The said document did not record an agreement to which Zenober (the present Appellant) was a party.

Exhibit D/1 is only a memorandum recording the decision of the Committee of the Colony (not a legal person) to occupy the building and not to do or allow anything to be done which might affect the rights of the contesting parties *i. e.* Zenober and Tennenbaum. The memorandum was signed by members of the Committee and there is no indication whatsoever that Zenober was present at the time. On the contrary, there is evidence to the effect that a copy of D/1 was not even sent to Zenober. In fact document D/1 might be aptly described as a unilateral declaration of policy made by the Committee.

We would add that D/1 was drawn up on the 20th September, 1940, whereas parts of the building had already been put to use in August, 1940, for housing schools and other public institutions.

What happened after 1940, is that when Zenober's rights as owner of the building were no longer in doubt, he caused his advocate Dr. Werner, to write to the Committee of the Colony of Kfar Atta and to the A. R. P. Association which were occupying part of the building. The letter (Exhibit D/2) is dated the 6.11.41 and pointed out that the question of rent had not been settled and went on to explain that, being given that the building was not yet completed, Zenober would be prepared to accept LP. 2.500 per month for each flat and would also accept to pay for the reasonable expenses incurred for rendering the flats habitable. This letter specified that a reply to the offer would have to be made within one week and that if a settlement were not arrived at, Zenober would have to ask for eviction.

It is of course important to find out whether the offer made in D/3 was taken up and accepted. The learned Magistrate found that it was not, and, after reading the evidence and exhibits P/3, P/5 and P/6 we cannot find fault with his finding. These exhibits, which were dated October, 1942, show that some 11 months after Zenober had made his offer, no agreement had been reached about the rent to be paid for the premises. Furthermore, letters P/5 and P/6 contained a fresh invitation to the occupiers to come to an agreement as to rent and to attend to the office of Zenober's advocate to execute a contract

of lease, failing which proceedings for eviction would be taken. The offer was not taken up. On behalf of the Respondents it has been urged that rent was in fact deposited with the local Council. We need only say that there was no evidence that Zenober had been notified of the fact or that he had accepted payment.

We therefore cannot agree with the view taken by the learned President that there was a "revocable" lease in existence. It is consequently unnecessary for us to examine whether there has been sufficient revocation of such a lease by notice in accordance with the provisions of Article 494 of the *Mejelle*.

We allow the appeal, set aside the judgment of the District Court and restore the Magistrate's judgment.

The Appellant will have his costs here and below and we assess an inclusive sum of LP. 10 for the costs of the appeal before this Court. The Appellant is also entitled to the costs awarded in C. A. 191/45.

Delivered this 0 day of December, 1946, in the presence of Dr. Alfred Werner for Appellant and in the presence of the Respondents.

British Puisne Judge.

CRIMINAL APPEAL No. 61/46.

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

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

IN THE APPEAL OF :—

Isaac Kaufman & an. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Keeping a gaming house, C. C. O. 190 — Chips interchangeable for cash — Accomplices — Prosecution under sec. 190(4).

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 29th March, 1946, in Criminal Appeal No. 22/46, from the judgment of the A/Chief Magistrate, Haifa, dated 14th January, 1946, in Criminal Case No. 10952/45, dismissed:—

1. A game of chance in which chips may be won and changed for money comes within sec. 190 C. C. O.

2. A person who can be prosecuted under sec. 190(4) C. C. O. is not an accomplice of a person who is prosecuted under the remaining part of the section, the offences being entirely distinct.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* CR. A. D. C. Ja. 3/36 (7, C. of J. 262) — a case under the Gaming Ordinance, 1935.

2. *Quaere* whether sec. 190 presupposes the passing of money or money's worth? In England this requirement is expressly negatived by sec. 5 of the Gaming Act, 1845.

3. "Nor does (the rule requiring the corroboration of the evidence of accomplices) apply where the witness is not an accomplice in the particular crime with which the prisoner is charged ...": Phipson on Evidence, 8th ed., p. 478; *cf.* Cr. C. D. C. T. A. 172/45 (1945, S. C. D. C. 745).

(*H. K.*)

FOR APPELLANTS: Levitsky and S. T. Cohen.

FOR RESPONDENT: Crown Counsel — (Southworth).

JUDGMENT.

In our opinion, the reasons why the decisions of the Magistrate and the District Court must be upheld can be briefly stated. It seems to us that, except for one point, the issue raised was a question of fact. The Appellants were prosecuted under section 190 of the Criminal Code Ordinance for keeping a gaming house. There can be little doubt, and indeed it was not contested, that this game was one the chances of which were not alike favourable to all the players. Mr. Levitsky has argued that as the won chips were not, according to him, changeable for money, a prosecution under this section could not succeed. Now it is true that over the machine there was the following notice:—

> "The little runner, played with chips only, not to be used except for amusement. Won chips not changed in cash."

There was evidence that each chip cost the not inconsiderable sum of 50 mils. There was also evidence that one player alone had lost some LP. 150 worth of chips. It seems to us ludicrous to suggest that a person would have invested this money merely for the sake of the amusement of watching a dummy figure run up and down a board. We think the Magistrate was entitled to regard this notice as little more than a piece of camouflage, and to draw the inference that the won chips could in fact be changed for cash, the more so as there was evidence to the effect that unused chips were sometimes taken back by the management and the money refunded.

The legal point raised in favour of the Appellants by Mr. Levitsky was that Haddad, the principal witness for the prosecution, was in fact an accomplice in that he also could have been prosecuted under the section. We are unable to agree with this contention. If he were prosecuted at all the only provision under which he could have been prosecuted was sub-section (4) which is a totally different offence to

the one in respect of which the Appellants were prosecuted and convicted. It follows that the appeal must fail and the conviction must be confirmed.

Delivered this 24th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 182/46.

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

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

IN THE APPEAL OF:—

Moshe Yaakobovitz & an. — APPELLANTS.

v.

Naphtali Viteles. — RESPONDENT.

Expiry of lease of business premises — Abortive negotiations for a new contract — Fatal delay of 11 days of paying or tendering the rent.

Appeal from the judgment of the District Court of Haifa, dated 4.4.46 in C. A. 41/46, from the judgment of the Magistrate's Court of Tiberias, dated 21.2.46 in C. C. No. 328/45, dismissed:—

Rent Restrictions (Business Premises) Ord. affords no protection to a lessee who at expiry of lease enters into negotiations with landlord with intention to create a lease different from the statutory lease and thus allows several days to pass without paying or tendering the rent due at beginning of new term.

(*M. L.*)

ANNOTATIONS:

1. For decisions to the effect that relief against forfeiture by non-payment may be given by Court see C. A. 326/45 (1946 A. L. R. 446, 13 P. L. R. 168) and annotations.

2. See C. A. 326/45 (*supra*) for a decision distinguishing between the grant of equitable relief against forfeiture for non-payment in cases of dwelling houses and those of business premises.

(*A. G.*)

FOR APPELLANTS: Weinshall.

FOR RESPONDENT: Goitein.

JUDGMENT.

The Appellants in this case were the lessees of a café and restaurant in Tiberias. Normally the lease terminated on the 14th December, 1945. By virtue of the provisions of the Rent Restrictions (Business

Premises) Ordinance they could have held on after that date in accordance with the provisions of that Ordinance. In other words, with an option either to abide by the contract to clear out, or call to their aid the provisions of the Ordinance. It was established in this case that the rent was payable in advance. It was not denied that the rent was neither paid nor tendered until 11 days after the expiration of the contract.

We will now enquire what happened on the 14th December when the lease expired. The Appellants did not call to their aid the Rent Restrictions (Business Premises) Ordinance. In fact, they entered into negotiations with the Respondent who is the landlord. The object of these negotiations being to create a lease different from the statutory lease which would have been created under the Rent Restrictions (Business Premises) Ordinance. It appears to us that the case can be decided on this issue alone. A person must decide immediately whether he is going to invoke the Ordinance. It is true that there are several decisions of this Court dealing with the Rent Restrictions (Dwelling Houses) Ordinance which indicate that the failure by a few days to pay rent at the exact time would not deprive the lessee of the benefit of the Ordinance. But here it appears to us it was not merely a question of failure to pay rent for some 11 days afterwards. The negotiations into which the lessees entered were clearly inconsistent with the intention to carry on under the Ordinance, and, in our opinion, the failure of these negotiations would not entitle the lessee to fall back on the Ordinance.

For these reasons we think 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 fee.

Delivered this 27th day of November, 1946.

Chief Justice.

HIGH COURT No. 113/46.

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

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

IN THE PETITION OF:—

Adel Eff. Kan'an. PETITIONER.

v.

Suleiman Bey Abdul Razzak Touqan, Mayor of Nablus & 3 ors. RESPONDENTS.

Application for change of venue in a matter of local elections on ground of alleged danger to public security — Jurisdiction of High Court — Inadequacy of proof of danger.

Return to an order *nisi*, dated 9th December, 1946, directed against the Respondents, calling upon them to show cause why Election Petition No. 23/46, of the District Court of Nablus, should not be heard and tried by the District Court of Jerusalem:—

1. For purposes of sec. 7(3), Courts Ord. actions triable and determinable by High Court under any Ordinance are civil actions, if they do not fall within criminal jurisdiction of the Court.

2. High Court will not be inclined to grant change of venue on mere affidavit of person aggrieved by results of local election averring danger to public security in area concerned.

(*M. L.*)

ANNOTATIONS: For authorities on change of venue see H. C. 52/45 (1945 A. L. R. 779) and annotations.

(*A. G.*)

FOR PETITIONER: Hamoudeh.

FOR RESPONDENTS: Nos. 1—3 — Nakhleh and Germanus.
No. 4 — Crown Counsel — (Hooton).

ORDER.

This is an application for a change of venue under section 7(3) of the Courts Ordinance. The first point made by the Respondent in reply to the petition, was that the High Court had no power to entertain the application in that this was not a civil action. We are unable to accept this contention. For the purposes of section 7(3) actions triable and determinable by this Court under any Ordinance are civil actions, if they do not fall within the criminal jurisdiction of the Court.

Turning now to the facts of the case, it appears to us that the seriousness of a request for the change of venue has perhaps not been fully appreciated, because this happens to be an election petition. The grounds averred are danger to public security. In regard to this we need only say that the High Court would be reluctant to accede to an application of this nature in the absence of support by those who are responsible for security in the area concerned. We certainly would not feel inclined to grant it on the mere affidavit of a person aggrieved by the results of a local election.

The prayer of the Petitioner is therefore rejected, and there will be LP. 15 costs in respect of each of the advocates representing the Respondents.

Given this 30th day of January, 1947.

Chief Justice.

CIVIL APPEAL No. 104/46.

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

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

IN THE APPEAL OF:—

Raja Taher Hussein & 2 ors. APPELLANTS.

v.

Ali Khalil. RESPONDENT.

Withdrawal of appeal — Conditions must be acceptable by the Court.

Application to confirm a settlement and to withdraw the appeal from the order of the Land Court of Haifa in Land Case No. 16/43, refused:—

An appeal may be withdrawn unconditionally or on such conditions as the Court may find acceptable.

(*A. M. A.*)

ANNOTATIONS:

1. The facts underlying this application are as follows: Appellants filed an action for *awlawiyeh* which was dismissed upon a motion by Respondent under r. 21A of the C. P. R. for want of jurisdiction as the claim was lodged after notification of settlement had been published in the area in question, but before publication of the Schedule of Rights (Land (S. of T.) Ord., sec. 6). Appellants appealed, but before the appeal came up for hearing the parties reached a settlement to the effect that the appeal should be allowed, judgment for *awlawiyeh* be entered in Appellants' favour on payment of LP. 23,000.— and the lands be registered in Appellants' names.

2. On withdrawing an appeal see the commentaries in the Annual Practice to O. 58, r. 8, heading *"Withdrawal or Abandonment of Appeal"; vide* also C. A. 261 & 264/44 (1946, A. L. R. 137 & 12, P. L. R. 541; 1946, A. L. R. 162).

(*H. K.*)

FOR APPELLANTS: S. Khadra.

FOR RESPONDENT: W. Salah.

ORDER.

We are not prepared to allow the appeal to be withdrawn on the conditions stated. If the parties wish to withdraw their appeal unconditionally or on conditions acceptable to the Court they may apply again.

Delivered this 26th day of July, 1946.

Chief Justice.

HIGH COURT No. 111/46.

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

BEFORE: Edwards, Shaw and De Comarmond, JJ.

IN THE PETITION OF:—

Mohammad Mahmoud Husseini el Ja'ar & 3 ors. PETITIONERS.

v.

1. The Assistant District Commissioner, Beersheba,
2. The Officer in charge Central Prison, Jerusalem. RESPONDENTS.

Public Officer failing to file affidavit in reply within time fixed by High Court — Application for extension of time for filing affidavit after expiry of period and after Court adjourned hearing of petition.

Application for an extension of time until the 26th January, 1947, within which to file an amended reply to Petition of Petitioners, refused:—

"Extended time" in Rule 6, High Court Rules, 1937, refers to extension of time beyond period of 8 days provided therein for filing affidavit in reply. Adjournment of the hearing of the petition on return day has no effect on failure to file affidavit in reply within time fixed by Court.

(*M. L.*)

ANNOTATIONS: *Cf.* H. C. 58/46 (1946 A. L. R. 787) and annotations and H. C. 70/46 (*post*, p. 120).

(*A. G.*)

FOR PETITIONERS: Moghannam.

FOR RESPONDENTS: Assistant Government Adv. — (Pinhassowitz).

O R D E R.

On 6th December, 1946, this Court issued an Order *nisi*, calling upon the 1st Respondent to show cause why his order of 18th November, 1946, under sections 2, 3 and 15 of the Crime Prevention Ordinance against the four Petitioners should not be set aside. The first Respondent was ordered to file an affidavit within 15 days of service. The first Respondent was served on the 12th of December, 1946, so that the time for filing an affidavit expired on the 27th December, 1946.

The first Respondent did not file an affidavit. Instead of filing an affidavit he sent to the Chief Registrar of this Court a written reply which was received here on 19th of December, 1946. So that, had the

written reply been sworn to, it is quite clear that it would have been in time.

On the return day, namely, 14th January, 1947, the first Respondent appeared in person. It is, of course, customary when Assistant District Commissioners are served with Orders *nisi* of this nature for them to consult Crown Counsel before the return day, and it is usual for Crown Counsel to draft the affidavit in reply, and it is also customary for Crown Counsel to appear for the Assistant District Commissioner on the return day. This Court on the 14th January, 1947, apparently realising that it would be preferable for the Assistant District Commissioner to be represented by Crown Counsel, granted an adjournment of the return day. Mr. Mogannam, for the Petitioners, now informs us that there was no suggestion on the 14th of January that this Court was at that time dealing with any application for an extension of time for filing an affidavit. After this Court had granted an adjournment Mr. Mogannam and the Assistant District Commissioner, Beersheba, apparently left the Court. It is reasonable to assume that the Assistant District Commissioner (Mr. Klebo) then consulted Crown Counsel because on the 16th January Crown Counsel (Mr. A. Hooton) filed a written application in this Court asking for an extension of time until the 26th of January, 1947, within which to file an "amended reply" by which words we assume he means an affidavit in reply. We might add that this application, filed on the 16th January, was in fact dated the 14th January, 1947. Mr. Pinhassowitz, Assistant Government Advocate, has informed us today that when Crown Counsel, on 16th January, filed this application, he was under the impression that the application would be fixed for hearing before the 26th of January. Unfortunately, the Registry of this Court were apparently unable to fix the hearing of this application before today which is the 29th January, that is to say, three days after the 26th. We wish to make it clear that we are not sitting here to day for the purpose of hearing the return to the petition. We are (as Mr. Mogannam says) hearing the application of 14th January which was filed on 16th January.

Mr. Mogannam opposes the grant of this application on the ground, that the time for filing the affidavit expired on the 27th of December, 1946. He has rightly pointed out that the "extended time" mentioned in rule 6 of the High Court Rules, 1937, was the period of 15 days instead of 8 days from the date of service which was (as we have said) the 12th December, 1946. We think that Mr. Mogannam's contention is sound and must prevail.

We therefore refuse the application for an extension of time within which to file an affidavit in reply. The position now is that the hearing

of the return to this petition must be adjourned to a date to be fixed in the Registry.

On the adjourned return day it will be open to the Respondents (or to Crown Counsel on their behalf) to move this Court to be heard in opposition to the petition under the last sentence of Rule 6 of the High Court Rules, 1937. Should Crown Counsel then ask to be heard in opposition to the petition this Court will doubtless listen to any representations which the Petitioners' advocate may wish to make.

The first Respondent must pay one set of costs to the Petitioners as the costs of to day, in any event, namely fixed (or inclusive) costs of LP. 5.—.

Given this 29th day of January, 1947.

British Puisne Judge.

HIGH COURT No. 70/46.

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

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Mrs. Antonina Nemirovsky. APPLICANT.

IN THE MATTER OF:—

The Acting Administrator General in his capacity as Acting Registrar of Trade Marks, Jerusalem. PETITIONER.

and

Jacob Scomorovsky & an. RESPONDENTS.

Petition to High Court by Registrar of Trade Marks — Delay in filing affidavit in reply — Application by Respondent for extension of time for filing affidavit — Scope of Rule 6, 7, 8 *of High Court (Trade Marks) Rules.*

Application for an extension of time within which to file a sworn declaration made by Respondent No. 2 and dated 22.8.46, dismissed:—

1. High Court (Trade Marks) Rules do not provide for grant of extension of period fixed for filing affidavits nor do they provide for interlocutory applications for that purpose.

2. Rules applicable to High Court cases do not contain a provision similar to Rule 330, Civil Procedure Rules; proper course, therefore, for a Respond-

ent to a petition under Rule 4, High Court (Trade Marks) Rules who failed to file affidavit within statutory 10 days is to file it even after expiry of that period and then invoke Rule 8 of said Rules on the day fixed for hearing the petition.

(*M. L.*)

ANNOTATIONS:

1. On failure to file affidavit in reply see H. C. 58/46 (1946 A. L. R. 787) and annotations.

2. *Cf.* H. C. 111/46 (*ante*, p. 118).

(*A. G.*)

FOR APPLICANT: Seligsohn.

FOR RESPONDENTS: No. 1 — Yifrach.

ORDER.

This is an application by Mrs. Antonina Nemirovsky who is the second Respondent in the case between the Acting Registrar of Trade Marks (Petitioner) and Respondents Jacob Scomorovsky and the said Mrs. Nemirovsky (High Court Case 70/46).

The petition was filed in accordance with the provisions of Rule 4 of the High Court (Trade Marks) Rules, 1937, which refers to section 16 of the Trade Marks Ordinance, Cap. 144, now repealed (the corresponding section of the Trade Marks Ordinance No. 35 of 1938 is section 17).

In accordance with rule 6 of the aforementioned rules a notice was served on the two Respondents informing them that the case would be heard on the 20th September, 1946, and calling upon each of them to file an affidavit in reply within 10 days from the date of service of the notice.

The notice was served on the second Respondent (hereinafter referred to as "the present Applicant") on the 13th August, 1946, and the period of 10 days thus ended on the 23rd. On the 22nd August, the present Applicant swore an affidavit at Tel Aviv and on the same day her advocate Dr. Seligsohn caused the document to be forwarded under cover of an express registered letter to Dr. Ernst Katzenstein of Jerusalem for filing at the Registry of the Supreme Court in H. C. 70/46.

The Post Office receipt establishes that the letter was mailed at Tel Aviv on the 22nd August and there is an affidavit by the advocate's secretary to the effect that this was done at 10.30 *a. m.*

An affidavit sworn by Dr. Katzenstein is to the effect that the letter was delivered to him in Jerusalem on the 23rd at 12.40 *p. m.* and that he immediately repaired to the Registry of the Supreme Court where

he was informed at 12.55 *p. m.* by the Officer in charge that filing would not be accepted in vacation after 12 noon. This last mentioned fact is corroborated by an entry made by a clerk of the Registry on the letter addressed by Dr. Seligsohn to Dr. Katzenstein. The latter then returned the affidavit to Dr. Seligsohn at Tel Aviv.

We would here point out that we have not been told why the affidavit was not filed *after* the 23rd August. We have no reason to think that the Registrar would have refused to accept the affidavit even after the 10-day period had expired. The rules applicable to High Court cases do not contain a provision similar to rule 330 of the Civil Procedure Rules, 1938. It seems to us that the proper course would have been for the present Applicant to file her affidavit even after the 23rd August, and then invoke rule 8 of the High Court (Trade Marks) Rules, on the day fixed for hearing the petition. It would then have been for the Court after taking cognizance of all relevant facts, to decide whether the present Applicant would be heard in opposition to the petition. We would point out that according to rule 7 of the High Court (Trade Marks) Rules, an affidavit in reply is to be served on the Petitioner (no mention is made of other Respondents).

The present Applicant has chosen to apply to this Court for an extension of time to file her affidavit in reply. She has cited the Petitioner and the other Respondent. The former has not appeared before us at this juncture, but the latter through his advocate, Mr. Yifrach, has put in an appearance and has opposed the application on the ground that the rules do not provide for the grant of an extension of the period fixed for filing affidavits. Mr. Yifrach also submitted that no good cause had been adduced in support of the application and that, moreover, the present Applicant had waited about 12 days before lodging the application.

We have reached the conclusion that this application is premature and misconceived and must be dismissed without prejudice to any steps that the present Applicant may wish to take before the date of hearing of the petition, and without prejudice to her right to invoke rule 8 of the High Court (Trade Marks) Rules, 1937, at the proper time and place, and in the proper manner.

We would point out that if we were to hold that this application is in order, it would mean that a respondent might delay the date fixed under rule 6 for hearing the petition by filing an application on the previous day for example. Moreover, the Rules do not provide for interlocutory applications for the purpose of extending the prescribed delay.

We express no opinion as regards the merits of the application or as

regards the submission made on behalf of the present Applicant that rule 8 of the High Court (Trade Marks) Rules, 1937, only lays down that a respondent who has not filed an affidavit shall not be heard unless the Court otherwise direct, whereas rule 6 of the High Court Rules, 1937, lays down clearly that a respondent who has not filed and served on the Petitioner an affidavit in reply within the time fixed shall not be heard unless the Court otherwise directs. We are ready, however, to concede that the last mentioned submission does deserve consideration.

We allow Jacob Scomorovsky LP. 5 (five) inclusive costs.

Delivered this 13th day of September, 1946, in presence of Dr. E. Katzenstein for Applicant and Mr. G. Hausner for 1st Respondent.

British Puisne Judge.

CIVIL APPEAL No. 21/46.

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

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

IN THE APPEAL OF:—

Hanna Issa Kawas. APPELLANT.

v.

Jamileh Elias Kawas & 2 ors. RESPONDENTS.

Injunction to stay proceedings — Final judgment of Privy Council — Action to set aside judgment on the ground of fraud — Stay of execution — New proceedings — C. A. 117/29.

Appeal from the decision of the District Court Jerusalem in Civil Case No. 135/45, dismissed:—

In an action brought in the District Court to set aside a judgment, confirmed on appeal by the Privy Council, on the ground of fraud, the Court has no jurisdiction to grant stay of execution.

(*A. M. A.*)

DISTINGUISHED: C. A. 117/29 (1, P. L. R. 585; 3, C. of J. 946).

ANNOTATIONS:

1. The order under appeal was given on a motion to stay the execution proceedings in Execution File D. C. Jm. No. 514/40 pending the determination of Appellant's action for the setting aside on account of fraud of the original judgment which had meanwhile been confirmed by the Supreme Court and the Privy Council.

2. See the previous proceedings in this case: C. A. 40/40 (7, P. L. R. 411;

1940, S. C. J. 444; 8, Ct. L. R. 173), confirmed in P. C. 41/42 (10, P. L. R. 328; 1943, A. L. R. 487); H. C. 47/45 (1945, A. L. R. 807); Mo. D. C. Jm. 502/45 (1946, S. C. D. C. 96); *vide* also Pr. D. C. Jm. 5/44 (1945, S. C. D. C. 543).

3. For Palestinian authorities on interlocutory injunctions see note to C. A. 83/46 (1946, A. L. R. 379); *cf.* especially Mo. D. C. Ha. 365/45 (1945, S. C. D. C. 685) and note thereto.

4. *Vide* C. A. 194/46 (13, P. L. R. 370; 1946, A. L. R. 383), C. A. 201/46 (*ibid.*, pp. 365 & 387), H. C. 65 & 66/46 (*ibid.*, pp. 387 & 603) and P. C. L. A. 41/46 (1946, A. L. R. 746) and notes to these cases in A. L. R.

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENTS: Smoira.

JUDGMENT.

This is an appeal from a decision of the R/President of the District Court, Jerusalem, refusing to grant a stay of execution on the ground that he had no jurisdiction to grant it.

For a proper understanding of the true nature of the application it is necessary briefly to state the facts. The Respondents had initiated an action in the District Court and they got judgment in their favour both in the lower Court and in the Court of Appeal. It was carried to the Privy Council where the Respondents also succeeded.

The Appellant now states that the judgment was obtained by fraud and the application to the District Court was to stay the execution of that judgment pending the determination of the issue of fraud. Mr. Eliash has argued that the present action in the District Court amounts to a continuation of the previous proceedings. We are unable to agree. The previous proceedings were finally determined by a Court of Record. The present issue before the District Court constituted a new cause of action based on totally different grounds. Now an injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act, until the determination of an issue which is pending before the Court. The object is to preserve the *status quo* between the parties as it existed at the time of bringing the action and not to restore some past status which may have existed between the parties. Now what was the status between the parties at the time of the bringing of this action? It was the position in which they had been placed by a final judgment of a Court of Record, that is the judgment of the Privy Council, which carried with it the automatic right of execution which in the last resort is a command to the state to execute it. The *status quo* was not, as Mr. Eliash argued, the posi-

tion of the parties 5 or 6 years ago when they first became involved in litigation, but the legal status established by the judgment.

I have studied carefully the cases cited and they all have this principle in common that the status which the injunction was issued to preserve was the status at the actual date of the issue of the injunction. Much reliance was placed by the Appellant on C. A. 117/29 particularly on that part of the judgment which states:—

> "The proper course therefore for the District Court was to adjourn the hearing of the Respondents' action pending the production of a judgment of the Land Court as to the validity of the mortgage of the Respondents' shares and to order an *interim* stay of sale."

It seems to me that this amounts to nothing more than a stay and adjournment for the purpose of ascertaining what in fact were the legal rights of the parties at the date when the injunction was being sought and this could only be done by the production of the Land Court judgment, but in this case the legal rights of the parties had already been established by the Privy Council judgment which was before the District Court.

For these reasons we are of opinion that the learned R/President was correct when he decided that he had no authority to grant a stay of execution of the Privy Council judgment. We allow LP. 10 inclusive costs to Respondents.

Delivered this 25th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 335/46.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Ernestine Salzberger. APPELLANT.

v.

Maccabi Salzberger. RESPONDENT.

Probate sought in District Court of a will said to be in civil form and made by a Palestinian citizen, member of Jewish Community — Opposer contending that matter is within exclusive jurisdiction of Rabbinical Court — Reference to Special Tribunal.

Appeal from the Order of the District Court of Jerusalem in Probate Case No. 59/46 dated 30th September, 1946, dismissed:—

Question whether probate of a will said to be in civil form and made by a Palestinian citizen and member of Jewish Community can be granted by District Court or is a matter within exclusive jurisdiction of Rabbinical Court must be determined by a Special Tribunal.

(*M. L.*)

FOLLOWED: C. A. 70/46 (*ante*, p. 91).

REFERRED TO: C. A. 106/40 (7 P. L. R. 310, 7 Ct. L. R. 5, 1940 S. C. J. 229) and C. A. 131/42 (9 P. L. R. 752, 12 Ct. L. R. 257, 1942 S. C. J. 728).

ANNOTATIONS: See case followed and annotations.

(*A. G.*)

FOR APPELLANT: A. Levitzky & H. Hopp.

FOR RESPONDENT: M. Scharf.

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 30.9.46 of the learned Relieving President of the District Court Jerusalem in Probate Application No. 59/46. The opposer in that application contended that the District Court had no jurisdiction to confirm the will of a testator, who was not a foreigner and who was a member of the Jewish Community. The will is said to be in civil form. The Petitioner, on the other hand, contended that probate of the will could be granted by the District Court.

In this instance, as in C. A. 70/46, there is clearly a question whether or not the case is one of personal status within the exclusive jurisdiction of a Religious Court. That being so I find that the learned Relieving President's order is a proper one. It is not necessary for me to repeat here what I have said in my judgment in C. A. 70/46 with regard to C. A. 106/40 and C. A. 131/42.

The appeal must be dismissed with costs on the lower scale, to include an attendance fee of LP. 15.— (fifteen). These costs will be paid out of the Estate.

Delivered this 24th day of January, 1947, in the presence of Mr. Hopp for the Appellant and Mr. Scharf for the Respondent.

British Puisne Judge.

CIVIL APPEAL No. 288/46.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: FitzGerald, C. J. (in Chambers).

IN THE APPLICATION OF:—

Arieh Carasso. APPLICANT.

v.

Isaac Arditi & an. RESPONDENTS.

Order of eviction — Application for leave to appeal from District Court.

Application for leave to appeal from the judgment of the District Court of Jerusalem, dated 21st May, 1946, in Civil Appeal No. 18/46, refused:—

1. (*Obiter*): Where a lease has normally expired and tenant by his conduct has indicated that he is not invoking Rent Restrictions Ordinance, he cannot afterwards claim benefit of that Ordinance.

2. Where there are numerous cases supporting Applicant's proposition as to a certain question of law, leave to appeal from appellate judgment of District Court will not be granted, as there is no point of novelty or complexity involved.

3. (*Obiter*): Court may overlook minor lapses as between landlord and tenant.

REFERRED TO: C. A. 182/46 (*ante*, p. 114).

(*M. L.*)

ANNOTATIONS:

1. On the first point see case referred to (*supra*).

2. On point 2 see C. A. 204/45 (1945 A. L. R. 772) and C. A. 18/46 (1946 A. L. R. 104, 13 P. L. R. 56).

3. On the third point see C. A. 326/45 (1946 A. L. R. 446, 13 P. L. R. 168) and annotations.

4. The judgment of the District Court is reported in 1946, S. C. D. C. 779.

(*A. G.*)

FOR APPLICANT: Eliash.

FOR RESPONDENTS: A. Moyal.

ORDER.

Civil Appeal No. 182/46, which has now been decided, is an authority for stating that where a lease has normally expired and a person by his conduct has indicated that he is not calling to his aid the Rent Restrictions Ordinance, he cannot afterwards claim the benefit of that Ordinance.

The position is different in the case in which Mr. Eliash now seeks

leave to appeal. Whatever the facts of that case may be, it is quite clear that the District Court judgment was based on the fact found by the District Court, that failure of the tenant to pay rent was merely a minor lapse and could not be taken as an indication that the tenant did not immediately claim the protection of the Ordinance. There is nothing novel or complex about this proposition, as there are numerous cases to the effect that the Court may overlook minor lapses.

For these reasons I must refuse leave to appeal.

Given this 3rd day of January, 1947.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 2/47.

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

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

IN THE APPLICATION OF :—

Frank Gruner. APPLICANT.

v.

1. Commissioner of Prisons, Jerusalem,
2. Officer in Charge, Central Prison, Jerusalem. RESPONDENTS.

Application for leave to appeal to Privy Council from order of High Court.

Application for leave to appeal to the Privy Council from the order of the Supreme Court, sitting as a High Court of Justice, dated the 3rd February, 1947, in H. C. 13/47:—

Art. 3(b), Palestine (Leave to Appeal to the Privy Council) Order-in-Council only applies to cases determined by Supreme Court sitting as Court of Appeal, not as High Court of Justice.

FOLLOWED: P. C. L. A. 22/43 (1943 A. L. R. 741, 10 P. L. R. 600) and P. C. L. A. 1/46 (1946 A. L. R. 269, 13 P. L. R. 35).

(*M. L.*)

ANNOTATIONS:

1. The order which it was sought to appeal (H. C. 13/47) is reported *ante*, at p. 79.
2. See cases followed and annotations in A. L. R.

(*A. G.*)

FOR APPLICANT: Yerushalmi.

FOR RESPONDENTS: Not served.

ORDER.

This is an application for leave to appeal to the Privy Council against an order of this Court delivered yesterday in High Court Case No. 13/47. It appears to us that we have no authority to entertain this application. Privy Council Leave to Appeal Case No. 22 of 1943 and Privy Council Leave to Appeal Application No. 1/46 decided that Article 2 of the Palestine (Appeal to the Privy Council) Order-in-Council defines "Court" as the Supreme Court of Palestine sitting as a Court of Appeal and it must follow that the discretion given to the Court under Article 3(b) of the Palestine (Leave to Appeal to the Privy Council) Order-in-Council, 1924, only applies to cases determined by the Court sitting as a Court of Appeal. The case which is the subject-matter of this application was determined by the Court sitting as a High Court of Justice. This of course does not debar the Applicant from applying direct to the Privy Council for special leave.

Given this 4th day of February, 1947.

Chief Justice.

HIGH COURT No. 52/46.

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

BEFORE: De Comarmond and Abdul Hadi, JJ.

In the matter of the Trade Marks Ordinance, 1938.

and

IN THE MATTER OF :—

Ibrahim Nimer El Nabulsi. PETITIONER.

v.

The Registrar of Trade Marks, Jerusalem & an. RESPONDENTS.

Opposition to registration of trade mark on account of similarity.

Appeal by way of petition from the decision of the Registrar of Trade Marks under section 14(5) of the Trade Marks Ordinance, 1938, dismissed:—

A certain lack of similarity with a registered mark does not necessarily mean that a mark is entitled to registration. Consideration must be given to the main idea conveyed by, and the essential features of, each mark; to the nature of the goods upon which they are employed; and even to the critical sense or sense of observation of the class of persons who are likely to purchase the goods bearing the trade mark.

(*M. L.*)

REFERRED TO: Murphy's Trade Mark case (Kerly On Trade Marks 6th ed. pp. 279, 280) Dairy-maid case (31 C. D. 454) and Farrow's case (63 L. T. 233).

ANNOTATIONS: For Palestinian authorities on trade marks see H. C. 102/45 (1946 A. L. R. 318) and annotations.

(*A. G.*)

FOR PETITIONER: Levitsky & Hopp.

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

ORDER.

This is an appeal from a decision of the Registrar of Trade Marks given on the 4th April, 1946.

The Petitioner (hereinafter referred to as "the Appellant") applied in 1943 for the registration of a trade mark in respect of household soap and toilet soap of the Nablus type. This application was numbered No. 6277 in Class 3. The mark was accepted for registration and the application was advertised in Palestine *Gazette* No. 1402 of the 12th April, 1945.

Within the prescribed period, a notice of opposition to the registration of the trade mark was filed by the present Respondents in their capacity as liquidators of the company Haj Mohammad Nimer Hassan el Nabulsi & Sons Ltd. which was the proprietor by assignment of a trade mark originally registered in 1923 in respect of candles, common soap, detergents, illuminating, heating and lubricating oils, laundry blue and other preparations used for laundry purposes. The Registrar after hearing the parties held that there was sufficient resemblance between the registered mark and the mark sought to be registered as to cause confusion, and he cancelled the acceptance of the Applicant's mark for registration.

The registered trade-mark in described by the Registrar as "consisting of a figure resembling a crescent, of which the pointed ends have been cut off, and the device of a five-pointed star, three of the points of the star touching the arc of the crescent-like figure. Both the crescent and star devices bear certain letter press in Arabic".

We have taken cognisance of the Registrar's file and looked at the representations of the registered trade mark as printed in the Palestine *Gazette* and as used on calendars and labels, and we have also been shown a piece of soap bearing the same mark.

Mr. Levitsky who appeared for the Applicant-Appellant has criticized the Registrar's description and insisted that the so-called crescent device

in the registered mark possesses no point of resemblance with a crescent. Mr. Levitsky maintained that the Registrar did not pay attention to the most essential point which is whether there is resemblance between the two marks, and he went on to say that nowhere does the Registrar state that the marks are similar.

We would point out that what the Registrar did decide was that the mark sought to be registered is so nearly resembling the registered mark as to be calculated to deceive (section 8(i) of Trade Marks Ordinance, 1938). The Registrar never suggested that the marks were identical and we are fully satisfied, after reading his decision, that he did apply his mind to the question of similarity. We would add that the Registrar's description of the registered mark is not inaccurate and that the semi-circular design, slightly tapering at both extremities, does suggest a crescent with the tips cut off.

The mark sought to be registered is a well defined crescent with three five-pointed stars in or near to the gap between the two points of the crescent.

We concede that if the two marks be placed side by side for the purpose of detecting differences, it would not be difficult to realise that there are differences. But we cannot ignore the well known principles of Trade Marks case law which were quoted by the Registrar and which establish that a certain lack of similarity with a registered mark does not necessarily mean that a mark is entitled to registration. Consideration must be given to the main idea conveyed by, and the essential features of, each mark; to the nature of the goods upon which they are employed; and even to the critical sense or sense of observation of the class of persons who are likely to purchase the goods bearing the trade-marks.

Applying these principles to the present case, we find that the two marks do suggest to the mind a crescent and star idea; in fact, the essential features of each mark are a crescent or part of a crescent and a star or stars. Furthermore, both trade marks are intended to be applied, *inter alia*, to common household soap which is bought by the poorer and sometimes illiterate classes in Palestine and the neighbouring countries. Under those circumstances, we are of opinion that there was justification for the Registrar's finding.

We have had the opportunity of looking not only at the printed reproductions of the two marks, but we have also seen them on pieces of soap submitted to us by counsel for the parties, and we feel bound to say that we attach weight to the Registrar's remark that details of

the Petitioner's mark do not appear in sharp relief on soap and are apt to be blurred. For example, we have noticed that the Petitioner's crescent is very thick in the middle and is not dissimilar from the half-crescent of the registered mark; furthermore, the three stars of the Petitioner's mark are so badly reproduced on soap that they do not appear as three distinct stars. With regard to the Arabic script on the crescent and star of the registered mark, we do not think that they constitute such a startling feature (if at all visible) as to attract the attention of an ordinary and not hyper-critical purchaser.

We might refer to numerous decided cases which have a bearing on the present case but we will only draw attention to Murphy's Trade Mark case mentioned in Kerly (6th edition) at pages 279—280; to the dairy-maid case (31 C. D. 454) where a half-length figure of a milkmaid carrying one pail with the word "Dairy-maid" was held to be too near another mark consisting of a full-length figure of a milkmaid carrying two pails; and finally, to Farrow's case 63 L. T. 233. The last mentioned case is rather interesting because the two rival marks consisted of a charging buffalo and a bull's head respectively. Each picture was encircled by a silver ring common to the trade and the labels were of the same colour which was common to the trade. Stirling, J., said that the pictures as printed in the Trade Marks Journal were very different, but when they were placed upon the coloured labels, the Applicant's label too closely resembled that of the opponent.

Reference was made by counsel for Appellant to the fact that the registered trade-mark has been mainly, if not wholly, used in the past on soap exported to Egypt, whereas the mark sought to be registered has been in use on the local market for the last two or three years. It is not quite clear to us how this argument would help Appellant in the circumstances of the present case; we have no ground for thinking that the registered mark will not be used locally — just the reverse.

To conclude, we find no reason for holding that the Registrar exercised his discretion wrongly or failed to direct his mind to the important points of the case. We would go further and state that we entirely agree with the Registrar's finding and are satisfied that the use of the Appellant's mark would lead to confusion. It seems to us beyond doubt that the majority of the purchasers of common soap in Palestine would be mainly guided by the idea of a crescent and star trade mark and could not be expected to pick out the differences in the pictorial representations. In this connection, we would again call attention to the principle that the persons to be considered in estimating whether the

resemblance is likely to deceive are those who are likely to become purchasers of the goods.

We do not consider that Appellant's offer to sell his soap wrapped up in a label bearing a clear representation of his mark can materially affect the decision arrived at by the Registrar.

We therefore dismiss the appeal and allow the second Respondents LP. 15 inclusive costs.

Given this 22nd day of July, 1946, in presence of Mr. Hopp for Petitioner and Mr. A. Wittkowski for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 310/46.

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

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

IN THE APPEAL OF:—

Jamileh Hanna El Bandak. APPELLANT.

v.

Joudeh Abdallah El Bandak & an. RESPONDENTS.

New evidence after judgment — Fraud — Alleged concealment of evidence — No duty to disclose.

Appeal from the judgment of the Magistrate's Court of Bethlehem sitting as a Land Court, dated the 3rd day of September, 1946, in Land Case No. 83/45, dismissed:—

Where a party, after losing an action, discovers a document which might have assisted him and of which the other party was aware, it is not sufficient to set the judgment aside unless the other party took active steps to conceal the existence of that document.

(*A. M. A.*)

ANNOTATIONS: On setting aside judgments on account of fraud *cf.* C. A. 108/46 (1946, A. L. R. 877) and cases cited in note 3 thereto.

(*H. K.*)

FOR APPELLANT: B. Elias.

FOR RESPONDENTS: No. 1 — In person and on behalf of Respondent No. 2.

JUDGMENT.

In this case although we do not find it necessary to call on the Respondent, Mr. Bishara Elias has no need to reproach himself as

everything that could have been said for the Appellant has been said with lucidity by him, but it appears to us that the law to be applied leaves no room for doubt. The facts are that the Respondent in the Magistrate's Court succeeded in obtaining an order for possession on the ground of prescription. After judgment had been given, the Appellant discovered a document in the registry which *prima facie* to all events might have defeated the plea of prescription. The case went on to the Court of Appeal which Court refused to allow the production of this new evidence. The Appellant again went to the Magistrate's Court and asked to have the previous judgment set aside on the ground of fraud. Now, fraud is a serious allegation and it has to be proved conclusively before a judgment will be set aside. Bishara Eff. Elias argues that this allegation of fraud here is founded on the action of the Respondent in claiming ownership to this property, whereas a document which was later discovered, and which was signed by him, was inconsistent with such a claim. When these facts were adduced before the Magistrate he said he was not in a position to say that this document would have altered the conclusion previously arrived at by the Court, and consequently the allegation, even if proved, fell far short of fraud. We must entirely agree with him. If it had been established that the Respondent had taken active steps to conceal this document, then indeed Bishara Elias might have substantiated his averment of fraud. But in the first place there was no obligation on the Respondent to produce this document. In the second place, it is evident that he took no steps whatsoever to avoid its production. The document was in the public registry. The fact that it could not be produced in time was not due to any action on the part of the Respondent but to an action altogether outside his control, which was, so it was alleged, the bombing of the Land Registry. It was further argued by Mr. Bishara Elias that the evidence given by the Respondent was false and that in itself amounted to fraud. Now, apart altogether from the question as to whether false evidence would in itself in all circumstances, constitute fraud sufficient to set aside a judgment confirmed by a Court of Appeal, there is no finding of a Court that the evidence given by the Respondent was false. It is true that his oral evidence would seem, on the face of it, to conflict with this later discovered document but this document was never produced in the Court of Trial, and it is possible that the Respondent, if called upon, could give a reasonable explanation of the apparent conflict between the document and his evidence. It may indeed well be that if this document was produced at the original trial the result, as Mr. Bishara Elias has argued, might have been different, although the Magistrate did not seem to think so. But that is im-

material now because in order to set aside the judgment it was imperative to prove not only that this document would have conclusively altered the judgment, but that its non-production was due to the fraud of the Respondent. As we have found there was no fraud on his part, the appeal must be dismissed.

No costs.

Delivered this 7th day of January, 1947.

Chief Justice.

CIVIL APPEAL No. 13/46.

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

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

IN THE APPEAL OF:—

Awad Hanna Baddour. APPELLANT.

v.

Theodore Kirschbaum. RESPONDENT.

Claim for eviction under sec. 8(1)(c), Rent Restrictions (Dwelling Houses) Ord. — Finding by Magistrate, upheld by District Court, that premises are not reasonably required by landlord — Interpretation of "reasonably required" in sec. 8(1)(c) — Alternative accommodation.

Appeal from the judgment of the District Court, Jerusalem, sitting as a Court of Civil Appeal, in C. A. 29/45, which was delivered on 17.12.45, whereby the judgment of the Magistrate's Court, Jerusalem, in Civil Case No. 52/45 dismissing Appellant's Plaintiff's claim for eviction was confirmed; judgments of the Magistrate's and District Court set aside and eviction ordered:—

1. Court of appeal on the material before them may find that contrary to Magistrate's judgment confirmed on appeal it is not only reasonable to order eviction but unreasonable not so to do.

2. While "reasonable requirement" in Rent Restrictions (Dwelling Houses) Ordinance implies something more than a mere desire, it does not amount to absolute necessity; all that landlord need prove is that he has a genuine present need of that accommodation.

3. An increase of some 15% in rent is not sufficient ground for holding that alternative accommodation is not suitable nor is lack of small amenity such as central heating.

(*M. L.*)

ANNOTATIONS:

1. On point 1 *cf.* C. A. 161/45 (1945, A. L. R. 683; 12, P. L. R. 419) and annotations in A. L. R.

2. On point 2 see C. A. 389/45 (1946, A. L. R. 752) and annotations.
3. On point 3 see C. A. 161/45 (*supra*).

(*A. G.*)

FOR APPELLANT: H. Atalla.
FOR RESPONDENT: Shereshevsky.

JUDGMENT.

Curry, A/J.: The Appellant brought an action in the Magistrate's Court, Jerusalem, praying that the Defendant be ordered to vacate the flat occupied by him on the ground that the premises were reasonably required by the Appellant, who was the landlord, for the occupation of himself and his family. The learned Magistrate dismissed the action and that judgment was upheld by the District Court on appeal. Now, the facts in this case are briefly as follows:—

The Plaintiff's family consists of 11 persons, himself, his wife and 9 children — 6 sons and 3 daughters. The sons' ages range from 26 years to 10 years and the daughters from 16 years to 9 years. The flat at present occupied by him consists of 3 bedrooms and 2 living rooms. The flat occupied by the Defendant has the same number of rooms which, however, are larger in size, and a garage. His family consists of himself, his wife, and 2 sons. It must be appreciated that, whilst "reasonable requirement" implies something more than a mere desire, it does not amount to an absolute necessity. All the landlord need prove is that he has a genuine present need of that accommodation. On the face of it, I feel there can be no doubt whatsoever that the present accommodation of the landlord is inadequate. At the moment 9 children are occupying 2 bedrooms, six in one bedroom and 3 in the other. To say that a person living in such conditions has not a genuine need for more adequate accommodation is, I consider a finding entirely unwarranted by the facts and against the weight of evidence. It is apparent from the judgment of the Magistrate that the Magistrate did not apply his mind correctly to the question before him. The Magistrate in his judgment makes it clear that he considers a person who owns property and leases it to others as someone who is an enemy to society. He refers to the Appellant as a capitalist, clearly giving that word a derogatory meaning. He is obviously greatly influenced by the fact that the Appellant could have moved into the flat, now required, some 5 to 6 years ago when he completed the building, but he did not then choose to do so but let the flat at a higher rent than he was paying for the flat occupied by himself.

The Magistrate seems to infer that there was something wrong in the Appellant seeking to make additional income by letting his own

flat at a higher rent than that of the one in which he continued to live. There was nothing of course wrong in this at all. A person is perfectly justified in doing so, and it may have been necessary at that time for the Appellant in order to maintain his family to have the extra income afforded by so doing even though it meant his living in a flat with inadequate accommodation. In fact, he stated in his evidence that had he not been financially embarrassed at that time he would not have let the flat. It must be remembered that at that period the Rent Restrictions Ordinances were not in force and it may well be that the landlord felt it necessary to let the flat for one or perhaps two years and suffer the cramped conditions under which he lived, but he had no idea that he might be forced to continue therein for some six years. It is true that one of the grounds for the claim by the landlord was that two of his sons were about to get married and that they would be bringing their respective wives with them to live with the family. Quite rightly the Magistrate rejected that ground. Having rejected that ground the Magistrate and the learned Judge of the District Court attached much weight to the fact that the number of members of the family of the Appellant was the same now as in 1940. That is so, but it does not alter the fact that, owing to their having grown, the situation has become much worse. It is easy for very young children to sleep in the same bedroom as their parents or for young children of both sexes to share the same bedroom, but this cannot continue indefinitely and undoubtedly the position of the landlord in this respect is now extremely difficult. Apart from that, however, if a landlord instead of occupying a flat of his own when it is vacant, chooses to let it, it does not follow that, unless he shows that his family has increased in numbers, he is for ever barred from proving that he has a reasonable need of that flat. I am fully satisfied that the Appellant has proved that he reasonably requires other accommodation than that at present occupied by him and that the Magistrate allowed factors not relevant to the matter to cause him to come to a different conclusion.

The next argument that was submitted was to the effect that, as the flat required by the Appellant contained the same number of rooms, he would be no better off. This is not quite correct. In the first place, the flat required by him contains larger rooms. It also contains a garage and apparently adjoining the building are two stores which belong to the Appellant. Whilst it is true that he has as yet no permit to convert either the garage or the stores into living quarters, in all probability he can, as he suggests, make use of them as playrooms for the children or otherwise, all of which would assist, at least in some

small measure, in relieving the congestion. Undoubtedly, the Appellant is likely to be better off in the flat at present occupied by the Defendant than in the one he at present occupies.

The only other point to be considered is whether the alternative accommodation offered to the Defendant, *i. e.* the flat at present occupied by the Appellant, is suitable alternative accommodation. As regards the number of rooms, it certainly comes within that definition. As regards the rent, it would appear that his total outlay per year would be in the neighbourhood of LP. 150 instead of LP. 130. I do not think that this increase in rent is sufficient to cause me to hold that it is excessive. It has been argued by the advocate for the Respondent that the standard rent of the flat is LP. 75 and not the LP. 120, at present charged, and that it would be wrong for this Court to approve the transfer in such conditions. I see no merit in this point. In the first place, it is not clear that the standard rent is LP. 75 and there is nothing to prevent the Defendant, when he occupies the flat, from applying to the Rent Tribunal with a view to obtaining a reduction in the rent; if the case is as stated by the Defendant's advocate. The only other material difference is that the flat at present occupied by the Defendant has central heating whereas the flat offered has not. I do not consider the lack of this small amenity as sufficient ground for holding that the alternative accommodation is not suitable.

For all the foregoing reasons I hold that the premises are reasonably required by the landlord and that, after considering all the circumstances of the case, especially that of alternative accommodation available for the tenant, it is not only reasonable to order eviction but unreasonable not so to do. The judgments of the Magistrate and the District Court are accordingly set aside and judgment entered for the Appellant ordering Respondent to vacate the flat at present occupied by him. The Appellant is entitled to the costs in the Magistrate's Court and in the District Court, and to a fixed sum for this appeal of LP. 10.

Delivered this 14th day of November, 1946, in presence of Mr. Habiby by delegation from Mr. Atallah for Appellant and Mr. Shereshevsky for Respondent.

A/British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 386/45.

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

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

IN THE APPEAL OF :—

Abraham Kantrovitch. APPELLANT.

v.

Bruria Zucker. RESPONDENT.

Sub-lease of a room to a married woman — Conditions as to manner of user — Continuing breach of covenant.

Appeal from the judgment of the District Court, Jerusalem, sitting as a Court of Civil Appeal given in Civil Appeal No. 44/45 on 7th December, 1945; appeal allowed:—

1. Motive is entirely irrelevant to question as to whether or not certain acts of tenant constitute in circumstances of the case a nuisance within sec. 8(1)(a) Rent Restrictions (Dwelling Houses) Ordinance.

2. a) Immediately a tenant sublets, alters construction of premises or starts trade contrary to covenant of lease, there is a natural presumption that the breach is final and permanent.

b) Breach of condition not to use in a particular manner, *e. g.* not to cook or wash clothes in bathroom, is a continuing breach.

3. Receipt of rent after breach of covenant not to use in a particular manner does not amount to waiver in respect of subsequent breaches, and landlord is not precluded from taking advantage of forfeiture as long as user continued after receipt of rent.

4. There is no waiver of forfeiture where landlord did not know of breach of covenant until after he accepted the rent.

5. Where as in case of lease of a single room with use of conveniences jointly with landlord and his family, it is an essential condition of the lease that occupation should be by a single person, coming of a second person — even if it be a husband or a wife — to reside together with tenant constitutes a breach of condition.

(*M. L.*)

REFERRED TO: Doe d. Ambler *v.* Woodbridge, 1829 K. B., 33 R. R. 203, Waldron *v.* Hawkins, 10 Law Times Reports, Vol. 32 p. 119, Griffin *v.* Tomlins (1880) 42 Law Times 359, Woodfall's Law of Landlord & Tenant, 29th Edition, p. 929. C. A. D. C. Ha. 55/44 (1944, S. C. D. C. 214), C. A. D. C. Ha. 182/44 (1945 S. C. D. C. 192).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. at p. 521.

2. On permanent and continuous breach of covenant see cases referred to see also Redman's Landlord & Tenant, 9th Edition, p. 186, 187.

3. On waiver of forfeiture by accepting rent with knowledge of breach see C. A. 326/45 (1946, A. L. R. 446) and annotations in A. L. R., see also C. A. 20/46

(1947, A. L. R. 8) and annotations, see also Redman's Landlord and Tenant, 9th Edition, p. 202, 203.

4. On point 4 see C. A. 178/44 (1945, A. L. R. 172) and annotations.

5. On change of user see C. A. 359/45 (*ante*, p. 45) and annotations.

(*A. G.*)

FOR APPELLANT: P. Rabinovitch.

FOR RESPONDENT: M. Cohen.

JUDGMENT.

Curry, A/J.: The Appellant brought an action in the Magistrate's Court of Jerusalem for the eviction of the Respondent from a room in Appellant's flat on the ground of alleged breach of certain conditions of the lease. It is necessary to set out the vital conditions of that oral lease. It is clear from the evidence of the Appellant (Plaintiff) that he was only prepared to sublet the one room with the use of bath-room and lavatory to a single person. He gives very sound reasons for this condition. He himself is a tenant, and he says in fact that he only has permission to sublet to a single person, moreover it involved the joint use of the bathroom and W. C. with Appellant and his family. He leased the room, however, to the Respondent, who is a married woman. At the time he leased, however, her husband was in the Army, and it is clear that, after discussion, he only agreed to lease to her because her husband was in the Army and would therefore not be living with her. At the request of the Respondent he made a special concession allowing her husband to stay for the periods of his leave from time to time, but not exceeding a fortnight, and he further specifically provided that the concession should not constitute the husband a tenant. There were further conditions that the Respondent should not cook or wash clothes in the bathroom.

The lease commenced in June, 1942, and for about one year the conditions were complied with. It appears that the Respondent then started to do her laundry and to cook in the bathroom. In June, 1944, she gave birth to a child and the amount of laundry done increased considerably. However, thereafter the Appellant agreed to accept an increase of rent. Finally the husband arrived, apparently to live permanently with his wife. The Appellant alleges in his evidence that he did not become aware of the fact that the husband had been discharged from the Army and intended living permanently in the flat until after he received rent in February, 1945. He instituted this action in March, 1945. Before the Magistrate there were two issues to be decided — whether the Appellant was entitled to have Respondent evicted on the ground of annoyance, as provided for by section 8(1)(a) of the Rent Restrictions (Dwelling Houses) Ordinance, and on the ground of breach

of the terms of the lease. The Magistrate found that Respondent's conduct did not constitute a nuisance.

I think there can be no doubt that the Magistrate was wrong in this decision and I find myself in complete agreement with the learned Relieving President of the District Court when he states that the Magistrate introduced motive, a matter entirely irrelevant to the question as to whether or not these acts in the circumstances of this case constituted a nuisance, and if this was the only issue, he would have allowed the appeal.

Proceeding to a consideration of the second issue, the argument of Mr. Rabinovitch on behalf of the Appellant is that the breach of the washing and cooking condition was a continuing breach and therefore, although Appellant accepted rent after those breaches, as the breaches continued, he acquired a fresh right for eviction in respect of each fresh breach. The learned Relieving President, agreeing with the Magistrate, held that the cooking and washing on each separate occasion did not constitute a new breach. He referred to the cases of Doe d. Ambler *v.* Woodbridge; Waldron *v.* Hawkins; and Griffin *v.* Tomlins, and I propose to review those cases in some detail.

In the case of Doe d. Ambler *v.* Woodbridge, 1829 K. B. 33 R. R. 203, there was a covenant in a lease that the rooms should not be used for certain purposes, *viz.* that the tenant should not alter, convert or use the rooms thereof, then used as bed-rooms, or either of them, into or for any other use or purpose than bed-sitting rooms, for the occupation of himself, his executors or his or their family. The tenant sublet the rooms to a lodger, and the landlord received rent after knowledge thereof. It was held that a new breach occurred every day during the time they were used in breach of the covenant, and the landlord by receiving the rent was not precluded from taking advantage of the forfeiture so long as the user continued after the receipt of the rent.

The basis of that case clearly is that there was a covenant as regards user. Admittedly it was a border-line case because I think it could be argued that in reality it was a covenant not to sublet, and if considered as breach of such a covenant the breach would not be a continuing one. However, the facts in our case are on much clearer ground — here the tenant covenants to use the room for herself only, and not to wash or cook in the bathroom.

The learned Relieving President mentions that Doe d. Ambler *v.* Woodbridge was discussed in the case of Waldron *v.* Hawkins, 10 Law Times Reports, Vol. 32—119, and the Court did not accept the doctrine with a great measure of enthusiasm. I cannot quite agree with that view. Waldron *v.* Hawkins was a clear case of underletting without

leave and although as mentioned in that judgment the distinction between that case and Doe d. Ambler *v.* Woodbridge was fine, there is no resemblance between the case of Waldron *v.* Hawkins and this case. In my opinion Doe d. Ambler *v.* Woodbridge was decided on the ground that there was a breach of a covenant in respect of user whilst Waldron *v.* Hawkins was a breach in respect of subletting and there is nothing to suggest that the Court intended to override Doe d. Ambler *v.* Woodbridge. Likewise in the case of Griffin *v.* Tomlins (1880) 42 Law Times 359, to which the learned Judge also refers, there is no resemblance to the facts in this case. In that case there was a covenant not to carry on a trade or business in the premises, but nevertheless the tenant made constructural alterations, converting the premises into two shops, and it was held that it could not be presumed that a plumber's business would be commenced upon a less tenancy than a year of a shop in which it was to be carried on, and that the Plaintiff's waiver of the breach by receipt of rent was sufficient to render the proceedings ineffective.

From a study of these cases it appears to me that, where a person sublets or makes constructural alterations, or starts a trade in premises, contrary to a covenant in the lease, there is a breach which he cannot go back upon. Immediately he sublets, alters the construction of the premises or starts the trade, there is a natural presumption that the breach is final and permanent, because presumably, the subletting is for a period of at least a year; the alteration is permanent and there is not intention to alter the construction back to the original, and the trade is to continue for the rest of the period of the lease.

The circumstances in the case of a continuing breach are, however, fundamentally different, in that, although the tenant has committed a breach, no one can say that he is going to persist in that breach. If, for example, there is a covenant not to wash clothes in the bathroom, and the tenant in breach thereof one Monday does wash clothes, there is no presumption that he is going to do so again next Monday and every Monday therafter or every day thereafter. That this distinction is recognised in the law is clearly stated in Woodfall 29th Edition p. 929 the author of which gives examples of continuing breaches; a covenant to keep in repair; to keep the premises insured; and not to use in a particular manner. There can be no argument that in this case there was a covenant not to use in a particular manner.

For these reasons I am of the opinion that, although the landlord received rent after the washing and cooking had taken place in the bathroom in breach of the covenant, nevertheless this did not amount to waiver in respect of those breaches which occurred after the receipt

of rent, and for these reasons alone I should be inclined to allow the appeal. But there is the further point to consider, namely the return of the husband. It is important to note that the Defendant called no evidence, and therefore the Plaintiff's evidence stands uncontradicted. The Plaintiff states that he did not know that the husband had been discharged from the Army and was intending to take up permanent residence, until after he had accepted the rent in February, 1945. He instituted this action in March, 1945. Therefore, in my opinion, if that was a breach of one of the conditions, there was no waiver thereof.

We have been referred to Haifa District Court C. A. 55/44 in which it was held that where a room is let to a person alone, if he subsequently marries, his wife may live with him in the room and to Haifa District Court C. A. 182/44, where it was held that a condition that a lady should reside alone, was not broken because she married and her husband came to reside with her. On the facts of those cases those decisions may be good law — I express no opinion thereon. The facts in this case, however, are not the lease of a house or a self-contained flat, but of a single room, with the use of the bath-room and lavatory jointly with the landlord and his family. It can therefore be seen that it was an essential condition of the lease that the occupation should be by a single person and there was a good reason therefor, and it is clear that the agreement was that the husband should not live in the flat. In such circumstances I am of the opinion that when the husband came to reside together with his wife an essential condition of the lease was breached, and that, as the landlord took action immediately on his awareness thereof, there has been no waiver on his part. In the Courts below there was some discussion as regards the condition that the wife should live there without her husband being against public policy. The question of public policy cannot possibly arise in an action of this nature and Mr. Hermann Cohen on behalf of the Respondent, with his usual reasonableness admitted so. I therefore do not propose to discuss that subject further.

For the foregoing reasons this appeal must be allowed, the judgment of the District Court and Magistrate's Court set aside and judgment entered for Appellant together with costs in the Magistrates and District Courts and to a fixed sum for this appeal of LP. 10 (ten).

Delivered this 14th day of November, 1946, in presence of Rabinovitch for Appellant and of Herman Cohen for Respondent.

A/British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 289/46.

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

BEFORE: Edwards, Shaw and De Comarmond, JJ.

IN THE APPEAL OF:—

1. Hemnutah Limited,
2. Jacob Barazani. APPELLANTS.

v.

1. Raphael Habib Ben Shalom,
2. Keren Kayemeth Leisrael Ltd. RESPONDENTS.

Awlawiyeh — Land Code, Arts. 41—5 — *Whether village musha' can be said to exist after settlement, L. A.* 59/27, *L. A.* 121/26 — *Collusion — C. A.* 459/44, *C. A.* 236/42, *C. A.* 364, 5/44 — *Exchange and sale.*

Appeal from the judgment of the Land Court of Nablus, given on 25th July, 1946, in Land Case No. 20/45, dismissed subject to a variation:—

After land settlement, village *musha,* even if the lands remain undivided, ceases to bear that classification.

(*A. M. A.*)

REFERRED TO: C. A. 121/26 (1, P. L. R. 234; 4, C. of J. 1271); L. A. 59/27 (1, P. L. R. 179; 4, C. of J. 1532); C. A. 236/42 (10, P. L. R. 383; 1943, A. L. R.509); C. A. 364 & 5/44 (12, P. L. R. 152; 1945, A. L. R. 321); C. A. 459/44 (12, P. L. R. 134; 1945, A. L. R. 106).

ANNOTATIONS:

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

2 Authorities on *masha'* lands are collated in the annotations to C A. 99/43 (1943, A. L. R. 239); see also C. A. 416—419 & 421/44 (13, P. L. R. 195; 1946, A. L. R. 313).

3. On the binding force of precedents on the Supreme Court see C. A. 70/46 (*ante,* p. 91) and note 4.

4. As regards the applicability or otherwise of the *Mejelle* to *miri* lands and the ruling in C. A. 459/44 (*supra*) see C. A. D. C. Ha. 112/45 (1946, S. C. D. C. 614) with cases therein cited and note thereto.

5. On the question of the applicability of the *awlawiyeh* provisions to juristic persons see C. A. 195/46 and C. A. 220/46 (*post,* pp. 150 & 153).

(*H. K.*)

FOR APPELLANTS: No.1 — A. Levin.
No. 2 — Eliash and Ben Shemesh.

FOR RESPONDENTS: No. 1 — G. E. Berouti.
No. 2 — Not served — formally cited.

JUDGMENT.

Edwards, J.: This is an appeal from the judgment of the Land Court of Nablus, dated the 9th July, 1946, in Land Case No. 20/45, which Court had given judgment in favour of the Respondents in an action for *awlawiyeh* under Article 41 and 42 of the Ottoman Land Code. Many grounds of appeal were argued by Mr. Levin for the first Appellant and Dr. Eliash for the second Appellant.

I quote from the judgment of the Land Court:—

> "This is a claim for *awlawiyeh* under Article 42 of the Ottoman Land Code. The Plaintiff is a registered co-owner of *masha'* shares in four parcels of *miri* land situated at Khirbet Beit Lid, Tulkarm sub-district, more particularly described in paragraphs 4 and 5 of the statement of claim and in Exhibits P/1—P/4. Defendant No. 1 is a company authorised to acquire and hold land, and is registered co-owner of *masha'* shares in the same lands (Exhibits P/1—P/4). Defendant No. 2 is also a company and it was before this action was lodged, a registered co-owner of 12 shares out of 530 shares in the lands in question (Exhibits P/1—P/14). As to Defendant No. 3, he is a watchman of Defendant No. 1, and under deeds Nos. 1137, 1139, 1142 and 1144 dated 20.9.43, he is the lessee of the shares which were owned by Defendant No. 2. The period of this lease is 25 years and the rent is LP. 1 *per annum*.
>
> Before he lodged this action, the Plaintiff had brought in this Court another action for *awlawiyeh* against Defendant No. 2 in Land Case No. 27/44. He claimed in it by *awlawiyeh* the afore-mentioned shares of Defendant No. 2. While that Land Case No. 27/44 was pending, Defendant No. 2 transferred to Defendant No. 1 by way of exchange its shares referred to above (Exhibits P/5—P/8). This transfer was executed at the Land Registry, Tulkarm, Deed No. 1370, dated 1.11.44.
>
> Defendant No. 1 furthermore, at various dates between 1.11.44 and 13.10.45, purchased from other co-owners 19 shares out of 530 shares in the four parcels of land in question (Exhibits P/5—P/8). The particulars of these transfers of the said 19 shares to the name of Defendant No. 1 are more fully described in paragraph 11 of the statement of claim.
>
> Plaintiff and Defendant No. 1, being co-owners when Defendant No. 1 acquired from Defendant No. 2 and from other co-owners the afore-mentioned shares totalling 31 shares out of 530 shares, Plaintiff now in this action claims under Article 42 of the Ottoman Land Code half of these 31 shares out of 530 shares, *i. e.* 31 shares out of 1060 shares in the four parcels of land, the subject-matter of this action."

I wish at the outset to deal with the third ground of appeal, which is that the Trial Court erred in holding that, since land settlement had

been carried out, the land in question had ceased to be village *masha'*. In their judgment the learned Judges of the Land Court said:—

> "The second point is that the lands, the subject-matter of this case, being of Khirbet Beit Lid *masha'* lands, they could not be subject to *awlawiyeh*. The Defendants' advocate quoted Land Appeals 121/26, Vol. I, P. L .R. p. 234, and 59/27, Vol. I, p. 179. This may be the case in village *masha'*, but Khirbet Beit Lid lands, since land settlement was carried out on them, ceased to be village *masha'*."

It is this submission which Mr. Levin attacks.

In the Court below the Plaintiff's advocate called the Plaintiff as a witness. In cross-examination the Plaintiff said:—

> "The lands are held by the co-owners in *masha'* shares, but the owners partitioned the lands by consent."

In re-examination he said:—

> "My shares in the land are *masha'* and not partitioned, but there is *Muhaya'a* for cultivation and plantation purposes only."

The Plaintiff's advocate also called one Shahir Damin, a clerk of the Land Registry Office, Tulkarm, as a witness. This witness said in evidence that the lands of Khirbet Beit Lid are registered as village *masha'* and owned by persons other than the people of the village. He went on to say:—

> "They are known as '*Masha'* Beit Lid'. The lands consist of ten blocks. The Plaintiff owns a *masha'* share in four out of the ten blocks."

Mr. Berouti, for the Respondents, says that in the *kushan* (or title deed) it is not stated that the lands are *masha'*. In Land Appeal 59/1927 this Court said:—

> "Article 8 of the Land Code intended that where the whole land of a village was held in undivided shares, it should be partitioned, and that each of the persons entitled should be given a separate piece of land and a *kushan* for it.
>
> After this step has been taken the provisions of Articles 41 and 42 would apply to land which by devolution on death or otherwise passed into joint ownership; but we hold that until the provisions of Article 8 are complied with, Articles 41 and 42 do not apply, and a person who holds an undivided share in the general *masha'* of a village cannot invoke their aid and claim priority of purchase (*awlawiyeh*)."

Under section 2 of the Land (Settlement of Title) Ordinance village *masha'* is defined as meaning the "lands of a village or of a section of a village held in undivided ownership and periodically distributed for cultivation among the inhabitants of the village or of a section thereof." I agree that these lands had ceased to be village *masha'*. One reason

which I would give is that, after the second Defendants (*i. e.* the K. K. L. Ltd.) had bought shares in the lands in question it ceased as a consequence to be village *masha'* within the meaning of that term as defined in section 2, Land (Settlement of Title) Ordinance, Cap. 80.

I attach to this judgment a copy of a translation into English of Articles 41 and 42 and 45, Ottoman Land Code, made by a person whom I believe to be competent.

Reverting to Land Appeal 59/27 I would say that the reasons given for the statement of the law in the concluding sentences of that judgment are not clear. I would, at this point, also remark that I am unable to agree with Mr. Levin's contention that Land Appeal 121/26 is clear authority for holding that the lands of Khirbet Beit Lid are *"Masha' el Balad"*. I do not consider that the evidence led by the Plaintiff at the trial of the action really affects the position in law. Although the point regarding these lands being village *masha'* and therefore not subject to Article 41 and Article 42 is a difficult one, I have not been persuaded by Mr. Levin's able argument that the Court below came to a wrong conclusion.

I now wish to deal with four grounds of appeal, namely grounds k, l, m and n, which are as follows:—

(k) The Court below erred in holding that the leases to Appellant No. 2 were made solely in order to defeat the right of *awlawiyeh* of Respondent.

(l) There was no evidence on which the Court below could find collusion regarding the leases to Appellant No. 2.

(m) The leases were made before the right of *awlawiyeh* as claimed by Respondent had even arisen.

(n) The Court below also erred in holding the leases to be voidable by reason of their having been made to a stranger without the consent of Respondent who is a co-owner since the provisions of the *Mejelle* in this respect are inapplicable to *miri* land.

I do not think that the Court below were justified in coming to the conclusion that the leases were executed with the sole intention of defeating the right of Respondent to *awlawiyeh*, nor do I think that the Court below were entitled on the evidence before them to hold that there was collusion. Nevertheless, in my view, it is only ground (n) which really affects this appeal. The Keren Kayemeth Leisrael Ltd., on 20th September, 1943, leased their shares to the 3rd Defendant (Jacob Barazani) for a period of 25 years at a rent of LP. 1 *per annum*. On 1st November, 1944, the Keren Kayemeth Leisrael transferred its

12 shares out of 530 shares in each of the four parcels of land mentioned in para. 4 of the statement of claim to the first Defendants (Hemnutah Ltd.). This transfer was expressed to be effected subject to the leases just referred to. It is not denied by the Appellants that the K. K. L. Ltd. bought the land on 20th September, 1943, and that, on the very same day they entered into the leases already referred to, and that on 1st November, 1944, they "exchanged" these shares for other land with Hemnutah Ltd. Now, it has to be noted that the exchange to Hemnutah took place more than thirteen months after the leases were entered into, that is to say, more than a year later. This is of significance, having regard to the period of one year specified in Article 41 as amended by section 6 Land Law (Amendment) Ordinance, Cap. 78.

In my judgment, because of the fact that a period of thirteen months had elapsed between the making of the lease and the exchange to Hemnutah Ltd., there was no ground for the finding of the Court below that the leases were collusive. With that part of the judgment of the Court below dealing with this point I am, accordingly, not in agreement. Mr. Berouti, for the Respondent, has invited us not to follow C. A. 459/44, Vol. 12 P. L. R., page 134, Mr. Berouti's argument being that this Court was not entitled to hold that "the *Mejelle* does not deal with immovable property of the *miri* category."

Whatever views I personally may have as to the correctness or otherwise of the decision in C. A. 459/44, it would require much stronger argument than that presented to us to justify me in not following that decision, which was given less than two years ago. In this connection I refer to C. A. 236/42, Vol. 10, P. L. R. page 383, especially para. 16 at page 390 of the report.

I also refer to C. A. 364 and C. A. 365 of 1944, Vol. 12, P. L. R., page 152. I am accordingly of the opinion that the leases are valid.

On 26th June, 1946, during the course of the trial of the action, the Court below gave a ruling that companies, as well as natural persons, are subject to the provisions of Articles 41 and 42 of the Ottoman Land Code. With that ruling I see no reason to differ. Nor do I feel able to quarrel with their finding that there is no difference between an "exchange" and a "transfer" for a consideration (in other words, a "sale"). Although the points raised by this appeal have undoubtedly been difficult and although, speaking for myself, I am by no means certain that there may not be much in the arguments of Mr. Levin and Dr. Eliash respectively, yet I do not feel that I can honestly say that the conclusions reached by the Court below, or the reasoning on which they are based, are wrong. I would accordingly vary the judg-

ment of the Court below by deleting para. (a) of the operative part of the judgment, that is, the part ordering cancellation of the four leases registered in the name of Defendant No. 3 under Deeds Nos. 1137, 1139, 1142 and 1144 of 20th September, 1943, and by adding to para. (b) the words "this registration shall be subject to the continuance of the four leases specified in the last preceding paragraph, *viz.* para. (a)." The words in para. (c), one month from the date of this judgment, will be understood as meaning one month from today, *i. e.* 10th February, 1946. Subject to the foregoing amendments I would dismiss this appeal. The first Appellants will pay one set of costs to the first Respondent, to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 25.

Delivered this 10th day of February, 1947.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

TRANSLATION FROM TURKISH OTTOMAN LAND CODE.

"*Article* 41. A person in possession of land in partnership with others cannot transfer his share *gratis* or in consideration of payment without the permission of his *khalit* (*i. e.* joint owner of a servitude) or his partner; otherwise that partner shall have the right, within the period of five years, to acquire that share, on payment of its equivalent value (*Badl el-misl*) at the time of the claim, from the person who has acquired it. Even if these five years have elapsed when the excuses of minority, unsoundness of mind, or absence on a journey exist, the right to claim shall not subsist after the lapse of the said period. But if, at the time of the transfer, the said partner has renounced his right, either by giving his permission or by failing to take the share when offered to him, he cannot afterwards make a claim.

Addendum, dated 19 *Shaban* 1291.

If the partner or *khalit* dies within the said five years, those of his heirs having the right of succession shall have the right to acquire the land in the above manner from the transferee; and if the transferee dies, then the partner and *khalit* shall have the right to take the land from the transferee's heirs having the right of succession. And if both the partner (or *khalit*) and transferee die, the partners' and *khalits'* heirs having the right of succession shall have the right and power to acquire the land, in the manner described above, from the transferees' heirs having the right of succession.

Article 42. If one of three or more partners desires to transfer his share to another, one partner may not be preferred to the others. If the other partners claim the share they shall have the right to take it in partnership.

If one of the partners transfers his share entirely to one of his partners, the other partners shall each have the right to acquire his proportionate share.

The provisions given in the preceding article apply also to them.

45. Lands lying within the boundaries of a village and possessed by *Tapu* deed, if the person in possession of such land transfers it to an inhabitant of another village, the inhabitants of the village where the lands lie who are in need of the land have the right, within the period of one year, to claim the lands at the equivalent value."

(Sgd.) *D. Edwards.*

CIVIL APPEAL No. 195/46.

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

BEFORE: Edwards, Shaw and De Comarmond, JJ.

IN THE APPEAL OF:—

Ahmad Shehadeh Abu Kana & 70 ors. APPELLANTS.

v.

Keren Kayemeth Leisrael Ltd. RESPONDENT.

Awlawiyeh — Land Code, Art. 45 — Land held by title deed — C. A. 229/40 — Companies as "inhabitants of another village" — Evidence of zarourat.

Appeal from the judgment of the Land Court of Haifa, dated 9th May, 1946, given in Land Case No. 47/45, dismissed:—

1. *Semble* "land possessed by title deed" (Art. 45) means registered land.
2. In view of the wording of Art. 45, a company is not an inhabitant of another village for the purpose of a claim for *awlawiyeh* under Art. 45.

(*A. M. A.*)

REFERRED TO: C. A. 229/40 (8, P. L. R. 48; 1941, S. C. J. 166; 9, Ct. L. R. 117).

ANNOTATIONS:

1. The judgment of the Land Court is reported in 1946, S. C. D. C., at p. 289.
2. See notes 1 & 2 to the Land Court judgment and *cf.* C. A. 289/46 (*supra*, p. 144) and C. A. 220/46 (*infra* p. 153).

(*H. K.*)

FOR APPELLANTS: Cattan & S. Khadra.

FOR RESPONDENT: Eliash, Ben Shemesh, Feiglin and Scharf.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the Land Court of Haifa dated 9th May, 1946, in Land Case 47/45 whereby the Appellants' claim for *awlawiyeh* under Article 45 Ottoman Land Code was dismissed. The learned trial Judge found for the Appellants on

certain grounds and I see no reason for disagreeing with his findings thereon. One reason why the learned trial Judge held that the Appellants' claim must fail was because they did not prove that the heirs of one Wadi Bishara Azam did in fact possess by virtue of a title deed. The contention of the Appellants' advocate at the Bar before us was that, on a proper construction of Article 45, it was not necessary for his clients to prove that there was in fact a title deed in existence but merely that the land was of the category for which a title deed was usually granted. The learned trial Judge said he realised that it might well be argued that since the Land Settlement Officer was satisfied that a good transfer of title had been effected by way of renunciation given by the heirs of Wadi in favour of the present Respondent there was enough material to entitle one to assume that they did in fact own the land by virtue of a title deed. The learned trial Judge went on to say that he was not satisfied that he should assume this in favour of the Plaintiffs. He said "if there was a title deed it was surely susceptible of proof. I think that this point must be resolved in favour of the Defendant."

I have obtained and I attach to this judgment * what I believe to be an accurate translation from the Turkish of Article 45 where the relevant words appear in English as follows:—

"Lands possessed by a title deed ... *etc.*"

Mr. Cattan has argued that possessing by title deed means merely that the land is *miri* and must be registered and does not mean that one must actually have a title deed. If the case depended on this point alone I would be inclined to think that Judge Bourke required too much when he required actual proof of the existence of a title deed.

The next important point is that the learned trial Judge was of opinion that a company, although it may be a juristic person, was not a natural person but an artificial one, and he went on to hold that the Court should not lean towards any extension of the interpretation of the words used in Article 45 so as to include a company. The learned trial Judge admitted that the present Respondents were the Defendants in Civil Appeal 229 of 1940 Vol. 8 P. L. R. (1941) p. 48, in a case under Article 45, but he held that, as the point does not appear to have been taken before the Court of first instance in that case, and was not dealt with by this Court on appeal, there is no direct authority on this point. He accordingly held that he was free to decide

* Omitted as the translation is given following the judgment in C. A. 289/46 (*supra*), p. 144.

the point in favour of the present Respondents. In my view, one reason for the silence of the Courts hitherto may well be that it never occurred to anyone to argue that Article 41 did not apply to companies. We understand that at one time companies under the Ottoman Law were not allowed to own land but that subsequent legislation enabled them to do so. Speaking for myself, I fail to see why a company which was at one time under a disability, that is, the disability of not being capable of owning land should, after that disability had been removed by legislation, be in a better position with regard to prior purchase than a natural person. If the matter depended on this point I would, with respect, disagree with Judge Bourke. I am, however, in agreement with Judge Bourke when he held that a company could not be regarded as an "inhabitant of another village" for the purpose of Article 45.

The next ground of appeal is that the learned Judge erred in holding that there was insufficient evidence to prove that the present Appellants were in need of (*zarourat*) the land. While it may be easy to say that people who have left a village temporarily in order to work as labourers with employers such as the Iraq Petroleum Company or as constables in the Police Force and so on, may later legitimately declare that they are tired of working as labourers or as policemen and that they properly wish to return to the land and own land, it seems to me that this must always be a matter of fact to be decided on the peculiar circumstances of each case. The learned trial Judge dealt with this matter at page 5 of the typewritten copy of the judgment and I am unable to hold that his finding is one with which an appellate Court should interfere. For these reasons I think that the appeal should be dismissed with costs on the lower scale to include an advocate's attendance fee at the hearing of LP. 25.—.

Delivered this 10th day of February, 1947.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 220/46.

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

BEFORE: Edwards, Shaw and De Comarmond, JJ.

IN THE APPEAL OF:—

Salah Said el Nahawi. APPELLANT.

v.

Keren Kayemeth Leisrael Ltd. RESPONDENT.

Awlawiyeh — C. A. 226/44, C. A. 70/44 — Whether it applies to companies — C. A. 195/46 — Land Code Arts. 41 and 45.

Appeal from the judgment of the Land Court of Haifa given in Land Case No. 28/45 on the 28th day of May, 1946, allowed:—

For the purpose of a claim for *awlawiyeh* under Art. 41 of the Land Code, a company is in no better position than a private individual.

(*A. M. A.*)

REFERRED TO: C. A. 70/44 (11, P. L. R. 367; 1944, A. L. R. 426); C. A. 226/44 (12, P. L. R. 10; 1945, A. L. R. 30).

FOLLOWED: C. A. 195/46 (*ante*, p. 150).

ANNOTATIONS:

1. The judgment of the Land Court is reported in 1946, S. C. D. C., at p. 313.

2. See C. A. 195/46 (*supra*) and note 2 thereto.

(*H. K.*)

FOR APPELLANT: Cattan and S. Khadra.

FOR RESPONDENT: Eliash, Benshemesh Feiglin and Scharf.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the Land Court of Haifa dated 28th May, 1946, in Land Case 28/45 dismissing the Appellants' claim for prior purchase under Article 41 Ottoman Land Code. The learned trial Judge at the beginning of his judgment referred to the words used by Frumkin, J., in Civil Appeal 226 of 1944 Annotated Law Reports (1945) at page 33. He also referred to Civil Appeal 70/1944 Vol. 11 P. L. R. 1944 pp. 367 and 369 which dealt with actions for "*shuf'a*" under the *Mejelle*. For the sake of convenience I append * to this judgment a copy of a translation from the Turkish

* Omitted as the translation is given following the judgment in C. A. 289/46 (*supra*), p. 144.

of Article 41 and 42 of the Ottoman Land Code made by one whom I believe to be reliable.

The principal matter argued in this appeal is whether Article 41 can be said to apply to a juristic or artificial person such as a company. The learned trial Judge held that it did not. For all the reasons given by me in Civil Appeal 195/46 I am unable to agree with the learned trial Judge when he held that a company is not an owner of an undivided share within the meaning of Article 41. Civil Appeal 195/46 dealt, of course, with a claim under Article 45 while we are now dealing with a claim under Article 41. The learned trial Judge dealt at length with the matter at pages 4 and 5 of the typed copy of his judgment. While there is much that is attractive in his reasoning I am unable to conclude that a company should be in a better position than any other owner of an undivided share in so far as Article 41 is concerned. The other issues were determined by the learned trial Judge in favour of the Plaintiff (Appellant). I would accordingly allow the appeal, set aside the judgment of the 28th May, 1946, and enter judgment for the Plaintiff as follows, namely — order registration in the name of Plaintiff of 24843 out of 103822 shares in the entire seven parcels specified in Part 3 of the statement of claim but such registration to be carried out only on Plaintiff depositing in Court within two months from today the sum of LP. 10,477.547 in which case the registration standing now in the names of the Respondents shall be altered accordingly. I further order that if the Plaintiff fails to pay the said amount within two months from today he shall forfeit the right of *awlawiyeh*.

The Respondents must pay Appellant's costs here and below, the costs of this appeal to be taxed on the lower scale, to include an advocate's attendance fee at the hearing of LP. 25.—. We fix the Appellant's costs in the Court below at fixed (or inclusive) costs of LP. 40.

Delivered this 10th day of February, 1947.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 287/46.

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

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

IN THE APPEAL OF:—

Hasan Asad Fahel. APPELLANT.

v.

Ahmad Abdula Zu'bi & an. RESPONDENTS.

Awlawiyeh — C. A. 399/44, C. A. 245/40 — Applies to towns — Houses follow the land.

Appeal from the judgment of the Magistrate's Court of Beisan, sitting as a Land Court, dated 18.7.46 in Land Case No. 1/46, allowed:—

1. *Awlawiyeh* may be claimed in urban as well as in rural areas.

2. A house acquires the status of the land on which it is built and is subject to the law relating to the disposition of the land.

(*A. M. A.*)

FOLLOWED: C. A. 245/40 (8, P. L. R. 8; 1941, S. C. J. 65; 9, Ct. L. R. 151).

DISTINGUISHED: C. A. 399/44 (12, P. L. R. 416; 1945, A. L. R. 492).

ANNOTATIONS: *Cf.* C. A. 220/46 (*ante*, p. 153) and cases therein cited.

(*H. K.*)

FOR APPELLANT: G. Elia.

FOR RESPONDENTS: No. 1 — F. Atallah.
No. 2 — Absent — served.

JUDGMENT.

This is an appeal from a judgment of the Magistrate of Beisan sitting as a Land Court. The Magistrate taking his stand on Civil Appeal No. 399/44 gave judgment in favour of the Respondents in a claim for *awlawiyeh* preferred by the Appellants. We think, however, that the learned Magistrate failed adequately to appreciate what exactly it was that Civil Appeal No. 399/44 decided. That judgment was to the effect that a claim to *awlawiyeh* is confined to *miri* land, and does not extend to things fixed to the land if such things do not carry with them rights in the land. The only rights claimed in that case by the person who preferred a claim for *awlawiyeh* were certain rights to draw water from a well. The claimant never averred that he had any rights over the land. In this case the person claiming *awlawiyeh* claims it over a house and over the land on which the house stands. Now whatever merits there may be in the arguments of the Respondents, this particular

case appears to us to be covered by authority which binds this Court. The two main points advanced by Fuad Bey were firstly that this law of *awlawiyeh* was originally not intended to apply to towns, in other words, it did not contemplate the progress of modern Palestine. We think indeed that there is much substance in this but the remedy is a matter for the legislature. Civil Appeal 245 of 1940 clearly decided that the principle of *awlawiyeh* applies equally to town and urban areas. Moreover it is clear from the Law of Disposition of Immovable Property of 1331 that a house built upon land acquires the status of the land and for the purpose of disposition it is subject to the law governing the disposition of the land. This, it may be remarked, brings it into line with the law of England on the subject.

For these reasons we are of opinion that this appeal must be allowed. The case must however be remitted to the Magistrate on one point only, that is to estimate the value of the land for the purpose of *awlawiyeh*. The Appellant will have the costs of this appeal of LP. 10.

Delivered this 27th day of January, 1947.

Chief Justice.

CRIMINAL APPEAL No. 130/46.

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

BEFORE: Edwards, De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

Moshe Gelfand. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Successive informations, T. U. I. sec. 28(9), 28(5)(*b*), 28(6) — *"Disjunctively", Interpretation Ord., sec.* 4 — *Arson — Circumstantial evidence, R. v. Dickman.*

Appeal from the judgment of the District Court of Tel-Aviv given in Criminal Case No. 36/46 and delivered on the 4th day of November, 1946, whereby the Appellant was convicted and sentenced to three years imprisonment with hard labour, dismissed:—

Sec. 28(5) of the Trial Upon Information Ordinance may be used not only if the Magistrate has refused to commit at all but also where he has refused to commit on one of a number of charges.

(*A. M. A.*)

REFERRED TO: CR. A. 17/38 (5, P. L. R. 249; 1938, 1 S. C. J. 214; 3, Ct. L. R. 198); R. *v.* Dickman, 1910, 74 J. P. 449; 26, T. L. R. 640; 5, Cr. App. Rep. 135.

ANNOTATIONS:

1. The order of the District Court is reported in 1946, S. C. D. C., at p. 701.
2. *Cf.* Cr. D. C. Ha. 145/46 (1946, S. C. D. C. 667) and note thereto.
3. On circumstantial evidence in criminal cases see CR. A. 121/46 (*ante*, p. 59) and note 1.

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Asst. Govt. Advocate — (Kokia).

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv whereby the Appellant was convicted of the offence of setting fire to goods in a building contrary to section 321 Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment.

The first ground of appeal is a highly technical one with regard to the information. At the trial, before the Accused was called upon to plead, Dr. Eliash, the Accused's advocate, applied to the Court to quash the information. After hearing legal argument, the learned Relieving President overruled the objection holding that the information was good. The history of the matter is as follows, namely, the Magistrate at Tel-Aviv had held a preliminary inquiry at which the present Appellant and one Haim Gradman were charged with three offences, namely, offences contrary to section 321, 34 and 301 of the Criminal Code Ordinance, 1936 (hereinafter referred to as the Criminal Code). On 4th February, 1945, the Magistrate refused to commit for trial on the charge under section 321, he being of opinion that there was insufficient evidence to justify committal, but did commit on the other two charges. On 30th April, 1945, the Attorney General filed an information in which both Accused were charged on three counts corresponding to all the three charges already mentioned; but on 20th June, 1945, a second information was filed replacing the one of 30th April in which new information the charge under section 321 was omitted. The authority for such replacement was section 28(9) Criminal Procedure (Trial Upon Information) Ordinance (hereinafter referred to as the "T. Upon I. Ordinance"). The trial Court proceeded against both Accused on the counts under sections 34 and 301 of the Criminal Code. On 3rd July, 1945, both Accused were acquitted on both counts. Later, as a result of fresh information coming to light or fresh evidence being available, the Attorney General, purporting to act under section

28(5)(b) T. Upon I. Ordinance as amended by the Criminal Procedure (Trial Upon Information) (Amendment) Ordinance, 1944, (hereinafter referred to as "the 1944 Ordinance"), made an order directing the Magistrate to take further evidence with a view to committal on the charge under section 321. Further evidence was recorded on 13th January, 1946, and the Appellant was committed for trial on the charge under section 321. On 14th April, 1946, the information, the subject of the present trial, was filed and it was that information which Dr. Eliash asked the trial Court to quash. His argument before the trial Court and before us was that section 28(5) of the T. Upon I. Ordinance and section 28(6) make provision for two alternative possibilities. He says that 28(5) only applies where a Magistrate has refused to commit at all. In other words, sub-section (5) applies only when the accused person has walked out of the Magistrate's Court "scot free" and he contends further that his argument is supported by the appearance of the word "disjunctively" in section 4 of the Interpretation Ordinance. He says that the argument of the Crown, if upheld, will create a position where one would have to substitute the word "joint" for the word "disjunctive" and this is contrary to section 4 Interpretation Ordinance. He contends that one cannot in the same case apply both section 28(5) and section 28(6). He says that the word "where" means a set of circumstances. In our view, however, the draftsman who drafted both section 28(5) and 28(6) had in view a preliminary inquiry where there was only one charge in the charge sheet. In our view, the words "or any other offence" in line 3 of sub-section (5) mean any offence with which the Accused was not charged by the police at the preliminary inquiry. In applying sub-section (5) and sub-section (6) therefore we must consider each particular offence as standing alone. We are accordingly unable to agree with Dr. Eliash in saying that the Attorney General could not make an order for further evidence to be taken under section 28(5)(b). We think that the refusal to commit and the two committals could properly be regarded as distinct, although the three charges were on one charge-sheet, that is to say, with regard to the refusal to commit on the charge under section 321 the Attorney General had the powers conferred by section 28(5) and with regard to the two committals he had the powers conferred by section 28(6). We accordingly hold that the learned trial Judge was right in refusing to quash the information.

We come now to the facts. The position was that the Appellant was a partner with one Haim Gradman in a firm known as "Tropic" which carried on the business of manufacturing and selling pith sun-helmets. The Accused insured a store rented by the firm in which some of the

firm's goods were deposited. The allegation of the Prosecution was that he deliberately set fire to a small quantity of the firm's goods, which were stored therein, then submitted a grossly exaggerated claim to the insurance company.

— — — — — — — — — — —*

Dr. Eliash in saying that the circumstantial evidence was not sufficient has relied on Criminal Appeal 17/38 reported at page 132 of Mr. Kantrovitch's Book, "Cases on the Law of Evidence." He also cited the English and Empire Digest Vol. 14 page 358 No. 3767. The learned trial Judge realised the necessity of care because he said in his judgment "Where the evidence is all circumstantial as it is here, it must point unequivocally and exclusively to the guilt of the Accused before it is safe to record a conviction. Has the prosecution discharged the onus upon it? I think that it has." He then goes on to recapitulate the facts which led him to his final conclusion that, to use his own words, "it would be quite unreasonable, indeed quite fanciful, to conclude that any person, other than the Accused, set fire to the goods in this case."

We think that it will not be out of place if we here quote from the Summing Up to the Jury by Mr. Justice Coleridge in the case of R. *v.* Dickman (1910); but, before we quote, we would say that that case went to the Court of Criminal Appeal where the summing up was impliedly approved. The Court of Criminal Appeal said:—

> "The evidence was entirely circumstantial but circumstantial evidence derived from admitted facts proved against a person charged is often most reliable, because it is not likely to be invented, and if invented, would in all probability not fit in with the admitted facts."

We now quote from Mr. Justice Coleridge's summing up as reported at page 185 of the "Trial of Dickman" in the Notable English Trials Series published in 1914:—

> "It is perfectly true, as the prosecution say in this case, that this is a case of circumstantial evidence and circumstantial evidence alone. Now, circumstantial evidence varies infinitely in its strength in proportion to the character and variety, the cogency, the independence, one of another, of the circumstances; I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and unsubstantial as the very air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents, through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its textures that no efforts on the part of the accused can break through. It may come to nothing. On the other hand, it may be absolutely convincing. If we find a variety of circumstances all pointing in the same direction, convincing in proportion to the number and variety of those circum-

* Omitted as dealing with the facts only. (*Ed.*)

> stances and their independence one of another, although each separate piece of evidence, standing by itself, may admit of an innocent interpretation, yet the cumulative effect of such evidence may be, I do not say that it is, overwhelming proof of guilt. The law does not demand that you should act upon certainties and certainties alone. In the passage of our lives, in our acts, in our thoughts, we do not deal with certainties. We ought to act — we do, in fact act — on just and reasonable grounds. Juries ought to act upon the evidence. The law asks for no more, and the law demands no less. Gentlemen, if upon a grave and careful purview of the facts any reasonable doubt assail your minds, the prisoner is entitled to go free. The prosecution are bound to allay such doubts and to convince you of the truth of the accusation which they bring. Ask yourselves, then, what is the cumulative effect upon your minds, of so many, so varied, so independent pieces of evidence, all pointing, it is said, in *one* direction, all tending, it is said, to inculpate the prisoner, and the prisoner alone, in the commission of this crime. Summon to your aid your just and ordered reason. If it tells you that the guilt of the prisoner is reasonably proved, then the law and the oath which you have taken alike demand that you should act with firmness and with courage."

Applying these principles we think that the conviction was amply warranted.

As regards sentence the trial Judge said that he could not overlook the fact that the fire occurred in a store which adjoined an inhabited house where children were sleeping. In the circumstances, we do not think that a sentence of three years imprisonment was excessive. The appeal is accordingly dismissed.

The attention of the trial Court is directed to the provisions of section 37(b) and 39(1) Criminal Code Ordinance.

Delivered this 18th day of December, 1946.

British Puisne Judge.

Dr. Eliash: I ask for special treatment. Accused's antecedents. Respectable middle class merchant; no previous convictions. Accustomed to a decent way of living. Section 40 Criminal Code Ordinance.

The sentence was wrong; so I had to appeal.

The sentence was to "hard labour", which was wrong. First offence. I ask that the sentence run from date of conviction.

Kokia: I am instructed to oppose. The trial Court alone can order special treatment.

ORDER.

We think that we have power to allow special treatment under section 72(1)(b) Cap. 36. The sentence will run from to-day with special treatment.

Given this 18th day of December, 1946.

British Puisne Judge.

CIVIL APPEAL No. 62/46.

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

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

IN THE APPEAL OF:—

Raja Boury. APPELLANT.

v.

The Attorney General. RESPONDENT.

Prescription — Action statute barred under C. C. O. 388(2) — Failure to plead prescription in defence, C. P. R. 113 — Scope of C. P. R. 21A — C. C. O. 388 explained.

Appeal from the judgment of the District Court of Haifa in Civil Case No. 164/42, dismissed:—

1. C. P. R. r. 21A may be invoked where it is contended that the action is statute-barred.

2. Failure to plead prescription in the defence does not estop a defendant from applying for the action to be struck out on that ground, under C. P. R., r. 21A.

3. An order under sec. 388 C. C. O. may be made for the deposit of the property in Court, even if the owner thereof is ascertainable.

(*A. M. A.*)

ANNOTATIONS:

1. "It may be useful to observe that in England such a defence (*i. e.* the defence of statutory limitation under sec. 12(4) of the Government Railways Ord., 1936) has to be pleaded. At the time when this action was commenced the Civil Procedure Rules were not in force, but we now have Rule 113, the marginal note to which is misleading": C. A. 18/39 (6, P. L. R. 247; 1939, S. C. J. 247; 5, Ct. L. R. 241), *per* Trusted, C. J.

2. As regards the inapplicability of the *ejusdem generis* rule to the words "or on any other ground" in r. 21A of the C. P. R. see Mo. L. C. Jm. 246/46 (1946, S. C. D. C. 783 and note 4.

3. On sec. 388 of the C. C. O. *cf.* C. A. D. C. T. A. 172/46 (1946, S. C. D. C. 556) and note 1.

(*H. K.*)

FOR APPELLANT: Wittkowski.

FOR RESPONDENT: Tscherniak.

JUDGMENT.

This is an appeal by the Plaintiff in Civil Case No. 164/42 of the Haifa District Court. The learned President of the District Court dismissed the action on a motion made by the Defendant under rules 21A and 305 of the Civil Procedure Rules, 1938. The motion was

based on the averment that the claim was time-barred under section 388(2) of the Criminal Code Ordinance, 1936.

Put shortly, the facts are that in 1940 the present Appellant complained that two of his employees had been robbed of 290 gold sovereigns belonging to him. Four persons were tried in respect of the alleged offence but were acquitted. In the course of the police investigation, 120 sovereigns were handed to the Police, and when the suspects were acquitted the Court of trial ordered the gold coins to be offered for sale to the High Commissioner, as provided by the Defence (Finance) Regulations, 1941, and the proceeds returned to the owners. The proceeds (LP. 225.491) were in fact returned to the District Court and, in December, 1941, the Appellant applied under section 388 of the Criminal Code Ordinance for delivery to him of the proceeds aforesaid. This application was dealt with by the District Court of Haifa which decided on the 11th February, 1942, that it had not been established who was the owner of the gold coins and that the Appellant (then the Applicant) was not entitled to a finding in his favour. The decision went on to order that the proceeds should be forfeited to the Government under the aforementioned section 388. The Appellant filed a statement of claim on the 17th August, 1942, *i. e.* more than six months after the order of the 11th February, and cited the Attorney General as Defendant.

The Defendant did not specifically raise the plea that the action was statute barred, but when the issues were settled on the 24th September, 1943, one of the issues set down was "whether in view of the order made by the Haifa District Court on the 11th February, 1942, this action is barred."

Mr. Wittkowski for the Appellant has referred to the first two grounds of appeal and submitted that the Defendant-Respondent had not pleaded limitation of action as required by rule 113 of the Civil Procedure Rules, and the learned counsel also argued that Civil Procedure Rule 21A did not apply.

We do not think that the last mentioned argument is wellfounded, being given that rule 21A refers to *res judicata*, want of jurisdiction and any other ground on which it may appear to the Court that the suit ought to be dismissed *in limine*.

We do agree, however, that the Defendant did not specifically plead that the action was statute-barred, but this is obviously a defect curable by amendment and we do not consider the defect fatal. The plea was clearly raised when motion was made under rule 21A and the Plaintiff would have been intitled, had he so requested, to insist on a formal

amendment and to have the matter adjourned if he was not ready. We therefore hold that the appeal fails on the two grounds mentioned above.

With regard to the other grounds of appeal, we need only consider two points which were fully argued before us.

The first point is whether section 388 does apply. Mr. Wittkowski, for the Appellant, says that under section 388(1) the Court of trial may either order the delivery of the property to the person appearing to the Court to be the owner thereof, or, if the owner cannot be ascertained, make such order as may seem meet. His submission was that, where the owner could not be ascertained, the ownership of the property remained at large, and that the Plaintiff in this case was entitled to bring an action irrespective of the provisions of section 388.

Mr. Wittkowski's second point was that the period of limitation fixed by section 388(2) only applies in cases where the owner is ascertained and an order of delivery is made in his favour.

Section 388 of the Criminal Code Ordinance is similar to section 1 of the Police (Property) Act, 1897, but the said Act also contains provisions enabling the Secretary of State to make regulations for the disposal of property which has come into the possession of the Police under the circumstances mentioned in the Act (and in our section 388) in cases where the owner of the property has not been ascertained and no order of a competent Court has been made with respect thereto.

In England regulations have been made by the Secretary of State on the 14th February, 1898, and in Palestine such regulations could be made under section 50(1)(b) of the Police Ordinance, but the important point is that those regulations are designed for use where the owner of the goods has not been ascertained and no order of a competent Court has been made.

In the present case an order was made and was never rescinded or altered, and we are of opinion that the said order which vested the proceeds of the property in the Government must hold good unless appealed from within six months.

We therefore decide that the appeal must fail and it is hereby dismissed with costs on the lower scale to include LP. 5.— advocate's attendance fee.

Delivered this 24th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 117/46.

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

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPEAL OF:—

Zeev Sugerman. APPELLANT.

v.

Ali Khalil Shehadeh Abu Sway & 8 ors. RESPONDENTS.

Land Transfer Regulations — Awlawiyeh, whether exercise of right amounts to "consolidation" — Reg. 3(c).

Appeal from the judgment of the Land Court of Jerusalem in Land Case No. 8/44 dated 19th March, 1946, dismissed:—

The exercise of a right of *awlawiyeh* is taken away by the Land Transfer Regulation if the claimant is not a Palestinian Arab. Such a claim seeks to increase the claimant's holdings, not to "consolidate" them within the meaning of Reg. 3(c).

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the Land Court is reported in 1946, S. C. D. C., at p. 358.
2. See note 1 to the judgment under appeal and *cf.* also C. A. 245/45 (13, P. L. R. 241; 1946, A. L. R. 507).

(*H. K.*)

FOR APPELLANT: Eliash — (by delegation from A. Rand).

FOR RESPONDENTS: Y. Hammudeh.

JUDGMENT.

This is an appeal from the judgment dated 19.3.46 of the Land Court, Jerusalem in Land Case No. 8/44.

The Appellant owns *masha'a* shares in land situated in Zone A where the transfer of land save to a Palestinian Arab is prohibited by the Land Transfers Regulations, 1940, (Supplement No. 2 (1940) p. 327). Clause 3(c) of those Regulations, however, provides that the High Commissioner, if he considers it desirable to do so, may permit the transfer of such land to persons not being Palestinian Arabs if in his opinion such transfer is necessary for the purpose of consolidating existing holdings.

The question to be decided is whether the exercise by the Appellant (who is not a Palestinian Arab) of a right of *awlawiyeh* under Article 41 of the Ottoman Land Law is a consolidation of his existing holdings.

Having considered the submissions of the advocates for the parties we are unable to find that this could be regarded as a consolidation, within the meaning of the Land Transfer Regulations.

What the Appellant is really seeking is to increase the shares which he holds in the land.

Holding as we do this view in regard to the meaning of the term "consolidation" we feel that the learned Judge below was right in dismissing the action because any right of *awlawiyeh* that the Appellant might have had in this land has been taken away as a result of the Land Transfers Regulations, 1940. In the result the appeal must be dismissed with costs on the lower scale to include an advocate's fee of LP. 5.— for attendance at the hearing.

Delivered this 12th day of February, 1947.

British Puisne Judge.

CIVIL APPEAL No. 63/46.

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

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

IN THE APPEAL OF:—

Elias Thos. Gelat & George E. Berouti in their capacity as trustees of the property of Mr. Nicolas Berouti (Bankrupt). APPELLANTS.

v.

Elias Cezar Araktingi. RESPONDENT.

Bankruptcy — Application by trustee to set aside a transaction effected by the bankrupt — Fraud — Sale of property mortgaged by the bankrupt, L. T. O., sec. 14(1)(b) — No objections by bankrupt — Collusion — Sale with a condition to repurchase, C. A. 223/40, as affected by the Mortgage Law (Amendment) Ordinance — Irregularities in the sale.

Appeal from the judgment of the Land Court of Jaffa, dated 28th February, 1946, in Land Case No. 41/44, dismissed:—

1. There is nothing to prevent a mortgagor from accepting consideration from the mortgagee not to oppose the sale proceedings.

2. If the parties also agree that the mortgagor should subsequently be entitled to repurchase the property for the same price, this does not make the transaction a *faragh bil wafa.*

(*A. M. A.*)

REFERRED TO: C. A. 223/40 (7, P. L. R. 610; 1940, S. C. J. 459; 9, Ct. L. R. 5).

ANNOTATIONS:

1. *Vide* secs. 42 & 43 of the Bankruptcy Ordinance and the notes thereto in Annotated Laws of Palestine, Vol. 2, pp. 321—3.

2. On *bei bil wafa* and *faragh bil wafa* see note 1 to C. A. 175/46 (1946, A. L. R. 774).

(*H. K.*,

FOR APPELLANTS: Cattan and Mulky.

FOR RESPONDENTS: Eliash.

JUDGMENT.

This is an appeal from the judgment dated 28.2.46 of the Land Court of Jaffa in case No. 41/44, whereby the Appellants' claim for cancellation of the registration in the name of the Respondent of certain land and for registration of the said land in the names of the Appellants as trustees in the bankruptcy of Nicolas Berouti, was dismissed with costs.

The principal ground of appeal, and one that was argued at considerable length by Mr. Cattan for the Appellants, was that the Court of trial erred in finding that there was no evidence of fraud in the transaction made between Mr. Nicolas Berouti (the bankrupt) and the Respondent, whereby the Respondent obtained registration of the land in suit.

The land in question was transferred to the Respondent consequent upon a sale in the execution office of mortgaged property of which the Respondent was the mortgagee. The learned Judge in the Court below after a careful consideration of the evidence was unable to see any evidence of fraud.

Sec. 4 of the Land Courts Ordinance (Cap. 75) provides that no appeal shall lie from the judgment of a Land Court to the Court of Appeal save on a question of law, and unless we can say that the Court's finding that there was no fraud was one which no Court could reasonably come to on the evidence, we cannot upset it. But having ourselves carefully considered the evidence we find that the learned Judge came to the only possible conclusion on this point.

A mortgagee, after the period of the mortgage has expired and if the debt has not been paid, has a legal right to have the mortgaged property sold. Sec. 14(1)(b) of the Land Transfer Ordinance (Cap. 81) provides that:—

> "Application for the sale of immovable property ..... in satisfaction of a mortgage shall be made to the President of the District Court who, upon such application:—

(b) shall have power to order postponement of the sale if he is satisfied that the debtor has reasonable prospects of payment if given time, or that, having regard to all the circumstances of the case, including the deeds of the creditor, it would involve undue hardship to sell the property of the debtor."

In the present case the evidence shows that the mortgagor, namely the bankrupt Nicolas Berouti, who had been given an opportunity for submitting any proposal he might wish to submit with a view to getting a better price for the property, said that he could not find a higher bidder, and he did not ask for any further adjournment. In these circumstances there were no grounds whatsoever upon which the President of the District Court could have given a further adjournment. The mortgagee was asking for a remedy to which he had a legal right and the mortgagor was not asking the President of the District Court to exercise his discretion by granting an adjournment to enable him to pay the debt or to find a higher bidder. The order for final sale was made on 21.3.41 and it was not until December, 1941, that a bankruptcy notice was served on the mortgagor, a receiving order being made in May, 1942, and an order of adjudication in July.

Mr. Cattan has submitted that the Respondent had made a private agreement with the mortgagor not to oppose the sale, in order that the Respondent might buy the land at an unduly low price and so deprive the mortgagor's creditors of the benefit of his most valuable asset.

At the best, the evidence shows that the Respondent, by making an agreement with the mortgagor in pursuance of which the sum of LP. 1000 was paid to, or for the benefit of, the mortgagor, and by virtue of which the mortgagor had a right to repurchase the property after it had been sold in execution, persuaded the mortgagor not to ask for a further adjournment of the sale. That is to say, the Respondent by giving consideration to the mortgagor smoothed the way for a quick sale to which he was legally entitled. Of course, if it had been shown that the Respondent had improperly influenced the conduct of the sale proceedings with a view to defrauding the mortgagor's creditors, by obtaining the property for less than it would otherwise have fetched, the Court below would doubtless have upset the sale, but there was no evidence to show that the Respondent had done this. It may be that the Respondent was guilty of concealing facts when he gave evidence in connection with the bankruptcy proceedings (see Exh. P/14) but even if he did so, we do not think that an intention to defraud the creditors is necessarily to be inferred from what he did in order to obtain a quick sale.

Another submission made by Mr. Cattan was that as the mortgagor

had the right, in certain circumstances, to repurchase the property, the sale was in law a *faragh bil wafa* by virtue of which the mortgagor, and consequently the trustees, had the right at any time to recover the property by repaying the purchase price. He submits that it was a continuation of the mortgage relationship. He has referred us to C. A. 223/40 (7 P. L. R. 610) where it was held that whilst it was true that sec. 8 of the Mortgage Law (Amendment) Ordinance (Cap. 95) conferred on a purchaser in execution an indefeasible title as against the mortgagor, yet there was nothing to prevent the purchaser from making an agreement with the mortgagor to return the property to him on payment of the purchase price or as might be arranged.

It may be that if the mortgagor had come within the time stipulated in the agreement he might have been able to obtain an order for specific performance, but that is far from saying that the sale in execution was in fact a *faragh bil wafa* giving the seller the right to recover the property on repayment of the purchase price and without any limitation of time. The provisions of sec. 8 of the Mortgage Law (Amendment) Ordinance read as follows:—

> "Where immovable property is sold under the Ottoman Law the registration thereof in the name of the purchaser shall transfer to him all the estate and title of the mortgagor in the property mortgaged and, as against the mortgagor, the purchaser's title shall be indefeasible".

Mr. Cattan has further submitted that there were irregularities in the execution proceedings which vitiate those proceedings. One of the irregularities to which he refers is the fact that the valuation (LP. 5625) of the property which was submitted to the President of the District Court was taken from the file of the 2nd mortgage on this property and was less than the valuation (LP. 6791) in the file of the first mortgage. It appears, however, that the valuation which was submitted to the President of the District Court was, in fact, the later, and presumably the more correct, of the two valuations, and in any event we see no reason for thinking that if the President of the District Court had been shown the earlier valuation he would not have made the order for final sale. The other irregularity referred to by Mr. Cattan was the absence of a bidding list. With regard to this all that need be said is that there is no evidence that anybody except the Respondent made (or tried to make) a bid. The property was duly advertised and any person, including any creditor of the mortgagor, was at liberty to make a bid. The Respondent's bid was recorded, and while we do not want to give any encouragement to laxity in the keeping of these important files we do not think that the mere fact that the Respondent's bid was

not recorded in a list of a particular form affords any ground for upsetting the sale in this instance.

Mr. Cattan further argued that the transfer and registration of the property was void under the Bankruptcy Law, or under the common law. Having considered these arguments we find no merit in them.

In the result the appeal fails, and we dismiss it with costs on the lower scale to include an advocate's fee of LP. 25 for attendance at the hearing.

Delivered this 10th day of January, 1947.

Chief Justice.

CIVIL APPEAL No. 82/46.

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

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

IN THE APPEAL OF:—

Abd El Halim Ahmad Muhammad Abdullah. APPELLANT.

v.

Ruqiya Ahmad Muhammad Abdallah & 4 ors. RESPONDENTS.

Co-heirs — Adverse possession to rebut presumption of trusteeship — Length of period necessary to rebut presumption — C. A. 220/41, C. A. 104/42, C. A. 49/46 — Effect of period prior to the Land Law (Amendment) Ordinance, C. A. 49/46 explained.

Appeal from the decision of the Settlement Officer, Nazareth Settlement Area, in Case I/Ilut, dated 24.1.1946, dismissed:—

Although material, the length of the period within which no adverse claims are made is not conclusive to rebut the presumption that a person holds in trust for his co-heirs. That presumption applies with particular force where the heir in possession is a male and the claimant a female.

(*A. M. A.*)

REFERRED TO: C. A. 220/41 (9, P. L. R. 14; 1942, S. C. J. 11; 11, Ct. L. R. 9); C. A. 104/42 (1942, S. C. J. 483; 12, Ct. L. R. 55); C. A. 49/46 (13, P. L. R. 307; 1946, A. L. R. 711).

ANNOTATIONS: See the notes in A. L. R. to C. A. 49/46 (*supra*).

(*H. K.*)

FOR APPELLANT: W. Salah.

FOR RESPONDENTS: No. 1 — Elia and A. Daudi.
No. 2 and 3 — F. Atalla.
No. 4 — In person.
No. 5 — Absent — served.

JUDGMENT.

Curry, A/J.: This is an appeal from the decision of the Land Settlement Officer in respect of a claim of adverse possession as between co-heirs. The Appellant is the son and the Respondent the daughter of a common ancestor.

Although the Appellant has been in possession of the property for 40 years — the Respondent having married and living in a nearby village — the Settlement Officer came to the conclusion that, apart from the fact that the Appellant had been the sole administrator of the property there was no other evidence of adverse possession and he considered that evidence insufficient to rebut the legal presumption of trusteeship by the male heir on behalf of the female heir.

The Appellant largely relies on C. A. 220/41 — 9 P. L. R. 14, where it was held that exclusive possession for a period of 22 years without any right or claim being asserted was sufficient to rebut the presumption of trusteeship and on C. A. 104/42, Supreme Court Judgments, 1942, Vol. 2, p. 483 where undisputed possession for 38 years was held to rebut the presumption.

Whilst undoubtedly lengthy periods of exclusive possession may be evidence in support of adverse possession, it does not follow that any lengthy period of exclusive possession of necessity proves adverse possession. It is necessary to consider all the surrounding circumstances and thus each case must be decided on its particular merits. This Court in C. A. 49/46 — 13 P. L. R. 307 expressed the opinion that where brothers take possession of land in exclusion of their sisters, very strong evidence is necessary to rebut the presumption that the brother is holding on behalf of his sister. In this case the only evidence of the adverse possession is the sole administration for 40 years. It may well be that it would be embarrasing for a sister well married to claim from her brother part of the yearly produce. It is to be noted that so soon as Land Settlement came the Respondent lodged her claim. We feel it is entirely a matter of weighing the evidence.

It may be this is a borderline case but satisfied as we are that the Settlement Officer has correctly applied his mind to the facts we do not feel that we are in a position to say he came to a wrong conclusion.

There is one other matter to which I think we must refer. In C. A. 49/46 13 P. L. R. 307 this Court expressed the opinion that the Land Law (Amendment) Ordinance did not prevent a co-heir in possession successfully claiming title by adverse possession in respect of a period prior to the coming into force of the Ordinance although his adverse possession subsequent to the Ordinance did not exceed the 10 year prescriptive period. Mr. Elia for the Respondent appears to have thought that this view was in contradiction to a long line of cases which held that the aforesaid Ordinance was not retroactive. We wish it to be clearly understood that it was not the intention of this Court to express any opinion contrary to those judgments. The opinion that we were there expressing was merely to the effect that, if a person has been in exclusive possession, amounting to adverse possession, for a number of years prior to the Land Law (Amendment) Ordinance his claim if established by the possession prior to the Ordinance would not be defeated merely because his period of possession did not also extend for a period of 10 years thereafter.

For the aforesaid reasons this appeal must fail and the decision of the learned Settlement Officer is confirmed. 1st Respondent is entitled to costs on the lower scale to include an advocate's attendance fee of LP. 10.

Delivered this 13th day of February, 1947.

A/British Puisne Judge.

INCOME TAX APPEAL No. 20/46.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Shaw, J.

IN THE APPEAL OF:—

G. B. APPELLANT.

v.

The Assessing Officer, Tel-Aviv. RESPONDENT.

Partnership created before Income Tax Ordinance was enacted — Partnership agreement containing no provision as to losses — Interpretation of carrying on business in sec. 45(1) Income Tax Ordinance.

Appeal under section 53(1) of the Income Tax Ordinance, 1941, from the assessment of income tax No. 2085/6752 made by the Assessing Officer, Tel-Aviv on 3.1.46, allowed:—

1. In case of a genuine partnership mere fact that partnership agreement contains no special provision for losses as that one of the partners was a sleeping partner does not prevent the partners from being regarded for purposes of amended sec. 45(1), Income Tax Ord., as carrying on a business jointly.
2. (*Obiter*): Absence in partnership agreement of provision for losses does not free a sleeping partner from liability in case of losses.

(*M. L.*)

ANNOTATIONS:

1. For a definition of dormant partner see Lindley On Partnership, 10th Ed. p. 49, 273 and 275.
2. On the liability of a dormant partner see *op. cit.* p. 49, 64, 65, 74, 174, 253.
3. *Quaere* whether Appellant's mother can be regarded as a dormant partner.

(*A. G.*)

FOR APPELLANT: Gornitzky.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

This is an appeal under section 53(1) of the Income Tax Ordinance, 1941, from an assessment of income tax (No. 2085/6752) made by the Assessing Officer, Tel-Aviv, on 3.1.46.

The Assessing Officer was not satisfied that a trade, business, profession or vocation was carried on jointly by the Appellant and his mother, Mrs. Hulda Blumenthal — see section 45(1) of the Income Tax Ordinance, as amended.

It is purely a question of fact whether in this particular case the business was being carried on by these two persons jointly, and what I have to decide is whether, on the evidence, the Assessing Officer could reasonably be satisfied that there was no joint trade.

Mr. G. B. has given evidence. Briefly this evidence shows that the Appellant's mother used to be the Appellant's partner in business in Switzerland, having invested the sum of 4500 German Marks in the business in 1917. The Appellant came to Palestine in 1933, and his mother followed in the same year. When he came to Palestine the Appellant brought with him the sum of £ 1,000 which belonged to him and to his mother jointly. Here the Appellant started his present business, which is that of a commercial enquiry office and advertising agency. The Appellant's mother takes no active part in the running of the business. In 1936 a partnership was registered, a notice of which appears at p. 190, of the Palestine *Gazette* No. 571 of 13.2.36. That notice showed the partners as being the Appellant and his mother, and that the partnership was to be for an unlimited period. On 25.3.36 the Appellant and his mother signed an agreement (Exh. 1). The last

sentence of this agreement provides that — "Upon signature of this agreement Mrs. Hulda Blumenthal waives her demands to ownership". The Appellant has explained that in 1936 he intended to get married, and that he wished to secure his mother's rights in the firm. He said:—

> "The intention was that my mother should have an income from the firm as long as she lived, but that she should not be an owner. She had a partnership in the profits for life, but not in the partnership property."

It is not suggested that the registration of the partnership, or the making of the agreement, were not perfectly genuine and honest transactions. There could obviously have been no intention to avoid income tax in 1936 which was some years before income tax was imposed in this country.

The partnership has not been dissolved and there is no doubt that, so far as the dealings of the firm with other persons are concerned the Appellant's mother has the responsibilities of a partner in respect of the debts of the firm.

It has been stressed by Mr. Wittkowski, for the Respondent, that the agreement (Exh. 1) made no provision with regard to the partnership losses, but the Appellant has explained that in view of the kind of work done it was virtually impossible for the partnership to suffer any loss.

There was a banking account in the name of the firm in Barclays Bank, Tel-Aviv, and the Appellant had a private account in Barclays Bank, Ramat Gan. He has stated that during the years ending 31.3.41, 31.3.42 and 31.3.43 his mother received nothing from the partnership, because the profits in those years fell short of the agreed figure of LP. 650.

Section 45(3) of the Income Tax Ordinance provides that nothing in this section shall prevent the discretion of the Assessing Officer in the exercise of any discretion given to him from being questioned in an appeal in accordance with section 53.

Having considered the facts, and the arguments which have been advanced by both sides, I find that this appeal must be allowed. There is no doubt at all that there was a genuine partnership between the Appellant and his mother, and although the agreement did not make special provision for losses to be shared I consider that Mrs. Blumenthal was legally liable to share in the losses of the partnership. The possibility that the Appellant, being her son, would not have pressed his legal rights against Mrs. Blumenthal does not in my judgment affect the position. Mere silence as to who should bear the possible

losses raises no presumption that the Appellant only was to bear them.

The partnership had been in existence for some years before the Income Tax Ordinance was enacted. The Ordinance supervened upon what was an existing and running partnership. If I were to hold that this business was not being carried on by the Appellant and his mother jointly, I think that I would be holding in principle that no sleeping partner can be regarded as carrying on a business jointly with his or her partner. There is no definition in the Ordinance of the expression "carried on", and I do not think that it would be reasonable to hold that a person who provides capital, and who is legally responsible as a member of the partnership both to third parties and to her partner, is not "carrying on" the business jointly with that partner.

In the result I allow this appeal with fixed costs in the sum of LP. 15 (fifteen pounds).

Delivered this 12th day of December, 1946, in the presence of Mr. Gornitzki for Appellant & in the presence of Mr. Wittkowski for Respondent.

British Puisne Judge.

HIGH COURT No. 115/46.

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

BEFORE: Curry, A/J., Frumkin and Abdul Hadi, JJ.

IN THE PETITION OF:—

Aharon Zvi Safrai. PETITIONER.

v.

The Assistant Chief Execution Officer, District Court, Jaffa & 21 ors. RESPONDENTS.

Moneys held by Receiver in trust for parties to arbitration pending result — Parties' creditors seeking to obtain distribution of the moneys without awaiting award.

Return to an order *nisi* issued against the first Respondent calling upon him to show cause why his orders dated the 8th and 12th November, 1946, in Execution File No. 71/46, Jaffa, should not be set aside and why he should not refrain from dealing with or distributing the monies collected by the receiver appointed by the District Court of Tel-Aviv; order made absolute:—

Where moneys held in trust for A and B pending result of arbitration proceedings between them were paid into Court and there is no evidence

that the proceedings are collusive, distribution of the moneys to B's (or A's) creditors must await award.

(*M. L.*)

FOR PETITIONER: Hake.

FOR RESPONDENTS: Nos. 15, 16, 17, 18, 19, 20 — E. Berouti.
Others — Absent — served.

ORDER.

The Petitioner obtained from the District Court an order appointing a Receiver to take possession of certain property and to hold the proceeds in trust for the Petitioner and one Mr. Notea pending the result of certain arbitration proceedings between them. The Receiver has paid these monies into Court and the Chief Execution Officer has ordered payment out to certain judgment creditors of Mr. Notea. It is in respect of that order that the Petitioner has come to this Court. We are of the opinion that the Chief Execution Officer is wrong in ordering payment out of these monies until the arbitration award has been made. There is no evidence before us that the arbitration proceedings are collusive and that an award will not be made in due course.

Order made absolute — distribution to await the award. Petitioner to receive a sum of LP. 10 inclusive costs.

Given this 26th day of February, 1947.

A/British Puisne Judge.

HIGH COURT No. 4/47.

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

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

IN THE PETITION OF:—

Eissa Darwish Kurdi. PETITIONER.

v.

1. Deputy District Commissioner, Jaffa,
2. Attorney General, Jerusalem,
3. Inspector General of Police, Jerusalem,
4. Superintendent of Police, Galilee District, Nazareth. RESPONDENTS.

Order under Crime (Prevention) Ordinance — Non-interference of High Court — Meaning of "criminally responsible" in sec. 21, Criminal Code Ordinance.

Return to an order *nisi* dated 23.1.47 directed against Respondents calling upon them to show cause why the order of the first Respondent dated 6.1.47, under the Crime (Prevention) Ordinance in case No. Ja/PCO/13/46, whereby Petitioner was required to execute a bond of LP. 200 with one surety for the same amount to be of good behaviour for eleven months subject to certain restrictions and to reside within Safad Sub-District, should not be set aside, and why Respondents Nos. 3 and 4 should not be ordered to refrain from executing the said order in so far as it affects the petitions; rule *nisi* discharged:—

1. While High Court cannot usurp powers of legislator to modify or extend provisions of any Ordinance, it will intervene to ensure that a person purporting to act under the Ordinance acts strictly within its legal limits, or if it considers that the manner in which a public officer acted under the Ordinance led to abuse of power and infringement of fundamental principles of justice.

2. The gist of sec. 5(4)(b), Crime (Prevention) Ord. is that it is sufficient to establish that the known character of the person concerned was such as to lead to the belief that he was of the type who might commit offences prejudicial to public safety.

3. a) "Criminally responsible" in sec. 21, Criminal Code Ordinance means responsible to answer for acts complained of in the lawfully constituted Courts of the country, it does not apply to administrative or *quasi*-judicial proceedings such as proceedings under Crime Prevention Ord. or Defence Regulations which provide for restriction of liberty of the subject in Palestine. b) High Court will not interfere in the case of a person charged a second time under Crime Prevention Ord. on similar averments, if circumstances are such that second charging does not amount to abuse of powers conferred by legislator by this Ordinance.

(*M. L.*)

REFERRED TO: H. C. 23/46 (1946, A. L. R. 511; 13, P. L. R. 290).

ANNOTATIONS: For other cases under the Crime (Prevention) Ordinance see H. C. 93/46 (1947, A. L. R. 40) and annotations.

(*A. G.*)

FOR PETITIONER: Cattan.

FOR RESPONDENTS: Crown Counsel — (Heenan).

JUDGMENT.

This is in fact an appeal from the consequences of an enquiry held under the Crime Prevention Ordinance. Now in view of certain arguments adduced we think it desirable to stress that it is not within the functions of this Court sitting as High Court, either to modify or to extend the provisions of any Ordinance. That power is vested in the legislator, but this Court will intervene to ensure firstly that a person purporting to act under the Ordinance acts strictly within the legal limits set by the Ordinance; and secondly we will intervene if we consider that the manner in which a public officer acted under the Ordinance led to an abuse of power and an infringement or fundamental principles of justice.

Two points arise in this case. The first is whether sufficient evidence was adduced before the Court to enable the District Commissioner to arrive at the conclusion which he did. In this connection Mr. Cattan referred to High Court Case No. 23/46. During the proceedings several witnesses were called to give evidence as to the general reputation of this man and the opinion which they had formed of his general character. We would in this connection refer to s. 6(4)(b) of the Ordinance which provides that it shall not be necessary to prove that the person charged was guilty of any particular act. The whole gravamen of the section is that it is sufficient to establish that his known character was such as to lead to the belief that he was of the type who might commit offences which are prejudicial to the public safety. We think that the evidence which was adduced before the Assistant District Commissioner amply warranted him in coming to the conclusion to which he did come.

The second and probably more important point of this appeal was that the man charged had previously been charged under the Ordinance on substantially the same averments. To deal first with the legal implications of submitting a man to the restrictions of the Ordinance after he had previously been tried under it and discharged, we accept the argument of the Crown Counsel that sec. 21 of the Criminal Code Ordinance has no application to this particular case. For the purpose of sec. 21 "criminally responsible" means responsible to answer for the acts complained of in the lawfully constituted Courts of the country. It does not apply to administrative or *quasi*-judicial proceedings such, for instance, as proceedings under Defence Regulation 18(b) in England and the Defence Regulations which provide for the restricting of the liberty of the subject in Palestine. It follows that the mere fact that a man had previously been charged on similar averments under the Crime Prevention Ordinance would not *per se* justify this Court in interfering, but we would intervene if we came to the conclusion that the circumstances of the recharging the person were such as to amount to an infringement of the fundamental principles of justice. This therefore compels us to examine the circumstances under which this man was twice forced to defend himself under the Ordinance. We observe that in the first enquiry, that was the enquiry held in May, 1946, only one witness was called, and the evidence which he gave was of a very sketchy character. In the second enquiry, not only was he charged with a further offence which had happened after the first enquiry, but the evidence adduced in support of his alleged wrong doings prior to the first enquiry, was much more detailed and convincing. In these circumstances we cannot say that charging him a second time

amounted to an abuse of the powers conferred by the legislator by this Ordinance. For these reasons the rule must be discharged.

Delivered this 25th day of February, 1947.

Chief Justice.

HIGH COURT No. 26/47.

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

BEFORE: FitzGerald, C. J., Hubbard, A/J. and Frumkin, J.

IN THE PETITION OF:—

Mr. Richard Lichtheim & an. — PETITIONERS.

v.

The District Commissioner, Jerusalem District & an. — RESPONDENTS.

Requisition order giving wrong name of owner — Requisitioning part of building — Non-interference of High Court.

Petition for an order to issue calling upon the first Respondent to show cause why his requisition order (undated) should not be set aside, and why the premises of Petitioners at Rehavia, Block No. 30038, Parcel 22, should not be delivered back to them, refused:—

1. High Court will not grant a writ unless they are satisfied that it will be effective to grant the remedy sought, thus they will not issue order *nisi* against requisitioning authorities because requisition order bore wrong name of owner, for mistake, if discovered, could and would be rectified and requisitioning would then be in order.

2. Under Defence Regulation 114 power to decide what is in interests of public safety is vested in District Commissioner, fact that only part of building has been requisitioned is no ground for High Court to interfere.

(*M. L.*)

ANNOTATIONS:

1. For other requisition cases see H. C. 13/46 (1946, A. L. R. 513) and annotations.

2. On High Court's non interference with discretion of public officer see H. C. 107/46 (1947, A. L. R. 15) and annotations.

3. On point that High Court will not grant writ if not satisfied that it will be effective see H. C. 78/39 (1939, S. C. J. 25; 7, P. L. R. 35; 7, Ct. L. R. 45) see also Halsbury Laws of England Vol. 9, p. 772, para. 1308.

(*A. G.*)

FOR PETITIONERS: Smoira.

FOR RESPONDENTS: *Ex parte.*

ORDER.

There are three grounds on which Dr. Smoira asks for this order.

The first ground is that the names of the persons to whom the requisition order was directed were altered by the person who served the requisition order. There is of course no doubt that this was an irregularity, but this Court will not grant a high prerogative writ unless it is satisfied that the writ will be effective to grant the remedy which is sought. It seems reasonable to assume from the facts which appear before us in this petition, that what the requisitioning authorities required was that particular building, and it follows that if they discovered they had been given the wrong name of the owner they could and would have altered it later, and the requisitioning would then have been in order.

The second ground urged by Dr. Smoira was that part of the building only was requisitioned and that therefore it could not be said that the building was required in the interests of public safety. As to this we need only say that under Defence Regulation 114 the power to decide what is in the interests of public safety has been vested in the District Commissioner. Moreover, it is a fact well known to this Court that in several instances the security authorities have considered that requisition of part of a building is necessary for public safety, and we would not feel justified in granting a return for this reason.

The third reason alleged by Dr. Smoira is that there has been discrimination, which is contrary to the laws of the territory. This issue will be decided in this Court tomorrow in a return to a writ which we have granted. This being so, it cannot be said that the interests of justice, which are after all the paramount consideration in all cases of the issue of the writ, do not (*sic.*) demand that we should grant a return to this *nisi*.

In these circumstances the petition must be rejected.

Given this 10th day of March, 1947.

Chief Justice.

HIGH COURT No. 18/47.

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

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

IN THE PETITION OF:—

Dinah Kazak. PETITIONER.

v.

The District Commissioner Haifa District, Haifa. RESPONDENT.

Evacuation order by District Commissioner — Non-interference of High Court.

Return to an order *nisi*, dated 12.2.47, directed to Respondent, calling upon him to show cause why his notice No. 500/5/32/1 S. N. 40, dated 4.2.47 advising the Petitioner that it is desired to take and retain possession of her one-room flat situated in House Carmi, Succot Street, off Pine Road and requiring possession forthwith, should not be cancelled, and to show cause why Petitioner should not be allowed right of access to and egress from her said flat and passage along the area and roads more particularly specified in the petition; rule *nisi* discharged:—

1. High Court cannot be used as short cut for obtaining legal redress, so it will, as a rule, not intervene where alternative remedy is available, but in order to reject a petition on this ground it must be satisfied that the alternative remedy is not a remote one, that there is a normal legal procedure for dealing with and deciding the real issue in the case.

2. Where an authority is given power to do an act which he considers in the interest of public security, High Court will not go behind his order to enquire whether the act was necessary for public security unless it can be proved that he acted with *mala fides*, capriciously or without reason.

(*M. L.*)

ANNOTATIONS:

1. On point 1 see H. C. 64/45 (1945, A. L. R. 640) and H. C. 28/45 (1945, A. L. R. 646; 12, P. L. R. 455).

2. On the second point see H. C. 26/47 (*ante*, p. 178) and annotations.

(*A. G.*)

FOR PETITIONER: A. Wittkowski (by delegation from J. Salomon).

FOR RESPONDENT: Solicitor General — (Hogan).

ORDER.

This is a return to an order *nisi*. The Petitioner's complaint concerns a notice, purporting to be made under Regulation 114 of the Defence (Emergency) Regulations, 1945, notifying her that the District Commissioner considered it necessary in the interests of public safety and the maintenance of public order to take and retain until further notice possession of her one-room flat situate at House Carmi, Succot Street, off Pine Road, Haifa. The petition raises questions both of law and of fact.

The Solicitor General who appeared for Respondents, took the objection that as the Petitioner had an alternative remedy this Court would not grant a writ of relief. There are, of course, numerous decisions to the effect that we will rarely intervene if an alternative remedy is open to Petitioner. The alternative remedy here, the Solicitor General argues, is to be found in section 3 of the Crown Actions Ordinance which enables a person who follows the procedure set out in that Ordinance

to maintain a claim against the Government for the restitution of immovable property. Now we would emphasise that in order successfully to reject the petition on the grounds of alternative remedy the Court must be satisfied that the remedy suggested is not a remote one. We must be convinced that there is a normal legal procedure capable of dealing directly with and deciding the real issue in the case. We ask ourselves the question what is the complaint of the Petitioner? It is that she has been the victim of an arbitrary act on the part of a public official, an act which she says has no justification in law and which is an abuse of power. It is true that if the Petitioner would be prepared to embark on the procedure dictated, and endure the delays involved in bringing an action under section 3 of the Crown Actions Ordinance, and if she were to succeed, one of the consequences of the alleged abuse of power, that is the ousting her from her property, would be nullified; but to insist on such a method of righting the wrong, if it be established that there was a wrong done to her, would in our opinion be placing too onerous a burden on a citizen prefering a complaint of oppression against the Crown. This High Court will not allow itself to be used as a short cut for obtaining legal redress, but on the other hand, if a citizen living under the protection of the Crown alleges some misuse of power we will not refuse to entertain the petition solely because the consequences which flow from the alleged abuse of power might eventually be nullified by a legal action on a question of title.

Turning now to the merits of the case. The Solicitor General sought to controvert the sequence of events as they are set out in the petition, but it seems to us that the evidence of Mr. Law, the District Commissioner, and of Isidor Cherah substantially confirm the facts as they have been stated by Mr. Salomon, advocate for the Petitioner. Those facts are that on the 4th of February a number of notices were served under Defence Regulation 114 on occupiers of houses in a certain area of French Carmel. With two exceptions all the notices were served on Jews. The two exceptions covered two Arab houses which there are good grounds for stating were requisitioned not as part of this general scheme, but because they were particularly required for specific military purposes. The Petitioner is a Jewess of British Nationality. The District Commissioner stated that he did not consider her to be in any way dangerous to public security, nor did he consider that any individual evacuated by virtue of these notices was a danger.

Mr. Salomon touched on the argument that service of these notices constituted discrimination against one community on the ground of race or religion. Later he indicated that he did not rely on this, and we

do not propose to deal with it. His main argument was that in considering the question of public security and maintenance of public order the District Commissioner misapplied his mind in that he took into consideration extraneous matter, such as the fact that the person being evacuated was a Jewess. It has been authoritatively established both by previous cases in this Court and decisions in the English Courts, that where an authority is given power, as the District Commissioner is under the Defence Regulations, to do an act which he considers necessary in the interest of public security, the High Court will not go behind his order to enquire whether the act was necessary for public security unless it can be proved that he acted with *mala fides*, capriciously or without reason. Mr. Salomon argues that the District Commissioner did act without reason because, he urges, if the District Commissioner did not consider that the Petitioner was personally a danger to public security, why then was an order made against her and not against Arab occupiers? We turn to the answer of the District Commissioner. He admitted that the fact that the houses were occupied by Jews was one of the facts which came into consideration. Here are his answers:—

> "It was not an accident. The fact that the houses were occupied by Jews was a fact which came into consideration. It was not a consideration against them. My consideration was security and for that reason I required the houses. It was one of the factors in deciding which house to take."

Now, ignoring for the moment the latter charge of *mala fides*, this version of what was in the District Commissioner's mind is not very far from what Mr. Salomon alleges was in his mind, but we are unable to follow Mr. Salomon in the inference he draws from this state of mind. The fact that Miss Kazak was a perfectly loyal law-abiding citizen as she undoubtedly was, would not make it unreasonable on the District Commissioner's part to requisition her house on grounds of public security. Apart altogether from the Petitioner's personal character, there might be many sound security reasons, reasons which even the District Commissioner could not be compelled to disclose in a return to this writ why her house should be requisitioned in preference to other houses. Faced with this contention, Mr. Salomon was forced to argue that the District Commissioner acted with *mala fides*. We think he would wish to stress that what he intended was *mala fides* in law, not in the moral sense. Indeed, the impression left on our minds is that this charge would not have been made at all had the District Commissioner been more ready to concede facts which, as we have said, are inescapable, and which did not impugn either the legality or *bona fides* of the notice. The *mala fides*, he said, consisted in what he can only infer from the circumstances as a concealed object of the

District Commissioner, which was to expel all the Jews, solely because they were Jews, from that area of Haifa. Now *mala fides* is a serious charge to make against a public officer, and it is the duty of this Court no less to the officer than to the Petitioner to investigate it. This in our opinion demands an appreciation of the whole background of the issue of these notices. Mr. Salomon, very understandably, would like to confine the investigation to the happenings at Haifa, but he has made this serious charge of *mala fides,* and it cannot be probed to its depths without taking into consideration a fact which is public knowledge to every inhabitant of this country, and which is most relevant to the issue of *mala fides*. That fact is that at this particular period there was a country-wide operation conducted by the security authorities in pursuance of which the principal towns were divided into zones, admission to and egress from which was regulated by permit. These evacuations in Haifa formed part of the general operation, and the District Commissioner was merely a cog in the machine conducting those operations. It is also public knowledge that the scheme involved the evacuation of large numbers of exclusively Arab families from certain areas of Jaffa, the evacuation of Britishers, including Judges of this Court, from certain areas in Jerusalem, and the evacuation of Jews from this area of Haifa. There must also be taken into account the fact which was established in the course of the hearing of this petition, that 145 Arab families from the same area have been served with notices or are about to be served with notices of requisition. Examining the Haifa notices, which included the notice of which the Petitioner complains, against this background, it seems to us that the suggestion that the District Commissioner acted with *mala fides* is quite untenable.

It follows that the rule *nisi* must be discharged.

Given this 14th day of March, 1947 in the presence of Mr. A. Wittkowski for Petitioner and Mr. M. Hogan, Solicitor General, for Respondent.

CIVIL APPEAL No. 383/46.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J. (in Chambers).

IN THE APPLICATION OF :—

Zeev Haller. APPLICANT.

v.

Philip Gredinger. RESPONDENT.

Question whether an order for part eviction can be given — Conflicting judgments of District Courts — Eviction refused on ground of unavailability of alternative accommodation — No leave to appeal as no point of novelty or complexity.

Application for leave to appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated 14.10.46 in Civil Appeal No. 73/46 from the judgment of the Magistrate, Jerusalem, dated 5.8.46 in Civil Case No. 182/46; application refused:—

1. While fact that on point raised by Applicant there are conflicting District Court decisions may be sufficient for granting leave to appeal, leave will be refused where judgment in question was not influenced by that point at all but was based on altogether different considerations.

2. Question whether or not an order for part eviction can be given is irrelevant where it is found that no proper alternative accommodation was available for tenant.

(*M. L.*)

ANNOTATIONS: On question of whether an order of part eviction can be given and whether alternative accommodation can consist of part of the premises eviction from which is sought see C. A. D. C. T. A. 27/46 (1946, S. C. D. C. 510) and annotations, see also Thompson *v.* Rolls (Blundell's Rent Restriction Cases No. 469, p. 207), Leaf *v.* Toone (*ibid.* No. 280, p. 123) and Thomas *v.* Evans (*ibid.* No. 466, p. 206).

(*A. G.*)

FOR APPLICANT: J. Sussmann.

FOR RESPONDENT: A. Gorali.

ORDER.

This application is concerned solely with the question whether a point of novelty or complexity arises. Mr. Sussmann for the Applicant said that the legal point was whether an order for part eviction can be given. He has quoted cases to show there are conflicting decisions in the District Courts on the point.

If I were satisfied that this was in fact the point decided by the District Court I might have allowed an appeal, reluctant as I am to do so in cases of this nature. But I have read both judgments and I find that the point raised by Mr. Sussmann did not at all influence the decision of the District Court. The learned Magistrate found as a fact that there was no proper alternative accommodation available. The District Court based the whole of its decision on this finding of fact and decided, in my opinion rightly, that having arrived at this finding, the Magistrate should not have given an order for eviction. I am unable to say that this decision of the District Court raises any question of novelty and complexity and the application must be refused. Costs LP. 2.

Given this 21st day of December, 1946.

Chief Justice.

CIVIL APPEAL No. 37/46.

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

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

IN THE APPEAL OF:—

Amminch Namika Sultan on behalf of the late Prince Mohammad Selim. APPELLANT.

v.

The Attorney General. RESPONDENT.

Sultan Abdul Hamid's heirs — Action for rectification of register — L. S. Ord., secs. 27, 43, 63, 66, *Land Courts Ord., sec.* 4(1) — *Cross appeals — "Omitted or incorrectly set out" (sec.* 66), *P. C.* 21/40, *C. A.* 141/37 — *Onus of proving that entry ought not to be on register — Yoklama and daftar khani registration — C. A.s* 306, 311, 318/44 — *Art.* 3 *of Prov. Law of Disposition — Iradehs of* 1908 *and* 1909 — *Sultan's civil list.*

Act of state, Secretary of State for India v. Kamachee Boye Sahaba, Salaman v. Secretary of State for India, Princess Olga Paley v. Weisz, Rustomjee v. The Queen, Cook v. Sprigg — Treaty of Peace with Turkey Art. 60 *"subrogation" — Construction of document whether question of fact or law, C. A.* 139/40.

Appeal from the judgment of the Land Court of Jerusalem dated the 17th day of January, 1946, in Land Case No. 44/45, dismissed:—

1. Rectification under sec. 66 of the L. S. Ord. is not confined to the correction of omissions due to oversight, but it cannot be applied for on the basis of old registration when recorded rights have been varied in settlement after taking that registration into account.

2. It is on the party seeking rectification to show that an entry which is *prima facie* right ought not to be there.

3. The *Iradeh* of 1909 was unconstitutional and the property comprised in the Sultan's civil list was held by him in his private capacity. The *Iradeh* itself was not an act of state, nor was it confirmed by act of state of the Turkish Government. But the Treaty of Lausanne, which includes the properties mentioned in the *Iradeh* constitutes an act of state.

4. The Treaty of Lausanne does not contemplate that the properties it includes (Art. 60) should be taken over subject to private claims, and the Courts are therefore precluded from holding that the *Iradeh* was invalid.

(*A. M. A.*)

REFERRED TO: C. A. 141/37 (4, P. L. R. 310; 1937, S. C. J. (N. S.) 521; 2, Ct. L. R. 130); C. A. 139/40 (7, P. L. R. 376; 1940, S. C. J. 505;

8, Ct. L. R. 196); C. A. 306, 311 & 318/44 (1946, A. L. R. 211); Secretary of State in Council of India *v.* Kamachee Boye Sahaba, 1859, 7 W. R. 722, *per* Lord Kingsdown — quoted in Salaman *v.* Secretary of State for India, 1906, 1 K. B. 613, 75 L. J. (K. B.) 418, 94 L. T. 858, C. A.; Paley (Princess Olga) *v.* Weisz, 1929, 1 K. B. 718, 98 L. J. (K. B.) 465, 141 L. T. 207, 45 T. L. R. 365; Rustomjee *v.* The Queen, 1876, 2 Q. B. D. 69, 46 L. J. (Q. B.) 238, 36 L. T. 190; Cook *v.* Sprigg, 1899, A. C. 572, 68 L. J. (P. C.) 144, 81 L. T. 281, 15 T. L. R. 515.

ANNOTATIONS:

1. The judgment of the Land Court is reported in 1946, S. C. D. C., at p. 3.

2. For the previous history of this litigation see L. C. Ja. 35/35 (P. P. 26.10.—2.11.37 (*dissenting judgments*) and P. P. 30.11.37 (*final judgment*), C. A. 237/37 (6, P. L. R. 8; 1939, S. C. J. 46; 5, Ct. L. R. 49) and P. C. 21/40 (8, P. L. R. 181; 1941, S. C. J. 334).

3. On the requirements of sec. 66 of the Land (S. of T.) Ord. see C. A. 315/44 (1945, A. L. R. 22) and note 2 thereto.

4. See C. A. 214/40 (7, P. L. R. 564; 1940, S. C. J. 550; 8, Ct. L. R. 169) on *yoklama* registrations.

5. On the nature and effect of an act of state see Halsbury, Vol. 26, pp. 246 *et seq.* and Replacement Volume.

6. See the following authorities on the Treaty of Peace (Turkey) Ordinance: CR. D. C. Jm. 14/24 (3, C. of J. 892), C. A. 141/24 (5, C. of J. 1765), H. C. 68/27 (1, P. L. R. 215; 1, C. of J. 301), P. C. 18/30 (1, P. L. R. 617; 3, C. of J. 1021), C. A. 163/32 (2, P. L. R. 83; 3, C. of J. 1049) and C. A. 379/44 (12, P. L. R. 272; 1945, A. L. R. 617).

(*H. K.*)

FOR APPELLANT: Weinshall and Murr.

FOR RESPONDENT: Attorney General (Gibson), Prof. N. Bentwich, and Administrator General (Kantrovitch).

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 17.1.46 of the Land Court of Jerusalem in Land Case No. 44/45.

The facts have been fully stated in the judgment of the trial Court, and it is unnecessary to recapitulate them at any length. The Appellant (original Plaintiff) brought the action on behalf of the estate of the late Prince Mohammad Selim, himself one of the heirs of the late Sultan Abdul Hamid II of Turkey, to recover lands said to have been the private property of the late Sultan, and to have the Land Register at Gaza rectified by inserting the names of the late Sultan's heirs in respect of their shares, in place of the High Commissioner in trust for the Government of Palestine. As it appears from Exh. 14 (at p. 96 of the shorthand note of the trial Court) the property in question was registered in the Land Register at Gaza in the name of the late Sultan

from about the year 1886. The Respondent's case is that after the deposition of the late Sultan in 1909 the Ottoman Government, by one or both of two decrees (*Iradehs*), took the property in this land, and that following the Treaty of Peace made in Lausanne in 1923 the Government of Palestine acquired the land. The two *Iradehs* on which the Respondent relies are Exh. 6 (p. 75) of 27.8.1324 (1908 *A. D.*), and Exh. 9 (p. 81) of 20 *Nissan* 1325 (1909 *A. D.*). It may be observed here that the 1908 *Iradeh* was made before Sultan Abdul Hamid had been deposed and the 1909 *Iradeh* was made after that event.

The most important provisions of law for the purposes of this appeal are sections 43 and 66 of the Land (Settlement of Title) Ordinance (Cap. 80) Laws of Palestine, which read as follows:—

> S. 43. Save as provided in this Ordinance, the registration of land in the new register shall invalidate any right conflicting with such registration.
>
> S. 66. After the completion of the settlement, rectification of the register may be ordered by the Land Court, subject to the law as to limitation of actions, either by annulling the registration, or in such other manner, as the Court thinks fit, where the Court is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the register.
>
> Provided that where a person has since the settlement acquired land in good faith and for value from a registered owner, the Court shall not order a rectification of the register.

In dealing with this appeal it is necessary for us to remember that s. 4(1) of the Land Courts Ordinance (Cap. 75) provides that:—

> No appeal shall lie from the judgment of a Land Court to the Court of Appeal, save on a question of law.

The Attorney General, in whose favour the judgment of the trial Court was given, did not, and could not, cross-appeal. But he submitted that the judgment could be supported on certain grounds in regard to which the trial Court had found against him.

In the first place he submitted that in this case no suit for the rectification of a register lay under sec. 66 of the Land (Settlement of Title) Ordinance. His argument is that the words "omitted or incorrectly set out" in sec. 66 are not intended to add to the right of appeal in respect of which provision is made under sec. 63 of the Ordinance. He submits that the omission or incorrectness must be of the nature of an oversight. He has stressed that the Ordinance was designed to give land owners certainty as to their rights, and he draws attention to the fact that provisions exist for giving notice to possible claimants, and for the investigation and settlement of all claims that may be preferred.

He points out that an application for leave to appeal from the decision of the Settlement Officer is limited as to time.

Dr. Weinshall, for the Appellants, has argued that the trial Court was precluded from at all dealing with the question whether sec. 66 could be invoked in a case like this because the point was, he submits, raised before the Privy Council in P. C. A. No. 21 of 1940 and, at any rate by implication, decided in his favour. He relies particularly on certain remarks which passed between Lord Thankerton and the Attorney General of England. These remarks appear at p. 137 of the shorthand note of the trial Court and they read as follows:—

> "*Lord Thankerton*: It is not enough for him (the Plaintiff) to say, that in fact there was an omission of his rights; he must prove that it was wrongly omitted or without just cause.
> *A. G.*: Yes.
> *Lord Thankerton*: It does not matter whether he appeared originally or what happened?
> *A. G.*: Not a bit.
> *Lord Thankerton*: How do you in fact construe s. 66, because that is the sheet anchor of Mr. Miller?
> *A. G.*: I am taking the words as omitted without just cause; it would be wrongly omitted.
> *Lord Thankerton*: It must be that. It would be too narrow to say mere errors and omissions especially having regard to s. 68, which makes provision for clerical errors.
> *A. G.*: A thing is not omitted unless it is wrongly omitted."

At page 2 of the Privy Council judgment the following appears:—

> "The grounds of the judgment therefore which emerge as being those with which alone this Board are empowered to deal on the terms of the order giving leave to appeal are:—
> (1) is Rule 2 of the Land Rules, 1921, still operative?
> (2) was the onus of proof rightly placed upon the Defendant?
> Their Lordships will be careful to decide nothing more."

It is quite clear that their Lordships of the Privy Council did not decide whether sec. 66 could be invoked and this question was still at large when the case came again for hearing before the trial Court.

Prior to 1930 the rectification of the register could only be obtained on the ground of fraud, but in that year the words "or that a right recorded in the existing registers has been omitted or incorrectly set out in the register" were added by Ordinance No. 18 of 1930. The Attorney General has referred to certain observations which were made by Dr. Weinshall at p. 375 of the shorthand note of the trial Court. Dr. Weinshall said:—

> "The clear object of this modification of the law was to give remedy to the person who might have suffered from a mistake in proceedings before the Settlement Officer. Obviously it cannot be deemed to

> apply to parties who actually appeared before the Settlement Officer and made their claim and argued their case before him, because in that event if there is some mistake their proper remedy is an appeal against the judgment and if they do so and if the judgment becomes final, certainly they have no further remedy."

The Attorney General has, however, pointed out that sec. 66 contains no implication that the remedy is limited to persons who did not make a claim at settlement, and he asks the pertinent question — Why should a person who did not take the trouble to make a claim be in a better position than one who did? He also submits that it is obvious that, so far as fraud is concerned, the remedy is open to a party whether or not he has claimed at settlement.

The Attorney General has traced the history of the Land (Settlement of Title) Ordinance. The first Ordinance, called the Land Settlement Ordinance, was No. 9 of 1928. Sec. 56 (corresponding to the present sec. 63) gave a right of appeal by leave. There followed certain sections also on the question of appeals, and then came sec. 59 (corresponding to the present sec. 66) giving the right of rectification. This was followed by sec. 61 (corresponding to the present sec. 68) which dealt with the correction of errors. The Attorney General argues that the legislature, when they amended Ordinance No. 18 of 1930, had in mind the appeal provisions of 1928 and he submits, therefore, that if they had wished to give a further right of appeal the natural course would have been to do so by amending the section dealing with appeals and not the section which deals with rectification. He submits that from the fact that until 1930 rectification was only permitted in cases of fraud, it is clear that sec. 59 (now sec. 66) was not at all a general appeal section, and he observes that it was the same Ordinance (No. 18 of 1930) that amended both the section dealing with appeals and that dealing with rectification. Finally, he draws attention to the fact that Ordinance No. 18 of 1930 amended sec. 61 (now sec. 68), which deals with the correction of errors and introduced words almost identical with those introduced into sec. 59 (now sec. 66).

The Attorney General submits that if the Settlement Officer has considered the matter, and has done so on some evidence, it cannot be said that the omission was made without just cause, and he further argues that the Settlement Officer did have some evidence and did consider the Sultan's registration. He has, in this connection, referred to the judgment of the trial Court (p. 496, para. 6) where the trial Judge found as a fact that the Settlement Officer had considered, even if inadequately, the question of the Government's alleged claim of title *via* the *Iradeh* of 1908 and the Treaty of Lausanne.

The final conclusion of the trial Judge was expressed by him in the following terms:—

> "But it seems to me that, whatever the merits of the learned Attorney General's argument may be when applied to the case of a claimant who was a party to the proceedings before the Settlement Officer and who therefore had an opportunity of appealing against his decision under section 63 (upon which point I do not feel it necessary to express any view) it cannot be acceded to in the case of a person such as the present Plaintiff, who was not a party to the settlement proceedings. Such a person, I consider, must be enabled to avail himself of section 66 where the Settlement Officer, through a mistake of fact or law (which would include a decision based on inadequate evidence) has omitted from the new register a right recorded in his name in the existing (*i. e.* old) register."

In C. A. 141/37 (4, P. L. R. 310), however, it was held that:—

> "The provision 'that a right recorded in the existing registers has been omitted or incorrectly set out in the register contained in the latter part of the first paragraph of s. 66 of the Land (Settlement of Title) Ordinance, has no application when the right recorded in the existing registers has been varied by the Settlement Officers or the Courts on appeal from a Settlement Officer under the provisions of the Land (Settlement of Title) Ordinance."

That case appears fully to support the submission that in the present case the Appellant could not call to his aid the provisions of sec. 66. Having considered the arguments on each side I find that the action was misconceived, and for this reason alone the appeal must fail.

Before going on to consider the further points raised both by the Appellant and by the Respondent I would here say that I agree with the learned trial Judge when he says (see para. 7 of his judgment, p. 497 and 498 of the shorthand note):—

> "The correctness or incorrectness of the entry at present on the register must, therefore, be decided upon in the light of all the evidence now brought before this Court. This interpretation would moreover seem to be in accordance with the view of their Lordships of the Privy Council as expressed in their remitting judgment, where they state that the onus is on the party seeking rectification to show that the entry which is *prima facie* right 'ought not to be there'. Their Lordships, it will be noted, use the present tense, and say 'ought not to be there' and do not say 'ought not to have been placed there'. And this ruling of the Privy Council further makes it clear to my mind that in the present case the burden lies on the Plaintiff not only of showing that the decision of the Settlement Officer was wrong, but also of going on to show that in the light of all the evidence adduced in this case the entry of the Defendant's name on the register ought not to be there. Dr. Weinshall has argued that once he has established that the Plaintiff's name was wrongfully omitted by the Settlement Officer from the register, the burden

> shifts to the Defendants to prove that the chain of title by which they claim is a good one. But I do not think the words of the Privy Council will bear this construction. The presumption still remains in favour of the Defendants being rightly on the register, so that it is for the Plaintiff to prove that the Defendants' chain of title, which is fully disclosed in the written pleadings, is a bad one."

Before dealing with the grounds of appeal I shall refer to certain further submissions by the Attorney General. One of these was argued by Mr. Kantrovitch and, briefly stated, it is that the registration upon which the Appellant was relying was of the *yoklama* kind, and not a *daftar khani* registration as held by the trial Court. Mr. Kantrovitch said that although he would not go so far as to argue that this *yoklama* title was entirely invalid, it did not come within the protection of Article 3 of the Provisional Law Regulating the Right to dispose of Immovable Property. That article appears at p. 169 of the Ottoman Land Laws by R. C. Tute and it reads as follows:—

> "Art. 3. Formal title deeds are valid and executory. The Civil and *Sharia* Courts shall give judgment on these deeds and their registration (without?) further proof. A formal title deed shall not be annulled except by a judgment of a Court based on lawful reasons provided that errors, which contradict unambiguous entries and official documents, may be corrected by the Registry Office on an order given by the Administrative Council after informing the parties interested."

Mr. Kantrovitch put in two new exhibits (Nos. 30 and 31), Dr. Weinshall not objecting, with the object of showing that the Court of Cassation at Constantinople, of which Court these are judgments of the years 1913 and 1915 respectively, did not place much, if any, reliance upon *yoklama* registrations. Mr. Kantrovitch has also advanced the proposition that possession even for a period less than that necessary to give a prescriptive title will defeat a *yoklama* registration.

The learned trial Judge dealt with this matter in para. 9 of his judgment. Dr. Weinshall has referred us to C. As. 306, 311, 318 of 1944 (1946, A. L. R. 211) in which the following para. appears in the judgment (at p. 219):—

> "Naim Bey has conceded that at the time when these *Yoklama* registrations were effected that was the only kind of official registration obtainable. I find no reason for not accepting these *Yoklama* registrations as a valid form of registration and in any event, Appellants have since obtained formal *kushans* (Exhs. 1 and 2) without material change."

At p. 312 of the Land Law of Palestine by Goadby and Doukhan there is a statement to the effect that:—

> "Evidence in writing sufficient to support an adverse title" would include entries in the *Yoklama* records.....

Having considered the point I can see no reason for disagreement with the learned trial Judge whose final conclusion was expressed in para. 9 of the judgment in the following terms:—

> "And I accordingly hold that this Court ought to consider the registration as sufficient proof of the Plaintiff's title to the lands in dispute, there being no conflicting permanent or '*daimi*' registration, unless it can be shown that it has been overridden or rendered void by any one or more of the three instruments relied on by the defence, namely the *Iradeh* of 1908, the *Iradeh* of 1909, and Article 60 of the Treaty of Lausanne."

Another submission made by the Attorney General is that the trial Court erred in holding that the 1908 *Iradeh* did not cover the property in suit. The point is dealt with in paras. 11 to 14 of the judgment. It is really a question of fact, and it is impossible for me to say that there was no evidence upon which the learned trial Judge could find that the 1908 *Iradeh* did not cover the property. I cannot therefore disturb that finding.

The Attorney General has submitted that the 1909 *Iradeh* was valid. This point was dealt with by the trial Judge in paras. 18 and 19 of his judgment. His conclusion on the point is stated at the beginning of para. 20 where he says:—

> "Upon all the evidence I find that, if we were to stop at this point, the *Iradeh* might well have been considered unconstitutional and invalid, on both the grounds raised by the Plaintiff, namely by offending Articles 6, 21 and 24 of the Constitution, or at least one of those Articles, and by reason of its not having been submitted to Parliament."

The arguments which I have heard have confirmed me in the view that the 1909 *Iradeh* was, for the reasons stated by the trial Judge, invalid as an *Iradeh*. The question whether it became an act of State by subsequent validation or ratification I shall consider later.

With regard to the meaning of the term "Civil List" the trial Judge stated, in para. 16:—

> "Furthermore we have been told by the defence witnesses Kleibo and Bseiso, and I accept their evidence on this point, that the Civil List, which administered these properties, existed to administer the private properties of the Sultan."

Here again it is a question of fact since "Civil List" is not a legal term, and although I incline to the belief that the property included in the Civil List comprised the Sultan's properties (some of which were *ab antiquo* properties) properties of other members of the Sultan's family, and private property of the Sultan himself, I am unable to disturb the finding of the trial Judge which is expressed in the following terms in para. 16 of his judgment:—

> "The evidence on the point, both oral and documentary, is very inconclusive, but upon a careful consideration I think the property must be considered to have been held by the Sultan in his private capacity."

I now come to the grounds of appeal, and I shall deal first with the question whether the schedule produced and alleged to be attached to the 1909 *Iradeh* (Exh. 9 p. 81) was properly found by the trial Court to be in fact the true and original schedule to this *Iradeh*. The facts have been fully set out in para. 10 of the judgment, and again I must say that it is a question of fact and that I am unable to find that there was no evidence upon which the trial Court could come to the conclusion that the schedule (at p. 82) was the true and original schedule to the *Iradeh*.

With regard to the meaning of the term *"amlak"* there are two questions. First, there is the question whether the term *could* include *miri* property, and then there is the question whether, in this particular instance, the term *did* include *miri* property. Dr. Weinshall contends that *"amlak"* can only refer to *mulk* property, and it is quite true that *"amlak"* is the plural of *"mulk"*. The land in dispute in this case is admittedly of the *miri* category. That is to say, it is land the legal ownership of which is vested in the State. Article 3 of the Ottoman Land Laws (at p. 7 of R. C. Tute's book) describes *"miri"* in the following terms:—

> "State land, the legal ownership of which is vested in the Treasury, comprises arable fields, meadows, summer and winter pasture grounds, woodland and the like, the enjoyment of which is granted by the Government."

And at p. 17 of the Land Law of Palestine by Goadby and Doukhan the following appears:—

> "The term *Miri* Land is here used to mean land over which a heritable right of possession (*tessaruf*) is granted by the State to a private person, though the *Raqabe* (ownership) remains in the State."

The meaning of the term *"amlak"* is discussed by the trial Judge in para. 15 of his judgment. It has been pointed out by Dr. Weinshall that the Government witness (Mr. Bseiso) gave, in re-examination on 13.12.45, see pp. 312 an 322 of the shorthand note, evidence more favourable to the Respondent's case than the evidence which he had given two days earlier (see pp. 295 and 296). Dr. Weinshall has further submitted that where there is a question of confiscation the more restrictive meaning of the term should be adopted. In Craies on Statute Law (3rd Ed.) the following appears at p. 105:—

> "Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:—
>
> — — — — — — — — —
>
> (2) Conferring or taking away legal rights whether public or private....."

Dr. Weinshall has submitted that this Court is not bound by the decision of the trial Court, and in this connection he has referred us to C. A. 139/40, (7, P. L. R. 376) where the Court, in its judgment (at p. 378) said:—

> "The Appellant has argued that the District Court on the appeal could not alter findings of fact made by the Chief Magistrate. The construction of a document, as I pointed out, is a question of law. The District Court was, therefore, quite entitled to its view as to the correct construction."

Having considered the arguments advanced by Dr. Weinshall I find that there are no grounds upon which we can upset the conclusion of the learned Judge that the term *"amlak"* as used in the Schedule to the 1909 *Iradeh,* does include *"miri"* land.

The next point to be considered is whether the Court erred in holding that the constitutional defects of the 1909 *Iradeh* had been cured by the subsequent attitude of the Ottoman State. The question is whether the 1909 *Iradeh* had been subsequently validated or ratified in such a way as to make it an act of State or otherwise incapable of being questioned in any Court.

The trial Judge held, in para. 23 of his judgment, that the 1909 *Iradeh* was not in itself an act of State. I agree with this finding, and I have only to consider the question of subsequent validation or ratification. This question has been very fully discussed by the trial Judge, in para. 20 to 27 of his judgment, and his final conclusion is expressed in para. 27, where he says:—

> "...on the evidence which I have just specifically considered it is in my view abundantly clear that the Ottoman State did adopt and act upon the transfers effected by the *Iradeh* of 1909, and thereby made them an act of State and as such binding on this Court. I need only add that if the transfer of the properties to the Ottoman State by the *Iradehs* was or become a valid transfer, as I have held it did, then the properties would automatically vest in the Ottoman State, and the registration of these properties in the name of the ex-Sultan Abdul Hamid would thereby become of no effect, without the necessity for the formal cancellation of the entry on the register. Mr. Bseiso in evidence appeared to be about to give an answer to this effect when the question was dropped, but to my mind the point is clear. The act of State must prevail."

At the beginning of para. 27 the trial Judge speaks of "the somewhat negative evidence that while the legality of *Iradehs* generally may be

questioned in the Courts, the legality of these particular *Iradehs* of 1908 and 1909 has never been challenged in the Turkish Courts". Dr. Weinshall has submitted, in the first place, that the fact that the legality of the *Iradehs* has not previously been questioned in the Courts does not prevent a party from doing so now and he has referred to the fact that in the discussions which led up to the Treaty of Lausanne the Turkish delegates spoke of litigation brought by the heirs for the restitution of the properties which, in their opinion, the Turkish Government had illegally confiscated (see pp. 107 and 108 of the shorthand note).

The Respondent had filed a judgment dated 7.12.44 (Exh. 23, p. 112), of the Court of Cassation, which upheld a decision that properties acquired by a Sultan during the term of his reign were not private properties but were imperial properties which vested in the Treasury. The property in suit in that case was "immovable property together with its appurtenances known as the mension of Ghazi Uthman Pasha, and situated at Bashlik-Tash", and it has been pointed out that the schedule to the 1909 *Iradeh* (see p. 82) contains the item — "Real property situated at Bashlik-Tash".

In order to counter the effect of this judgment the Appellant has filed two further Exhibits (T/1 and T/2). In Exhibit T/1 the United Chambers of the Court of Cassation were considering the effect of Article 8 of the law of 1924, (which the Respondent has now put in as Exh. 29), and they decided that this Article did not apply to the private property of the Sultan which was registered in his name and which had not been transferred to the Treasury in his lifetime. The following appears at p. 3 of Exh. T/1:—

> "In consequence the properties being the object of these cases and entered in the Land Registry in the name of the deceased have become the properties of the heirs by death of Abdul Hamid which took place in 1331 (1917) (*sic*) and it is not possible to maintain that these properties still belonged to the deceased Sultan after his death, having changed owners in the very minute the death took place."

Following that ruling the other case (Exh. T/2) was brought in respect of the property which was the subject matter of Exh. 23, with the result that that judgment (Exh. 23) was quashed. Prof. Bentwich has, however, observed that Exh. T/2 did not deal with the *Iradehs* or with Article 10 of the Law of 1924 (Exh. 29). He also submits that it is not clear whether the property referred to in Exh. 23 is one of the properties included in the Schedules to the *Iradehs*.

We have heard a great deal of argument on the question of validation,

and on the question of ratification (or adoption) of the *Iradeh* of 1909, and several cases have been referred to. Having considered these arguments I am unable to agree with the learned trial Judge that the 1909 *Iradeh* was adopted by virtue of the Budget and Finance Laws in such a way as to make it an act of State. Nor do I find that this *Iradeh* was validated in such a way as to make it an act of State. Neither the Budget Laws nor the Finance Laws were passed with the express purpose of depriving Sultan Abdul Hamid of his private property and if they had been passed with that purpose in view they would have been invalid as offending against the Constitution. I am unable to regard the Budget Laws or the Finance Laws as being acts of State. The Budget Laws, by treating the income of the property comprised in the schedule to the 1909 *Iradeh* as revenues of the State, did not alter the fact that the 1909 *Iradeh* was itself invalid. Acceptance of moneys which came from that invalid source could not, in my judgment, validate the *Iradeh*. The constitution could not be by-passed in this way. Halsbury, Vol. 26, p. 246, para. 556, contains the following definition of the expression "Act of State":—

> "The expression 'act of State' is here used to denote an executive or administrative exercise of sovereign power by an independent state or potentate, or by its or his duly authorised agents or officers. The expression is not a term of art and is used in different senses by different authorities."

And foot-note (a) to this paragraph reads as follows:—

> "The term, taken in its largest sense, might perhaps include legislative and judicial acts, such as an Act of Parliament or a judgment of the superior courts. The term act of State is applicable to any act done by the State in the execution of its Sovereign power."

There appears to me to be no doubt that the Turkish Courts could have entertained a claim by the heirs in respect of this property. If the Turkish Courts could have entertained such a claim then the Courts of Palestine, within whose jurisdiction the property is situated, can entertain it, unless their jurisdiction is ousted for any valid reason.

This brings me to the final and very important ground of appeal and that is whether the wording of Article 60 of the Treaty of Lausanne precludes the Court from holding that the *Iradeh* of 1909 was invalid, and/or from holding that no property passed to the Ottoman State and consequently to the successor state in virtue of this *Iradeh*. Bound up with this is the question as to the meaning of the term "subrogation" in Article 60 of the Treaty, and the question whether this article precludes the validity and/or the legal effect of the 1909 *Iradeh* and/or of the transfers purported to be effected thereunder from being questioned in the Courts.

I agree with the finding of the trial Judge (in para. 10 of his judgment) that the two *Iradehs* and their schedules have been properly proved, and I also agree with his finding (in para. 28) that the *Iradehs* of 1908 and 1909, referred to in Article 60 of the Treaty, are those which are the subject matter of this case.

The Treaty of Lausanne is part of the law of Palestine. The Treaty of Peace (Turkey) Ordinance (Cap. 146) appears at p. 1497, Vol. 2, Laws of Palestine, and sec. 2 provides that:—

> "The articles of the Treaty and the parts of the articles of the Treaty set out in Part 1 of the second schedule to this Ordinance shall have full force and effect as law in Palestine...."

Article 60 of the 2nd Schedule reads as follows:—

> "The States in favour of which territory was or is detached from the Ottoman Empire after the Balkan wars or by the present Treaty shall acquire, without payment, all the property and possessions of the Ottoman Empire situated therein.
>
> It is understood that the property and possessions of which the transfer from the Civil List to the States was laid down by the *Iradehs* of the 26th August, 1324 (8th September, 1908) and the 20th April, 1325 (2nd May, 1909) and also those which, on the 30th October, 1918, were administered by the Civil List for the benefit of a public service, are included among the property and possessions referred to in the preceding paragraph, the aforesaid States being subrogated to the Ottoman Empire in regard to the property and possessions in question. The *wakfs* created on such property shall be maintained.
>
> — — — — — — — — — — —
>
> The provisions of this Article will not modify the juridical nature of the property and possessions registered in the name of the Civil List or administered by it, which are not referred to in the second and third paragraphs above."

The Treaty is undoubtedly an act of State, and no Court in Palestine can question its provisions. The chief point to be decided is what is meant by the term "subrogated". Does this term, as used in this Article, mean that the successor States have undertaken to be liable for all claims that might have been brought against the Turkish State, in respect of the properties referred to in the *Iradehs* of 1908 and 1909?

The first point to be decided is whether the meaning of the term is clear as it stands. If it is clear in its context, we must not, for the purpose of construing it, refer to the discussions which led up to the final text of the Treaty.

I find, in the first place, that there is no indication in Article 60 that the properties were being taken over subject to private claims, and I think it cannot be doubted that if there had been any such intention,

it would have been clearly expressed. I am supported in this view by the fact that there is specific provision that "the *wakfs* created on such property shall be maintained". Had there been any intention to give effect to private claims there would have been similar specific provision to this effect. I am further supported by the final paragraph of Article 60 which preserves the juridical nature of the property and possessions registered in the name of the Civil List or administered by it, which are not referred to in the second and third paragraphs of Article 60, for example property which is not referred to in the *Iradehs* of 1908 and 1909. It follows therefore that there is no stipulation that the juridical nature of the properties covered by those two *Iradehs* shall not be modified.

In my view the term "subrogation", as used here, does not import any agreement to respect private rights. I agree with the learned trial Judge (as expressed in para.29 of his judgment) that the Article, having recited that the successor states should acquire the properties of which transfer from the Civil List to the State was laid down by the two *Iradehs*, precludes the Court from holding that no property was transferred by them, and thus precludes the Court from holding that either of the two *Iradehs* was invalid. I also agree with his finding that the term "subrogation" means that the Government of Palestine stands in the shoes of the Ottoman State only for the purpose of enabling a subject to determine in the Courts of this country whether any particular property did pass under either of the two *Iradehs*. But even if I do take into account the minutes of the discussions (see Exhs. 22, 22A and 22B) leading up to the drafting of Article 60 in its present form, I can see nothing in them to support a finding that there was any agreement to give effect to private claims. On the contrary, there are certain passages which show the opposite intention. For example, in Exh. 22 (at p. 105) we find the following:—

> "The property and possessions of the Civil List not referred to by the said *Iradehs* will be considered as private property."

The implication is that the properties referred to in those *Iradehs* were not to be considered as private property. The remarks of Mr. Bompard, and of Sir Alan Block, at p. 108, are of interest as showing the view of delegates other than Turkish. There are also the remarks of Sir Horace Rumbold and Mr. Bompard (at p. 109).

In the result I find that the property in suit was transferred to the Government of Palestine by virtue of Article 60 of the Treaty of Lausanne without any reservation except in regard to *wakfs*, if any, and that the provisions of the Treaty cannot be challenged in the Courts of Palestine.

The appeal must be dismissed with costs on the higher scale to include a hearing fee of LP. 80.

Delivered this 31st day of March, 1947.

British Puisne Judge.

De Comarmond, J.: The Attorney General was Defendant in the Court below and the claim having been dismissed, it was not possible for him to cross-appeal. When the appeal was heard, the learned Attorney General submitted, *inter alia,* that the Court below should have dismissed the case on the ground that there had been no omission within the meaning of section 66 of the Land (Settlement of Title) Ordinance, Cap. 80 of the Revised laws. This point was dealt with by the learned Judge in the Court below in paragraphs 4 and 6 of his judgment. One of the learned Attorney General's submissions on this point was that an omission within the meaning of section 66 must be in the nature of an oversight. I think that the interpretation suggested by the learned Attorney General is too narrow. I am of opinion that section 66 gives a right of action not only where it is alleged that the omission is due to the old registration having been overlooked, but also where such scant attention has been given to it as to amount to a denial of justice.

It is true that numerous provisions of the Ordinance ensure publicity, give rights of recourse to an appellate Court, and provide other safeguards, but it seems to me that section 66 was intended to afford a last opportunity in proper cases for overcoming the finality of settlement proceedings. Originally section 66 afforded such an opportunity only in cases of fraud. In 1930, section 59 of the 1928 Ordinance was amended by section 18 of Ordinance 18 of 1930, and the words 'or that a right recorded in the existing Registers has been omitted or incorrectly set out in the Register" were inserted therein, and it seems to me that the reason for the amendment was that the legislator considered that the position of a registered owner deserved special attention. What I have in mind is that the legislator in 1930 must have realised that settlement proceedings may for example take place during the absence from the country of a registered owner and may result in his rights not receiving due consideration. In such a case it would be fair to allow a person who was registered in the old register to vindicate his rights. I hasten to add that, in my opinion, an action brought by such a person would not succeed if it is shown that, in fact, the Settlement Officer did direct his mind to the original registration. In this connection I wish to draw attention to section 27(4) of Cap. 80 which empowers the Settlement Officer to take into consideration the rights of a person who has not presented a claim. I do not overlook the

argument that the view I take leads to the result that in some cases a person may use or attempt to use section 66 to bring what is virtually a second appeal, but the obvious answer is that it is open to the Defendant to point out that justice has already been done and that the action must fail; in fact, the Defendant would probably use rule 21A of the Civil Procedure Rules, 1938, as amended in 1945, and ask that the case be forthwith dismissed, or the Court might under rule 21 strike out the statement of claim on the ground that it is vexatious or frivolous. In the present case, the Defendant-Respondent pointed out in paragraph 4 of his statement of defence that the Settlement Officer had been placed in presence of the entries in the Turkish Land Register and the Defendant denied that there had been an omission within the meaning of sec. 66. I consider that the defence on this point was fully justified and that the Court below should have dismissed the claim on the ground that there could be no question of "wrong omission" where it was obvious that the Settlement Officer had applied his mind to the existence and value of the old registration. I will go further and say that I do not agree with the learned trial Judge when he says that the Settlement Officer erred in arriving at the conclusion that the *Muharraqa* lands were to be registered in the High Commissioner's name in trust for the Government of Palestine. In fact, I would have been surprised if the Settlement Officer had reached a different conclusion: he had before him a claim by the Government based on the *Iradeh* of 1908 and on Article 60 of the Treaty of Lausanne. It is true that the Settlement Officer did not see the Schedule to the 1908 *Iradeh* (Exhibit 6) and therefore could not from the *Iradeh* alone find out which were the properties transferred; but on the other hand, Article 60 of the Treaty of Lausanne coupled with the 1908 *Iradeh* did create a strong presumption in favour of Government and this taken together with the evidence heard during the settlement proceedings, afforded sufficient data to justify the decision arrived at. I would call attention in this connection to the fact that the witness Muhammad Khalil Mushaweiri, who represented the Village Settlement Committee, stated that people knew that the *raqaba* of the land, whether *miri* or *jiftlik*, belonged to the Government. I am, therefore, not at all ready to endorse the view that, in the circumstances, the Settlement Officer should have decided to have the *Muharraqa* lands registered in the name of Abdul Hamid or of his heirs. I have already drawn attention to sec. 27(4) of Cap. 80, and in my opinion it cannot be doubted that the Settlement Officer did direct his mind to the existence of the old registration and decided, after consideration, to register the *Muharraqa* lands in the name of Government.

My learned brother Shaw, J., has dealt with the various grounds of appeal and I concur in the views expressed by him. I would, however, like to offer a few remarks regarding the question of Act of State.

I am not satisfied that the so-called Budget Laws (Exhibit 11) afford a sufficient basis for the application of the doctrine of act of State. The learned trial Judge dealt with this matter in paragraphs 21 to 26 of his judgment. I would refer specially to paragraph 23 in which mention is made of the "adoption" by the Ottoman State of the transfers of property purported to be effected by the *Iradeh* of 1909. It seems to me that the Budget Laws lack the certainty and finality which, in my view, are necessary ingredients of an act of State. Furthermore, I cannot find in these Budget Laws that exercise of sovereign power which verges on arbitrariness and which places an act of State beyond the ambit of municipal law. I would perhaps convey my meaning more clearly by quoting the following passage from Lord Kingsdown's judgment in Secretary of State in Council of India *v.* Kamachee Boye Sahaba which is referred to in the judgment of Vaughan Williams, L. J., in Salaman *v.* Secretary of State for India (1906) 1 K. B. at page 626:—

> "Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? Or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor. If it were the latter, the defence set up, of course, has no foundation."

I will also quote the following passage from the judgment of Fletcher-Moulton, L. J., in the same case at p. 640:—

> "The true view of an act of State appears to me to be that it is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected...."

The learned trial Judge relied to a great extent on the case of Princess Olga Paley *v.* Weisz (1929) 1 K. B. 718 in which the principle of "adoption" was recognised with regard to acts of confiscation done by the Russian revolutionaries in 1918 and subsequently adopted by the Soviet Republic. I would point out that the Russian Government did unequivocally validate and adopt the acts of confiscation, whereas in the present case it is not clear that such an irrevocable step was signified by the Turkish Government. The importance of the Budget Laws in the present case is that they appropriated revenue produced by certain properties referred to in the *Iradehs* of 1908 and 1909 and thus

supply one more link in the chain connecting the *Muharraqa* lands with the properties transferred by the Lausanne Treaty.

Dr. Weinshall for the Appellant has argued that the reference to subrogation in the second paragraph of Article 60 of the Treaty of Lausanne means that the property and possessions therein mentioned were transferred subject to any legal claims which might have been made against the Ottoman State by persons claiming to be legally entitled thereto. The conclusion I have reached on this point is the same as the one expressed by my brother Shaw and I would add that a study of the French text convinces me that the mention of subrogation was only intended to refer to the existence of *wakfs* which had to be respected. I would add that I was impressed by the learned Attorney General's argument that it was difficult to conceive that a victorious State would have accepted to take properties subject to claims which had been or might be made by private citizens of the conquered State. In this connection it is of interest to recall the principles enunciated in Rustomjee *v.* The Queen 2 Q. B. 69 and Cook *v.* Sprigg (1899) A. C. 572. The former case is of special interest both as to facts and law. Rustomjee was the creditor of a firm of Chinese merchants and was expelled from China with other British subjects. When a treaty of peace was signed between Her Majesty Queen Victoria and the Emperor of China the latter agreed to pay to the British Government the sum of three millions of dollars on account of debts due to British subjects by Chinese merchants who had become insolvent. Rustomjee claimed by petition of right the amount originally owed to him by the said Chinese merchants. One of the grounds on which the claim was rejected was that the making of peace is an act of the prerogative of the Crown and (to quote from the judgment): "The Queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her; she acted throughout the making of the Treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and as in the making of the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts."

To conclude, I agree that this appeal should be dismissed with costs as stated in my learned brother's judgment (Shaw, J.).

British Puisne Judge.

Curry, A/J.: I entirely agree with the conclusions arrived at by my learned brother Shaw, J., and I feel there is very little indeed which

I would desire to add thereto. There are a few brief comments, however, which I would like to make upon certain issues in this case.

I do not think there can be any doubt that when section 66 of the Land (Settlement of Title) Ordinance empowers the Land Court to order rectification of the register, where the Court is satisfied that a right recorded in the existing registers has been omitted or incorrectly set out in the register, the word "omitted" must be very strictly interpreted. Whenever in Land Settlement proceedings the Settlement Officer gives judgment against the party who has a right recorded in the existing register and in favour of some other party, of course the right originally registered is omitted from the new register, but in my opinion it would be absurd to suggest that the party with the right recorded in the existing register could claim rectification under this section. He has his remedy under sec. 63, which deals specifically with appeals. This section was in my opinion enacted to allow rectification where the Settlement Officer had by oversight omitted to register the right in the new register. Its purpose is to provide for cases which could not be brought within the ambit of clerical errors referred to in section 68, *e. g.* cases where the Settlement Officer had forgotten to consider the registration of the existing right. If, however, the Settlement Officer does consider the right in the existing register, then his decision not to record it in the new register cannot possibly be called an omission.

Turning next to the question whether the *Iradehs* were adopted or validated by the Finance Acts in such a manner as to make them Acts of State, it appears to me that there has been some confusion of thought as to what is an act of State. The learned Attorney General relied largely on the case of Olga Paley *v.* Weisz, L. J. R., 1929, Vol. 9, p. 465. Very briefly, in that case certain properties of the Princess were seized by the Russian revolutionaries and subsequently sold to a Russian who came to England. The Princess brought an action to recover those properties. It was held that the action failed, as the adoption by the Government of Russia of the act of the revolutionaries in seizing the Plaintiff's goods was an act of State, into the validity of which the Court could not enquire.

Thus in that case one starts, not with an invalid Municipal law of Russia, but a seizure by revolutionaries by virtue of their sovereign power. Subsequently, that taking by force by the revolutionaries was adopted by the Russian Government by a decree of 1923 and it was held that in view of the fact that the seizure of the property had been adopted by the Russian Government that seizure became an Act of State.

How different are the facts in our case. The Finance Laws, merely

by appropriating the revenue, cannot be said to be validating the seizure of the property. They were merely legislative financial acts enacted within the framework of the Constitution, and therefore could not be interpreted as Acts of State, nor could they be said to be adopting an act of sovereign power, for the *Iradehs* took the property under colour of legal title, which can be questioned, and not by arbitrary power. In the Olga Paley case the Russian State itself claimed that it had a good title to the property. In our case Turkey makes no such claim, and in fact there was evidence that the Courts of Turkey would require evidence as to the validity of the *Iradehs*. When we consider the Treaty of Lausanne, which specifically mentions the *Iradeh* of 1909, we of course come to what is undoubtedly an act of State.

I find myself quite unable to accept the argument of Dr. Weinshall that the word "subrogation" in that Treaty means that the British Government was placed in the shoes of the Ottoman Empire, and therefore subject to any claims by third parties. It is impossible to conceive that a victorious State would enter into a treaty transferring property on such terms.

I agree that this appeal should be dismissed with costs as stated in the judgment of my learned brother (Shaw, J.).

A/British Puisne Judge.

CIVIL APPEAL No. 324/45.

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

BEFORE: De Comarmond, J.

IN THE APPEAL OF:—

Hanna Jubrail Batarsi & an. — APPELLANTS.

v.

Mrs. Madelain O'Brien & an. — RESPONDENTS.

Co-ownership — Lease by co-owner — Eviction, Art. 24 *Magistrates' Law, M. C. J. O., sec.* 3(*c*), *C. A.* 37/45, *C. A.* 244/45, *C. A.* 66/44, *C. A.* 179/43 — *Pleadings.*

Appeal against the judgment of the District Court of Jerusalem dated 21st June, 1945, in Civil Appeal No. 73/44, whereby the judgment of the Magistrate's Court of Jerusalem in Civil Case No. 133/44 of 24.7.44 was reversed and judgment entered in favour of Respondents for the dispossession of Appellants from a certain plot of land in Bethlehem, dismissed:—

Circumstances in which Art. 24 of the Magistrates' Law and sec. 3(*c*) of the Magistrates' Courts Jurisdiction Ordinance may be invoked, analyzed.

(*A. M. A.*)

REFERRED TO: C. A. 179/43 (1943, A. L. R. 639); C. A. 66/44 (11, P. L. R. 310; 1944, A. L. R. 590); C. A. 37/45 (12, P. L. R. 354; 1945, A. L. R. 678); C. A. 244/45 (13, P. L. R. 84; 1946, A. L. R. 129).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C., at p. 287.

2. See the notes to the judgment under appeal (*supra*), the cases cited with the notes thereto and *cf.* C. A. 319/45 (1946, A. L. R. 278) and C. A. 109/46 (*ante*, p. 48).

(*H. K.*)

FOR APPELLANTS: Elia.

FOR RESPONDENTS: Elhanani.

JUDGMENT.

This is an appeal from a decision of the District Court of Jerusalem in its appellate capacity whereby an appeal from a Magistrate's Court was allowed and the Magistrate's decision was reversed. The present Appellants were the Defendants in first instance and the present Respondents were the original Plaintiffs.

The two Respondents, who were the original Plaintiffs, are registered as co-owners, together with six other persons, of a parcel of land at Bethlehem. One of the former co-owners was Issa Jadallah Samaan, a brother of the first Respondent and a nephew of the second Respondent. Issa sold his share in 1927. In 1942 four of the registered co-owners, including the present two Respondents, sued Issa before the Bethlehem Magistrate alleging that he had trespassed on the land and had given out leases on his own account. Issa pleaded that the Plaintiffs never had possession of the land and that he had not trespassed. The case was struck out at the request of the Plaintiffs.

In 1943, the two present Respondents started proceedings before the Magistrate against the two present Appellants asking that they be ordered to vacate the property and deliver clear possession. The present Appellants (then Defendants) were occupying the property by virtue of an unregistered lease granted to them by the aforesaid Issa Jadallah Samaan in 1943 for a term of three years. During the hearing before the Magistrate, evidence was adduced by the Defendants to the effect that Issa had been acting as owner and leasing the property. Successive leases granted by Issa were produced dated from 1936 onwards.

In the statement of defence, the Defendants denied that the Plaintiffs were owners and alleged that they (the Defendants) were estopped from bringing the action because they had remained passive during a long time and furthermore because they had discontinued the action brought by them against Issa in 1942.

I would here point out that the pleadings in this case are of importance because they help to determine the question whether the case rests solely on Article 24 of the Ottoman Magistrates' Law as now contended by the present Appellants. It seems that the same contention was raised at the first hearing before the Magistrate, and this explains why the learned Magistrate, in an attempt to clarify the issues, ordered a reply to be filed. This was done, but the reply was rambling and failed to state clearly whether the Plaintiffs were relying solely on Article 24 or were invoking section 3(c) of the Magistrates' Courts Jurisdiction Ordinance, 1939. Paragraph 6 of the reply, however, clearly alleged that the Plaintiffs had always been in possession until the Defendants came on the property and this allegation was pointless unless its object was to base the claim for eviction upon Article 24. Being given that the learned Magistrate dismissed the case because the Defendants had not taken the land as trespassers, it would seem that he decided the case under Article 24 of the Ottoman Magistrates' Law, and I have no hesitation to say that this decision was fully justified (if the Plaintiffs were relying solely on the said Article) because the Plaintiffs failed to establish that they had been in "actual possession" and had been recently dispossessed.

In Civil Appeal 37/45 (12, P. L. R. 354) this Court held that the term "recovery" as used in section 3(c) of the Magistrates' Courts Jurisdiction Ordinance is not necessarily confined to the case of the reinstatement of an ousted owner. It was pointed out in the same judgment that Article 24 of the Ottoman Magistrates' Law deals with recovery of possession in certain specific circumstances and is concerned primarily with recovery where there has been trespass and that it does not exhaust all the remedies open to a legitimate owner to recover possession, nor does it oust section 3(c) of the Magistrates' Courts Jurisdiction Ordinance. In Civil Appeal 244/45 (13, P. L. R. 84) the extent of a Magistrate's jurisdiction in cases of recovery of possession was again referred to. Those decisions do not and could not preclude a plaintiff from relying exclusively on Article 24. It is conceivable that Article 24 of the Ottoman Magistrates' Law may still be used in certain cases where a person asks to be reinstated in possession after being recently dispossessed.

The learned President of the District Court held that Article 24 of

the Ottoman Magistrates' Law is only applicable where the parties to the action both claim ownership, and he quoted Civil Appeal 66/44 (11, P. L. R. 310). The learned President probably had in mind the passage of the judgment of Frumkin, J., in Civil Appeal 66/44 describing Article 24 as being "in the nature of an emergency rule providing a quick remedy in the case of recent trespass pending a decision as to ownership relating to the land in dispute". This statement of the law is no doubt correct in most instances, but I would not go so far as to say that the holder of a title-deed (which I understand to mean a deed evidencing ownership) may not use Article 24 against an opponent who does not claim ownership. Thus, in the present case, if the Plaintiffs came before the Magistrate and sued for recovery of the land solely on the strength of their *kushan,* it was open to the Defendants to cite Issa (their lessor) as co-Defendant and this might have brought up the issue of ownership and involved a reference to the Land Court. On the other hand, if the Plaintiffs meant to use Article 24 only, and rely on recent actual possession, the issue of ownership would have been shut out for the time being, but the Plaintiffs could not succeed under Article 24 unless recent actual possession was established.

As regards Civil Appeal 179/43 (1943) A. L. R. 639, which was relied upon by the Appellant, I confess that I experience some difficulty in reconciling it with subsequent decisions such as Civil Appeal 66/44 and Civil Appeal 37/45. I am inclined to think, however, that the Plaintiffs in Civil Appeal 179/43 had tied themselves down to Article 24 of the Ottoman Magistrates' Law and this would explain away the apparent conflict.

The difficulty I experience is to decide whether the issue before the Magistrate was narrowed down to Article 24. If it was not, I would hold that the Magistrate should have ordered eviction on the strength of the Plaintiffs' *kushan* which was not in fact properly challenged. I must confess that it is difficult to understand why the Plaintiffs would have stultified themselves by relying solely on Article 24, but being given the circumstances of the case, it is not impossible (for the reasons stated above) that their idea was to try and obtain quick results by using Article 24. I was impressed by the fact that on appeal before the District Court, at the first hearing before Judge Bourke, Mr. Krongold for the then Appellants (now Respondents) clearly stated that his case was based on Article 24 and that all the elements of that Article had been proved. On the other hand, at the hearing of the 9.2.44 before the Magistrate, the Plaintiffs' advocate had stated that the question of possession was irrelevant; this could only mean that he was not relying on Article 24. Furthermore, when the appeal was

finally argued before the District Court, Mr. Smoira for the then Appellants shifted from the position taken by Mr. Krongold before Judge Bourke and relied upon section 3 of the Magistrates' Courts Jurisdiction Ordinance.

After scrutinizing the pleadings and the record, I have reached the conclusion that I would not be justified in holding that the Plaintiffs-Respondents based their case solely on Article 24 of the Ottoman Magistrates' Law, and I therefore cannot find fault with the decision of the District Court. Being given, however, the lack of precision of the Plaintiffs' pleadings and the wavering way in which their case was conducted before the lower Courts, I do not consider it just to grant costs of this appeal against the Appellants. This appeal is therefore dismissed without costs.

Delivered this 15th day of October, 1946.

British Puisne Judge.

HIGH COURT No. 102/46.

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

BEFORE: Curry, A/J., Frumkin and Abdul Hadi, JJ.

IN THE PETITION OF:—

Aharon Yohananoff. PETITIONER.

v.

Commissioner for Migration and Statistics, Jerusalem. RESPONDENT.

Application by holder of Palestinian passport as naturalised person for passport describing him as Palestinian Citizen under Art. 1, Palestinian Citizenship Order-in-Council — Grant of Ottoman nationality to a minor whose father is of Russian nationality — Scope of Art. 6, Palestine Citizenship O. in C.

Return to an order *nisi*, issued on the 15th of November, 1946, directed to the Respondent, calling upon him to show cause why his decision communicated to Petitioner's attorney in his letter No. PJ/2121/938, dated the 2nd of June, 1946, should not be cancelled and why a Palestinian Passport should not be issued to the Petitioner describing him as a Palestinian Citizen under Article 1(1) of the Palestinian Citizenship Order-in-Council, 1925, in lieu of the Palestinian Passport issued to him by H. M.'s Consul General at Algiers on the 20th of November, 1943; order *nisi* discharged:—

1. a) Under Art. 6, Palestinian Citizenship Order-in-Council, as amended, a minor can have no other nationality than that of his father, thus no minor can for purposes of Art. 1(1) of said Order be deemed to be a Turkish subject unless his father was one.

b) All acts by other States purporting to grant a minor a nationality different from that of his father can have no effect in matters arising out of said Order-in-Council.

2. A person applying for and obtaining a Palestinian passport under Art. 7, Palestinian Citizenship Order-in-Council (*re* Naturalisation) cannot subsequently claim Palestinian citizenship under Art. 1 of the Order (*re* previous Turkish subjects).

(*M. L.*)

FOR PETITIONER: Eliash.

FOR RESPONDENT: J. Wieks.

JUDGMENT.

The Petitioner in this matter was born in Jerusalem in 1911. His father was a Russian subject and his mother who was born in Palestine was Russian by marriage. Apparently in 1914 the Petitioner's father went to Egypt as a result of an order banning Russian subjects from this country. In July, 1915, Petitioner and his mother were granted Ottoman nationality by the Turkish Government. On the first of August, 1925, Petitioner was a person habitually resident in Palestine and on the 29th of June, 1927, his father obtained from the Palestinian Government a certificate of naturalisation. That certificate contained the name of the Petitioner as one of his children. On the 20th of November, 1934, Petitioner obtained from the British Consul in Algiers a Palestinian Passport as one naturalised in Palestine under Article 7 of the Palestinian Citizenship Order-in-Council, 1925. On the 20th of August, 1945, Petitioner applied to the Commissioner for Migration for a new Palestinian passport as a Palestinian citizen by virtue of Article 1(1) of the Palestinian Citizenship Order-in-Council, 1925. The Commissioner refused the application. The Petitioner now applies for an order commanding the Commissioner for Migration to cancel his decision and to issue a Palestinian passport describing him as a Palestinian citizen under Article 1(1) of the aforesaid Order-in-Council in lieu of the passport issued to him in 1934 as a person naturalised in Palestine. Article 1 of the Palestine Citizenship Order reads as follows:—

> "Turkish subjects habitually resident in the territory of Palestine upon the first day of August, 1925, shall become Palestinian citizens."

Now it is clear that Petitioner's father was not a Turkish subject and therefore the father could not become a Palestinian citizen. Article 6 of the Order reads as follows:—

> "For the purpose of parts 1 and 2 of this Order the status of a

> married woman will be governed by that of her husband and the status of children who have not attained the age of majority by that of their parents."

Article 6 was subsequently amended to provide that the status of a child who had not attained the age of majority was to be governed by that of his father.

The question to be decided by this Court is whether in view of Article 6 the status of the Petitioner until attaining the age of majority was Russian, being governed by that of his father or was Turkish as a result of the *"nefus"* issued by the Turkish Government.

It seems to me perfectly clear that by the Palestinian Citizenship Order His Majesty has ordered that so far as this Government is concerned the status of a minor shall be governed by that of its father — no option is given in the matter nor does it recognise any possibility of other nationality for the minor and therefore so far as the said Order is concerned a minor can have no other nationality than that of its father. All acts by other States purporting to grant a minor a nationality different from that of its parents can have no effect in matters arising out of this order.

In my opinion Article 1 must be read together with Article 6 to the effect that only Turkish subjects habitually resident in Palestine upon the 1st of August, 1925, shall become Palestinian citizens and no minor can be deemed to be a Turkish subject unless his father was one. In this I am supported by H. C. 58/37.

Apart from this aspect of the case the Petitioner in 1934 after he had come of age applied for a passport and was granted one as a person naturalised in Palestine. It would, therefore, appear to me that he cannot now deny that he is in fact a naturalised Palestinian.

The order *nisi* is accordingly discharged.

Delivered this 27th day of March, 1947, in the absence of Petitioner and in presence of Hanna Eff. Khalaf for Respondent.

A/British Puisne Judge.

Frumkin, J.: I agree that the order be discharged on the last ground, namely that the Petitioner after becoming of age has accepted a passport as a naturalized subject and cannot after twelve years plead ignorance of the law as to the difference between a passport based on naturalisation and one issued to a Palestinian citizen.

Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 4/47

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

BEFORE: De Comarmond and Frumkin, JJ.

IN THE PETITION OF:—

Mrs. Ernestine Salzberger. APPLICANT.

v.

Mr. Maccabi Salzberger. RESPONDENT.

Civil Appeal referring matter to Special Tribunal — Application for leave to appeal to Privy Council — Grant of leave to appeal to Privy Council from interlocutory judgment.

Application for leave to appeal to His Majesty in Council from the judgment of the Supreme Court in C. A. No. 335/46, dated 24.1.47; application granted:—

1. No appeal to Privy Council lies as of right from judgment of Court of Appeal referring a matter to a Special Tribunal, such judgment being only interlocutory.

2. Question whether Civil Court has jurisdiction to deal with a will in civil form made by a Palestinian member of Jewish Community being complicated and of great importance to Jewish Community as a whole, it deserves leave to appeal to Privy Council in exercise of discretion of Court of Appeal.

(*M. L.*)

ANNOTATIONS:

1. The judgment from which leave to appeal was sought is reported in 1947 A. L. R. 125.

2. On point 1 *cf.* P. C. L. A. 22/44 (1945, A. L. R. 375; 12, P. L. R. 80).

(*A. G.*)

FOR APPELLANT: S. T. Cohen.

FOR RESPONDENT: M. Scharf.

O R D E R.

This application for leave to appeal to the Privy Council is resisted by the Respondent.

The Applicant avers that the amount in dispute exceeds £ 500 and, in the alternative, that the question involved being one "of great general or public importance or otherwise", it ought to be submitted to H. M. in Council for decision.

Mr. Scharf, for the Respondent, has submitted that there is no appeal as of right because there is no indication that the legatee (*i. e.* the Applicant) would ever receive an amount exceeding £ 500. Mr. Scharf's

point is that the Applicant should have established the value of the estate and shown that the will would have practical effect.

Mr. Scharf's other objection is that the judgment is not a final one and that, therefore, no appeal as of right lies.

This second objection is justified and I do not consider that an appeal lies as of right. It is, therefore, unnecessary to consider the question of value.

Mr. Scharf also submitted that discretion under Art. 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, should not be exercised because the decision is merely one given in pursuance of Art. 55 of the Palestine Order-in-Council of 1922 referring the matter to the Special Tribunal.

I am not prepared to accept Mr. Scharf's last-mentioned submission. Mr. Cohen, for the Applicant, has called attention to the judgment in C. A. 70/46 quoted by the learned Judges who decided C. A. 335/46. C. A. 70/46 itself reviews two previous decisions, namely C. A. 106/40 and C. A. 131/42 and it would be idle to deny that the point is complicated and is of great importance to the Jewish community as a whole. Put shortly, Mr. Cohen's submission is that when a will in civil form has been made by a Palestinian member of the Jewish community the civil court has jurisdiction and there is no need or justification for a reference to the Special Tribunal.

Being given that under Art. 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, discretion may be exercised even where the judgment is an interlocutory one, I have reached the conclusion that it is fit and proper to grant leave to appeal upon conditions which will be laid down after hearing the parties.

Given this 25th day of March, 1947, in the presence of Mr. H. Hopp for Applicant and Mr. Podhorzer for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 337/46.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Co-operative Society Printing Ahduth. APPELLANT.

v.

Israel Asher Shafir & 2 ors. RESPONDENTS.

Lease given by prospective purchaser who was allowed unrestricted possession — Rescission of purchase agreement by mutual consent — Eviction order against purchaser-lessor — Ineffectiveness of eviction order as regards purchaser's lessee.

Appeal from the judgment of the District Court of Tel-Aviv in C. A. 107/45, dated 12.7.46 from the Magistrate's Court judgment, dated 6.6.45 in C. C. 770/45; appeal allowed:—

1. Where A allowed B to enter into unrestricted possession of A's property including the right to let it or any part of it and B let part of the property to C, any eviction order granted to A against B cannot operate against C.

2. A, owner of premises let by B to C, cannot obtain eviction, if circumstances are such that B could be regarded, as far as the lease is concerned, as *quasi*-agent of A.

(*M. L.*)

ANNOTATIONS:

1. The District Court judgment is reported in 1946 *Hamishpat* at p. 146 and in Dr. Ab. Gorali's Law of Landlord and Tenant in Palestine, p. 74, para. 7.

2. *Cf.* C. A. 20/46 (1947, A. L. R. 8).

(*A. G.*)

FOR APPELLANT: U. Heinsheimer.

FOR RESPONDENTS: R. Hutory.

JUDGMENT.

Frumkin, J.: The Appellant in this case has, since 1941, occupied a store in Tel-Aviv, which he acquired by way of lease from one Stachel who is not a party to the present proceedings. Stachel, in 1937, had entered into an agreement to purchase from the Respondents certain property which included the store in question. It appears that Stachel did not pay the full purchase price, and in 1944, by consent, the agreement of 1937 was cancelled. Thereupon the Respondents brought an action for dispossession against Stachel which, being unopposed, resulted in an order of eviction against him. That order of eviction included the store occupied by the Appellant which forced him to bring the present action. He succeeded in the Magistrate's Court, but on appeal to the District Court the Magistrate's judgment was set aside. Hence the appeal to this Court.

The Agreement of 1937 has not been produced, but it is conceded that by virtue of it Stachel was allowed to enter into unrestricted possession, not excluding the right to let the property or any part of it. Moreover, it has not been denied that the Respondents were aware of the occupation by the Appellant which lasted, as mentioned above, from 1941 up to the present day. So whatever be the position of Stachel *vis-à-vis* the vendors (the present Respondents), and taking it for granted

that he was not vested with ownership of the property because the agreement was only an agreement to purchase and not a sale, *vis-à-vis* the Appellant Stachel was a landlord and the Appellant was entitled to look upon him as such.

It has been argued that Stachel could not confer upon others more rights than he had himself, and that he having agreed to cancel his agreement with the Respondents, the Appellant, who derived his rights from him, is not in a better position. Against that it could be argued with equal force that Stachel was not at liberty to take away from the Appellant rights which he had lawfully acquired from a person who, if not the owner, could at least as regards the lease to him, be regarded as a *quasi*-agent of the Respondents.

For these reasons the judgment of the District Court must be set aside and the judgment of the Magistrate restored, with costs to the Appellant here and below, to include LP. 10.— advocate's fees for attendance at the hearing of this appeal. The order as to costs in the District Court is reversed.

Delivered this 3rd day of April, 1947, in the presence of Miss L. Azoulai for Appellant and no appearance for Respondents.

Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 74/46.

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

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

IN THE APPLICATION OF:—

Abdul Hamid Mohammad Ahmad Andulla & an. APPLICANTS.

v.

Abdel Halim Ahmed Abdalla. RESPONDENT.

Appeals — Additional evidence — Must be tendered at the hearing not on motion — Compromise.

Application for the production of the document of compromise concluded between the first Appellant and the Respondent on the 2nd day of November, 1946, refused:—

An application to produce a compromise for the hearing of an appeal falls under C. P. R. r. 344, and should be made during the hearing, not on motion prior to the hearing.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 146/46 (1946, A. L. R. 771) and note 2 thereto.

(*H. K.*)

FOR APPLICANTS: F. Atallah.

FOR RESPONDENT: G. Tcherniak.

ORDER.

This motion is misconceived. It appears to fall under Rule 344 of the Civil Procedure Rules in which case the issue must be decided at the hearing of the appeal.

The application is therefore refused. Costs to abide the event.

Given this 17th day of December, 1946.

Chief Justice.

CRIMINAL APPEAL No. 12/47.

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

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

IN THE APPEAL OF :—

Mohammad Haj Mousa Arrar. APPELLANT.

v.

The Attorney General. RESPONDENT.

Dying statement — Sec. 8 Evidence Ord. — When admissible in favour of accused — Hearsay — R. v. Thomson — Same evidence against two accused, CR. A. 80/45, CR. A. 203/45 — Amendment of information.

Appeal from the judgment of the Court of Criminal Assize sitting at Nablus in Criminal Assize Case No. 1/47 dated 27th January, 1947, whereby Appellant was convicted of murder *contra* section 214 of the Criminal Code Ordinance, 1936 and sentenced to death, dismissed:—

(Shaw, J., *dissentiente*): The rules against the inadmissibility of hearsay evidence are based on the fact that such evidence is not reliable. The rule consequently applies to the defence evidence as much as to the prosecution evidence and a statement inadmissible under sec. 8 of the Evidence Ordinance cannot be used in favour of the accused.

(*A. M. A.*)

REFERRED TO: R. *v.* Thomson, 1912, 3 K. B. 19, 81 L. J. (K. B.) 892, 107 L. T. 464, 28 T. L. R. 478, 7 Cr. App. Rep. 276; CR. A. 80/45 (1945, A. L. R. 602); CR. A. 203/45 (13, P. L. R. 13; 1946, A. L. R. 16).

ANNOTATIONS :

1. On the inadmissibility of hearsay evidence see Phipson on Evidence, 8th ed., pp. 205 *et seq.; cf.* C. A. D. C. Jm. 58/45 (1946, S. C. D. C. 400) and note 3.

2. On sec. 8 of the Evidence Ordinance generally *cf.* CR. A. 37/45 (12, P. L. R. 210; 1945, A. L. R. 533) and CR. A. 183/45 (12, P. L. R. 561; 1946, A. L. R. 149) and notes in A. L. R.

3. As regards CR. As. 80/45 & 203/45 (*supra*) see CR. A. 117/46 (1946, A. L. R. 773) and note.

(*H. K.*)

FOR APPELLANT: Cattan and F. Ghussein.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

FitzGerald, C. J.: In this case the Appellant was convicted of murder by the Court of Criminal Assize sitting at Nablus. The main evidence against him was that of three witnesses who purported to be eye-witnesses of the killing. The evidence of the third witness, Mustafa, was to the effect that the victim, as was his usual custom, left his village early on the morning of the 27th of July, carting manure on a camel to a grove. He was in front leading the camel, and was followed at short distance by his father, his brother, and by a cousin, named Idreis. The evidence of the two witnesses Mustafa and Idreis was that as they proceeded on their way the deceased had reached the top of a hill when he (the witness) heard a man shout "Hands up", and saw a man shoot at deceased. He recognised the assailant as the Appellant. He went up to his brother, he saw the Accused who was armed with a rifle, and one other man, who was originally charged, run away. His brother Muhammad who had been wounded was removed to hospital. The doctor gave evidence describing the wound. A few days later Muhammad died and the Court found, and in our opinion rightly found, that his death was the result of the wound inflicted on him. This evidence of Mustafa was confirmed in detail by Idreis and by the father, with this exception — that the father did not actually see the Appellant fire the shot but he rushed up to his son and asked him who shot him. The son replied that it was the Accused.

Various points were raised in the appeal. The first was the question as to the possibility of identification, seeing that it was before sunrise. There were slight conflicts as to the amount of visibility. Two witnesses said they had no difficulty in clearly distinguishing the Accused, another witness, Daoud, who came on the scene afterwards, said that it was dark and he could not see more than a few metres. This slight deviation, as it can justifiably be so called, might be accounted for by the

effect of better eyesight or other reasons. In any case, it was a question for the trial Court to gauge the credibility of the witnesses, and decide whether identification could have been established. The Judges came to the conclusion that visibility was sufficient to enable a person to be identified, and as we are not prepared to say that that was an unreasonable conclusion, we see no ground for interfering with it.

Counsel for the Appellant also referred to other variations, particularly in regard to the position of the wound. As to these, we need only say that no Court could expect a witness to give an exact photographic picture of what he saw when he came face to face with a crime of violence such as this. Such variations as were disclosed were examined by the trial Court and accounted for to their satisfaction. Again, in so far as the variations of evidence were concerned, we can find no criticism with the reasoning of the trial Court, or their conclusion based on that reasoning.

We now come to the main ground of appeal, which was an issue never raised in the trial Court or even in the written grounds of appeal. The dead man made a statement before he died. It was P/1. This was tendered in evidence by the prosecution under section 8 of the Evidence Ordinance. The trial Court came to the conclusion that it was not admissible because in the circumstances in which it was made it could not have been said to have been made shortly after the act of violence, which was necessary to bring it within the ambit of section 8. The question as to what constitutes "shortly after" must depend on the circumstances of the case. In one case it might amount to a few minutes, in another case it might even be hours. Having directed their minds to the issue, the trial Court came to the conclusion that it could not be considered "shortly after", within the meaning of the section, because, as they stated, it was made some two hours after the incident and after he had seen and conversed with many people. The trial Court were, in our opinion, entitled to come to that conclusion, and having come to it they were entitled to, indeed they were bound to, exclude the statement.

The prisoner in the trial Court never questioned the correctness of this ruling. It is now challenged for the first time. Counsel for the Appellant says that that statement was favourable to the Appellant and that it should have been admitted in evidence. There are two grounds, he says, on which it should have been admitted. The first is that it was *per se* admissible under section 8 of the Ordinance. We have dealt with this ground and we have rejected it.

Mr. Cattan's alternative ground was that even if it was technically

inadmissible as coming under the hearsay rule, it was admissible as being in favour of the Accused.

The argument at first sight is attractive, but in our opinion it does not stand up to a critical analysis. It is a fundamental principle of English law that hearsay evidence, except in certain specified circumstances, is not admissible in the Courts. There are schools of jurisprudence which criticise this provision of English law, and in fact Moslem law freely admits hearsay evidence. The reason why it is excluded in English Courts is that centuries of experience have led Judges and the Legislature to the conclusion that it is unreliable. We would emphasize that it is not excluded merely because it is considered prejudicial to an accused person. It is excluded because the British Courts are not prepared to base a decision upon it. It seems to us, therefore, that if it is excluded on the ground that it is inadmissible evidence to be adduced before a Court by the prosecution, it must equally be inadmissible if it is placed before the Court by the defence. If the law enjoins the Court to reject evidence because of some inherent defect which goes to the very root of it, — and there is such an inherent defect in hearsay evidence, unless it comes within the exception — that defect is not cured merely because an accused person may consider the evidence favourable to him. We might here remark that a statement of the deceased man to his father was rightly admitted because it came within the hearsay exception and therefore was not inherently defective. It seems to us that the issue has been authoritatively decided in the case of Rex *v.* Thomson, 3 K. B. 1912. In that case the issue was on all fours with the issue here, although of course the facts were not quite the same. In our opinion the fact whether the woman died or not was immaterial. The statement was refused admission solely on the ground that it was hearsay and did not come within the exception rules. In Rex *v.* Thomson the accused was charged with using an instrument on a woman for the purpose of procuring miscarriage. The woman had made a statement which the defence considered to be of use to the accused, as here, the victim made a statement which the defence now consider might be of service to the Appellant.

The statement of the woman in Rex *v.* Thomson, as the statement of the deceased in this case, came within the hearsay rule, and in consequence it was excluded. The Court of Criminal Appeal upheld the trial Court in refusing to allow it to be used in favour of the accused on the ground that if such evidence was admissible for one side, it must also be admissible for the other. It follows that, if as we have

held, the Court rightly decided that the evidence was inadmissible for the prosecution, it must be inadmissible for the defence.

It follows that this ground of appeal must be rejected.

Two other grounds were advanced in favour of Appellant. It was said that the evidence against the second Accused was the same as the evidence against the first, and that therefore following the decision in Criminal Appeal No. 80/45, the first Accused could not have been convicted and the second acquitted. We think that this contention has been examined and disposed of in Criminal Appeal No. 203/1945. It seems to us that the issue here is similar to the issue considered in that Criminal Appeal. The Court have stated that the evidence against the two was not the same. The evidence against the second Accused was distinctly weaker. We agree with that conclusion. It therefore follows that the Court were entitled to differentiate between the two lines of evidence and convict one and acquit the other.

Finally, it was said that the Information was amended before the start of the trial and that there is no authority to do this. This is purely a technical objection. Not only was no objection taken at the time when the Court allowed the amendment, but counsel for the Appellant intimated that he had no objection to the amendment. The amendment did not in any way prejudice the course of the trial or the Accused in putting forward his defence, and whatever highly technical substance there may be in the point we will not allow it to be taken now.

For these reasons the appeal must be dismissed.

Delivered this 28th day of February, 1947.

Chief Justice.

British Puisne Judge.

Shaw, J.: This is an appeal from the judgment dated 27.1.47 of the Court of Criminal Assize sitting at Nablus in Criminal Assize Case No. 1/47.

The conviction was based mainly on a statement made by the deceased to his father shortly after the shooting, and on the evidence of two other witnesses — P. W. 3 Mustafa (a brother of the deceased), and P. W. 4 Idreis (a cousin of the deceased).

The principal submission of Mr. Cattan, who appeared on behalf of the Appellant, is that a statement made by the deceased to P. W. 8 Corporal Inspector Mustafa Samara was not admitted in evidence. The note which the Court made when it excluded this evidence is at p. 10 of the typewritten record.

This note together with the Court's ruling, reads as follows:—

> "(Pros. want to put in the Mahmud statement under section 8 Evidence Ordinance — evidence of a statement of a person upon whom an act of violence is alleged *etc.* ... shortly after). Court holds that it is inadmissible not being a statement made shortly after — made some two hours after the event and after he had seen and conversed with many people."

It may be remarked here that it is not one of the grounds of appeal that evidence was wrongly excluded, but the point has been extensively argued and we assume that Crown Counsel thought it proper (and his conduct commends itself to me) to allow this point to be taken in view of its great importance. I must also observe here that the record does not show that any objection to the exclusion of this statement was taken by the defence, and I must assume that in excluding it the Court could not possibly have apprehended that its exclusion would be considered otherwise than beneficial to the defence. It is also clear that the defence made no attempt to put in the statement for any other purpose later. Indeed it is clear that it could only have been very late in the day that it struck the Appellant's counsel that the statement might be used with advantage to the Appellant.

So the first question to be considered is whether the Appellant's counsel can be allowed to raise, for the first time, in this Court, a point which he never raised at the trial.

The excluded statement is in the file, and we have looked at it and listened to lengthy arguments upon it from both sides. The question is a legal one, and it may be put shortly as follows:—

Where a trial Court has excluded a statement made by a deceased person on the ground that it was not made shortly after the act of violence, for the purpose of section 8 of the Evidence Ordinance (Cap. 84), can the Court of Appeal admit that statement?

Although I take the view that in the circumstances of this case the trial Court might reasonably have admitted the statement as having been made shortly after the act of violence, I am not prepared to say that the Court erred in excluding it — particularly where, as in the present case, neither side pressed for its admission. It is a matter for conjecture whether the Court would or would not have admitted the statement if the defence had indicated its wish that it should be admitted. But if the Court had admitted it I certainly would not have been prepared to say that the Court had wrongly exercised its discretion.

But the question is whether this Court now has the power to admit

it. Section 71 of the Criminal Procedure (Trial Upon Information) Ordinance (Cap. 36) empowers the Court of Appeal to hear any witnesses whom it may see fit to call or require the production of any document, and I have no doubt that this power is wide enough to enable the Court to admit this statement provided that it is shown to be admissible in law.

The question to be decided then is whether this statement is admissible in law. It is, of course, hearsay evidence, since it is a statement which the deceased made to Corporal Samara. All evidence which is admitted under the provisions of section 8 of the Evidence Ordinance is hearsay. If this statement was not made shortly after the act of violence was committed it cannot be admitted under section 8 of the Evidence Ordinance, and the question arises whether it can be admitted under any other rule of law.

The use which Mr. Cattan wishes to make of the statement is briefly this — he submits that although the deceased stated to Corporal Samara that he had been shot by the Appellant, that statement might raise a doubt in the mind of a juror as to whether the witnesses Mustafa and Idreis were actually present at the time of the shooting, or at least raise a doubt as to whether the shooting amounted to premeditated murder. It is stressed that in this statement the deceased speaks of an altercation taking place before the shot was fired, and the submission is that the Appellant had not necessarily gone to the place with the intention of killing the deceased and that the killing was, at the worst, manslaughter.

If the deceased had survived, and if the Appellant had been charged with the offence of attempted murder, the statement which he made to Corporal Samara could subsequently have been used for purposes of cross-examination of the deceased; but if it had been intended to contradict him by the writing, it would have been necessary to call attention to those parts of the writing which were to be used for contradicting him.

Section 5 of the Criminal Procedure Act, 1865, contains the following proviso:—

> "Provided always that it shall be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

I of course realise that this Act is not in force in Palestine. But it seems to me to be reasonable to take it as a guide to the Court in the absence of any local law on the subject. I consider it to be against natural justice that the Appellant, by reason of the deceased's death

should be deprived of the possibility of showing that he made a statement which was either untrue or which left out facts favourable to the Appellant.

My attention has been drawn to the case of Rex *v.* Thomson (1912, 3 K. B. 19) where on a charge of procuring abortion the Defendant's counsel, cross-examining a witness for the prosecution, proposed to ask the witness about statements made by the woman (since dead) some time before her miscarriage, that she intended to operate upon herself and, shortly after the miscarriage, that she had operated upon herself. The questions were not allowed to be put, as the statements, being mere hearsay, were not admissible in evidence for the defence.

It seems to me that that case is clearly distinguishable from this. The accused in that case was not charged with causing the death of the woman, and it was not a question of proving that she had subsequently made a statement which differed in essential particular from the statement which had been admitted in evidence against the accused. It was a question of admitting an original statement which was quite clearly hearsay. In English and Empire Digest, Vol. 15, p. 807 the following appears in para. 8740:—

> "May be admitted if not objected to. —
>
> On a trial for murder it was proved that deceased, who lived a few hours after the wound was inflicted, made a statement, at the conclusion of which he exclaimed, 'Oh, God! I am going fast: I am too far gone to say any more'; but he did not appear to have previously said anything about his condition, and there was no evidence one way or other, to show that he was aware of it: — Held: the statement was inadmissible as a dying declaration.
>
> The objection to the statement having been subsequently withdrawn by prisoner's counsel:—
>
> Held: it might be read in evidence, although not evidence if objected to. — R. *v.* Nicolas (1852), 6 Cox C. C. 120."

And at page 313 of Phipson on Evidence (8th edition) in a chapter on "Dying Declarations in Cases of Homicide" the following appears:—

> "And his credibility may, perhaps, be impeached in the same manner as that of a witness (R. *v.* Macarthy, cited Russ. Cr. (8th ed.), 1931).

I regret that I have not been able to refer to the report of this case, as this brief quotation is not at all enlightening as to the facts.

If the deceased had survived and had been called as a witness it may be that he could have been able to explain his subsequent statement. On the other hand he might have denied that he made it. And in any event the Court would ultimately have had to decide whether

to believe his original or his subsequent statement. I am unable to see any reason why the circumstance that the person is dead should render his subsequent statement inadmissible either for the purpose of contradicting or modifying what he had previously said or for purposes of the cross-examination of other witnesses. Otherwise this would mean that, if alive, hearsay evidence is admissible for the purpose of contradicting him whereas if he is dead it is not admissible. That seems to me to be neither logical nor just. Nor can I find any justification for it in law.

It should be observed that section 8 of the Evidence Ordinance is peculiar to Palestine. There is no similar law in England. The following passage which appears at p. 85 of Evidence in Criminal Cases (2nd edition) by W. Shaw, shows the position as it exists in English law:—

> "On an indictment for murder, a statement made by the deceased almost immediately after her throat had been cut, on coming out of the house where it had been done, and in which the prisoner was lying with his throat cut and speechless, was held not admissible as part of the *res gestae*. 'Anything uttered by the deceased at the time the act was being done would be admissible, but here it was something stated by her when it was all over, whatever it was, and after the act was completed'. *Per* Cockburn, C. J., in R. *v.* Bedingfield (1879), 14 Cox 341."

In view of this difference one cannot expect to find any English case in which the facts are on all fours with the facts in the present case.

I find, therefore, that the statement is admissible. It may be that its admission would not benefit the Appellant. But I do not feel that I can guess at the effect it would have had on the minds of the trial Judges if it had been admitted. What perhaps appears to be a comparatively slight piece of evidence might affect the verdict by raising a reasonable doubt in the minds of the Judges.

It would be possible for this Court to call Corporal Samara before it, and to consider the effect of the statement after it had been properly proved, but I do not consider that such a course would be satisfactory. This piece of evidence should be considered by a trial Court together with all the rest of the relevant evidence, and the defence should have the opportunity, if they wish it, of using it for the purpose of cross-examining the prosecution witnesses.

Mr. Cattan has suggested that there should be a re-trial, and although I greatly regret the necessity I consider that in this case it is the only way in which justice can be done to both sides. I would allow the

appeal on this ground alone, and would remit the case to the Assize Court, Nablus, for retrial.

On all other points I agree with the judgment which my learned brother the Chief Justice has delivered.

Delivered this 28th day of February, 1947.

British Puisne Judge.

CIVIL APPEAL No. 15/46.

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

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

IN THE APPEAL OF :—

Hassan Mohammad Esh-Shayeb & 2 ors. APPELLANTS.

v.

Najib Kassab & 2 ors. RESPONDENTS.

Cultivators Protection — Special Commission (Appeals) Rules — Object of the Ordinance — "Tenant", "statutory tenant" — Trespasser as statutory tenant, C. A. 29/39 — Hired cultivator.

Appeal from the judgment of the District Court of Haifa dated 21.12.45 in C. A. No. 150/44 from the decision of the Special Commission under the Cultivators (Protection) Ordinance, dated 18.9.44, dismissed:—

It is immaterial for the purpose of the protection afforded by the Ordinance whether a person cultivates with the knowledge of the landlord or not; but a hired cultivator is not a statutory tenant.

(*A. M. A.*)

REFERRED TO: C. A. 29/39 (6, P. L. R. 281; 1939, S. C. J. 229; 6, Ct. L. R. 10).

ANNOTATIONS: *Vide* P. C. 47/41 (10, P. L. R. 323; 1943, A. L. R. 548) and notes in A. L. R.

(*H. K.*)

FOR APPELLANTS: Wittkowski.

FOR RESPONDENTS: Sanders.

JUDGMENT.

This is an appeal from the District Court of Haifa. The main issue is a question of the interpretation of the Cultivator's Protection Ordinance, Chapter 40 and the Cultivator's (Special Commission) Appeal Rules, 1937. It can be conceded that the Ordinance is not a satisfactory legislative measure. The Courts have experienced considerable diffi-

culty in interpreting certain sections, with the result that the decisions of different Courts appear to conflict.

I ask myself the question, what is it that this Ordinance sets out to do. It seems to me that the primary object was to protect cultivators. The intention was not, as in the case of the various Rent Restrictions Ordinances, to modify contractual relations which had already existed between the parties concerned. It is a type of measure which the past one hundred years of history have proved to be necessary in agricultural countries. It is based on the principle that he who turns the sod of earth for the purpose of producing food shall be protected in his right to continue to turn that sod. I cannot avoid the conclusion that the difficulty that arises in interpreting the Ordinance is due to the loose use, if I may say so, of the term "tenant" which of course in law presupposes the existence of a superior lord. But if we look at what I may call the effective sections of the Ordinance we will discover that the word "tenant" never occurs. In its place we find the term "statutory tenant". Now "statutory tenant" is an artificial creation of the Ordinance; it does not presuppose the existence of an overlord. I now proceed to examine the nature of this statutory creation. It is a person, family or tribe who not being the owner of the land, nevertheless cultivates it. It appears to me that for the purpose of this creation, it is immaterial whether the owner (landlord) is aware of the fact of cultivation. The one essential element necessary to constitute a person a statutory tenant, is cultivation. It follows that I must go so far as to admit that a person who originally was a trespasser could become a statutory tenant, although a person who was originally a trespasser by force would be excluded on general principles. I am reinforced in this opinion in that it appears to be in accordance with the general principles enunciated in Civil Appeal No. 29/39. The only exception to cultivation being the sole test, is to be found in the last lines of the definition of "statutory tenant" in section 2 of the Ordinance, which are to the effect that a person who although cultivating is hired to do so and who receives a money wage, does not come within the ambit of the legislative creation "statutory tenant".

Turning now to the facts of this case, it clearly emerges that the Appellants were managers or agents of the owner expressly employed as such by the owner and if they cultivated at all, they cultivated in the shoes as it were, of the owner and they do not come within the definition of statutory tenant.

An appeal must therefore be dismissed with inclusive costs of LP. 15.

Delivered this 25th day of February, 1947.

Chief Justice.

CIVIL APPEAL No. 126/46.

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

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

IN THE APPEAL OF:—

Itzhak Trachtengott. APPELLANT.

v.

1. Dr. W. Sommerfeld, Liquidator of Amiel Bros. Ltd., in liquidation,
2. The Official Receiver, Government of Palestine,
3. Eliezer Amiel & an. RESPONDENTS.

Liquidators — Remuneration, W. U. Rules, r. 135 — Scale of fees applying to Official Receiver — Fair remuneration.

Appeal from the judgment of the District Court of Jaffa in Motions Nos. 1/46 and 16/46 dated 20th March, 1946, partly allowed:—

Private liquidators may be paid more than provided in the Scale of Fees applying to the Official Receiver.

(*A. M. A.*)

ANNOTATIONS:

1. For Court proceedings in connection with this Winding Up see C. A. 159/44 (11, P. L. R. 220; 1944, A. L. R. 352), C. A. 332/44 (1945, A. L. R. 237), C. A. 36/45 (*ibid.*, p. 328), C. A. 211/45 (*ibid.*, p. 538) and C. A. 262/45 (12, P. L. R. 485; 1945, A. L. R. 783).

2. On the remuneration of liquidators *cf.* Annotated Laws of Palestine, Vol. VI, p. 518 and Halsbury, Vol. 5, pp. 609 *et seq.*, sub-sec. (viii).

(*H. K.*)

FOR APPELLANT: M. S. Levison and E. Z. Fellman.

FOR RESPONDENTS: No. 1 — A. Wittkowsky and W. Sommerfeld.
No. 2 — J. Gavison.
Nos. 3 & 4 — Absent — served.

JUDGMENT.

Curry, A/J.: The 1st Respondent is the Liquidator of the firm Amiel Bros. and the appeal arises from an order made upon his application for remuneration as Liquidator under Rule 135 of the Companies (Winding-up) Rules, 1936. The Liquidator applied for remuneration on the basis of 6% of the assets realised and 6% on the amount distributed. The total remuneration on that basis would amount to a sum of LP. 6,000 approximately. This application was supported by the Official

Receiver and an order was made by the learned President in those terms.

There was considerable argument as to whether or not the scale of fees laid down for Official Receivers should be followed in the case of private liquidators or whether private liquidators should be paid considerably higher fees. Whilst I would not go so far as to say that the scale fixed for Official Receivers should be strictly followed in the case of private liquidators, I see no good reason why the latter should be paid considerably higher fees, and I would merely say that I consider the scale fixed for Official Receivers affords a useful yard-stick. Clearly, however, each case must be considered on its merits, and it must be the endeavour of the Court to see that the liquidator is fairly remunerated for the work he has done. In this particular case, were the liquidation fee to be assessed on the scale fixed for Official Receivers he would receive a total amount of LP. 2,150 approximately. From the facts of the case as found by the learned Judge there can be no doubt that the liquidator has been involved in an exceptional amount of work and he has also been involved in considerable litigation which he, being an advocate, has personally conducted.

The learned Judge has fixed his remuneration at 6% of the amount realised — a sum amounting to LP. 3,500 approximately, such sum to include remuneration for his professional services. Under the Official Receiver's rules he would have been entitled to a sum of LP. 1,400 approximately. Now the Judge has given very cogent reasons for fixing the scale on realisation at 6% and although this rate may appear in the circumstances somewhat generous for work done over a period of two years only, nevertheless, it is a matter within the discretion of the Judge and I am not prepared to say that it was so generous as to be unreasonable.

Turning to the remuneration awarded for the distribution of the assets, here again the learned Judge has fixed the fee at 6% — a sum of LP. 3000 approximately instead of a sum of about LP. 700 payable under the Official Receiver's rules. The Judge gives as his reason for the special fee the fact that there are some 42 appeals pending by workmen. It appears, however, that these claims by workmen involve a sum of less than LP. 10,000, practically all the balance being due to the two contributors. In such circumstances to pay the Liquidator such a sum appears to me unreasonable, and I am of the opinion that if the Liquidator is paid for distribution at half the rate he is being paid for realisation — thereby following the usual practice — he will be adequately remunerated.

In the result, therefore, the appeal is allowed and the Order of the Judge amended by the substitution of 3% instead of 6% on the amount distributed. The Appellant is entitled to Court fees plus advocate's attendance fee fixed at LP. 10 (ten) to be paid out of the estate.

Delivered this 14th day of March, 1947.

A/British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

HIGH COURT No. 68/46.

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

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

IN THE PETITION OF:—

Lipa Lipman. PETITIONER.

v.

1. The Registrar, District Court, Jerusalem,
2. Chairman of the Municipal Commission, Jerusalem. RESPONDENTS.

Compensation money paid into Court in expropriation proceedings — Attachment of money by Municipal Corporation in respect of rates due — Ineffectiveness of attachment.

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) Society Anonyme Ltd. on or about the 22nd day of September, 1945, should not be released in accordance with law,

1. Attachment under sec. 116 Municipal Corporations Ordinance. cannot affect a rate payer who has had no previous notice of a claim for rates due.

2. Compensation money paid into Land Court in expropriation proceedings under Land (Expropriation) Ordinance to be distributed to owners of the land does not constitute a debt that can be attached under sec. 116(1)(a), Municipal Corporations Ord.

(*M. L.*)

REFERRED TO: Webb *v.* Stenton (1883) 11, Q. B. D. 522; Israelson *v.* Dawson, Port of Manchester Insurance Company Garnishee (1933) 1 K. B. 301; Spence *v.* Coleman (1901) 2 K. B. 199; Howell *v.* Metropolitan District Railway Company (1881) 19 Ch. D. 508.

(*A. G.*)

FOR PETITIONER: A. S. Moyal.

FOR RESPONDENTS: S. Said.

JUDGMENT.

Petitioner in this case was the owner of an undivided share in an immovable property which was the subject matter of expropriation proceedings under the Land (Expropriation) Ordinance, Cap. 77 (now repealed).

The promoters, Belpetrole (Egypt) Société Anonyme, brought an action before the Jerusalem Land Court under section 8 of Cap. 77 in order to have the compensation fixed. The promoters were themselves co-owners of the property. The Land Court fixed compensation at the rate of LP. 1.500 per square metre and also ordered the promoters (*i. e.* Plaintiffs) to pay into Court the amount of the said compensation with interest. The Court directed that the promoters were to deduct from the total amount of compensation the share accruing to them as co-owners.

We would point out that section 15 of Cap. 77 provides that the promoters may pay the compensation into Court if the persons entitled thereto cannot be found or fail to make out a title. When the compensation has been paid, the land is registered in the name of the promoters on a certificate of the Court to the effect that compensation has been duly paid in accordance with the provisions of the Ordinance. In the present case, the Court ordered payment into Court and payment was effected in September, 1945. Whether this was a correct order does not concern us, but it is important to bear in mind that the Land Court did not decide to whom and in what proportion the compensation was to be paid. It therefore seems to us that the compensation had to be distributed under the aegis of the Court, and, by virtue of section 6(e)(5) of the Registrars Ordinance, 1936, it would seem that application for payment out of Court should be made to the Registrar. As a matter of fact, six of the co-owners succeeded in withdrawing their shares of the compensation which amounted to about one half of the whole amount deposited.

It appears that the former owners of the expropriated property owed Municipal Property rates to the Municipal Corporation of Jerusalem in respect of the expropriated land. On the 17th November, 1945, a notice was served by the Municipal Authority on Ahmad el Khateeb, one of the co-owners, calling upon him to pay the said rates within 15 days of service of the notice. We would here explain that section 115(5) of the Municipal Corporation Ordinance, 1934, as replaced by section 9 of Ordinance 3 of 1940 empowers the Corporation to collect the rates from any one co-owner, and the latter may then recoup himself from the other co-owners. Ahmad el Khateeb did not comply with

the notice to pay and a warrant for the seizure and sale of his movable property was then issued under the provisions of subsection (3) of the aforementioned section 115 of the Municipal Corporations Ordinance as amended. The warrant yielded no results and the Mayor then took action under section 116 of the Ordinance as enacted by section 22 of the Ordinance 6 of 1945 and signed an order of attachment. The relevant part of section 116 reads as follows:—

> "116(1). Without prejudice to his right under section 115(3) to order the seizure and sale of the movable property of a person by whom a rate has not been paid, the mayor may, upon the refusal or neglect of such person to pay to the municipal tax collector the sum named in the warrant as provided under section 115(4)(a) — (a) attach any rents or debts due to such person".

The order of attachment dated 27th December, 1945, was addressed to the Registrar of the District Court, Jerusalem, and recited that the El Khateeb family and partners owed LP. 1851.185 to the Corporation. The order then proceeded to require the Registrar to send to the Mayor a statement of any debts due to the El Khateeb family and partners and also ordered the Registrar to pay "the same" into the treasury of the Corporation until withdrawal of the order or until payment of the rates due.

The order of attachment was not served upon, or notified to, the Petitioner, but Mr. Goitein (acting for the present Petitioner and certain other co-owners) wrote to the Registrar on the 4th January, 1946, mentioning that he had heard that the Municipality was attaching the balance of the money paid into Court. Mr. Goitein stated in that letter that he was not discussing whether an attachment could or could not be lodged but averred that the Municipal Corporation was not entitled to receive payment of the sums attached. Mr. Goitein then proceeded to call upon the Registrar not to make any payment to the Corporation. On the 15th January, 1946, the Registrar informed Mr. Goitein of the date and nature of the attachment and of the sum attached. On the next day, Mr. Goitein wrote again to the Registrar contending that the attachment was improper and requesting payment to his clients of the money in Court. The Registrar subsequently informed Mr. Goitein on the 20th May, 1946, that he could not order payment of the money in Court to Mr. Goitein's clients (including the Petitioner) unless there be an order of a competent Court releasing the attachment. It is that decision of the Registrar's dated the 20th May, which has given rise to the present petition.

The first point which falls to be decided is whether the Petitioner is entitled to invoke the help of the Supreme Court sitting as a High

Court or whether he had, in the present case, the alternative remedy of challenging the attachment under the procedure traced out in section 116(2) of the Municipal Corporation Ordinance *i. e.* bringing an action against the Corporation within 14 days of the date of the attachment.

Petitioner's counsel mentioned in his letter of the 4th January, 1946, that the Municipal Corporation "was attaching" the moneys. On that date, and up to the 14th January, the Petitioner had the undoubted right of entering a claim against the Municipal Corporation to have the attachment rescinded. After some hesitation, we have reached the conclusion that we cannot take it as established that the Petitioner had definite information that on the 27th December, 1945, an attachment had been lodged by the Mayor. It was only on the 15th January, 1946, that the Registrar (in answer to Mr. Goitein's letter) supplied to Mr. Goitein full information regarding the attachment. It was then too late for the Petitioner to avail himself of the remedy provided by section 116(2) of the Municipal Corporation Ordinance.

The attachment ordered the Registrar to pay over to the Municipal Corporation out of the moneys in his hands the sum due in respect of rates. The law does not seem to have made provision for the garnishee (*i. e.* the Registrar) to object to such an order and we do not know whether blind compliance by him might not involve him in difficulties. It seems to us difficult to accept that it was contemplated that an order of attachment would be so potent as to interfere with the normal functioning of a Court of law. The difficulty is that section 116 of the Municipal Corporations Ordinance does not contain provisions on the lines of Articles 282 and 284 of the Ottoman Civil Procedure Code or of Order 45 rule 1 of the English Supreme Court Rules. It would seem that section 116 deserves further consideration by the legislator.

The inevitable consequence of the very sketchy provisions of section 116 regarding attachment is that difficulties are bound to arise and not much help can be derived from the section for the solution of such difficulties. Thus, in the present instance, we are faced with the following problem: The Registrar of a Court is ordered by the Mayor to pay over to the Corporation moneys in the hands of the Court, which moneys have not yet been earmarked or distributed, the interested parties are not notified of the attachment and are thus deprived of the one and only remedy mentioned in section 116 *i. e.* the bringing of an action against the attaching creditor.

In the circumstances, we are not surprised that the Petitioner has invoked the intervention of this Court sitting as a High Court of Justice.

Two main points have been submitted by the Petitioner. The first one is that an attachment under section 116 cannot affect a rate-payer who has had no previous notice of a claim for rates due. This first point is well taken because section 116(1) makes it quite clear that the mayor may attach rents or debts due to a person who has refused or neglected to pay to a municipal tax collector the sum named in a warrant issued under section 115(3) as enacted by section 9 of Ordinance 3/1940. In the present case, there is no indication that the Petitioner had received any demand for payment of rates.

The other submission made on behalf of the Petitioner is that the compensation money paid into the Land Court does not constitute a debt due to the Petitioner or to the other co-owners. This is a rather delicate point and we have sought guidance from the principles established in England by cases decided under Order 45 of the Rules of the Supreme Court. We have found the cases of Webb *v.* Stenton (1883) 11 Q. B. D. 522 and of Israelson *v.* Dawson, Port of Manchester Insurance Company Garnishee (1933) 1 K. B. 301 which establish that there must be something which the law recognises as a debt. In the last mentioned case it was held that the agreement of the Insurance Company to indemnify the assured against liability for damages (for which judgment had been given against him) did not constitute a debt.

We have also found the case of Spence *v.* Coleman (1901) 2 K. B. 199 which decided that "where some officer of the Court is under a duty to the Court to distribute money which is in his hands in a particular way, there is no relation of debtor and creditor established between him and the person entitled to all or some part of the money in his hands. He is an officer of the Court and his duty is to the Court and no debt is created which can be the subject matter of attachment by means of a garnishee order. That principle has been applied to liquidators, trustees in bankruptcy and to registrars of the County Courts". We would mention that the facts in Spence *v.* Coleman were that there were surplus assets of a company in liquidation to which an absent shareholder was entitled; the money was paid into the Companies Liquidation Account with the Bank of England and a creditor of the shareholder sought to attach it by means of a garnishee order under Order 45 rule 1.

We might also mention the case of Howell *v.* Metropolitan District Railway Company (1881) 19 Ch. D. 508 which is about compensation money paid in respect of land expropriated. In that case, however, the attachment was lodged in the hands of the promoters.

We consider that the principles set out in the aforementioned decisions

of the English Courts constitute a useful guide and we hold that, in the present case, the money in the Registrar's hand is not a debt within the meaning of section 116(1) of the Municipal Corporations Ordinance. Looking at the problem from another angle, we are struck by the fact that until an expropriated co-owner has proved his title to the Registrar, the latter cannot decide to earmark his share for payment. It would, therefore, seem that a deadlock would occur in most cases.

We venture to suggest that section 116 of the Municipal Corporation Ordinance should receive attention from the Legislature.

It now remains for us to pay closer attention to the Petitioner's prayer. Petitioner asks that the Registrar's order of the 20th May, 1946, be set aside and that the money deposited in Court be released in accordance with law.

In view of our decision regarding the validity of the attachment we can but agree that the Registrar should not comply with the order of attachment under reference. We see no reason or justification for going any further and giving directions to the Registrar as to the release of the moneys in his hands. We therefore make the order *nisi* absolute only in so far as is necessary to direct the first Respondent not to obey or give effect to the attachment signed and issued by the Chairman of the Municipal Corporation of Jerusalem on the 27th December, 1945, when dealing with an application made by the present Petitioner for payment to him of a share of the money in Court.

Being given that a preliminary objection taken by the Petitioner was overruled, we allow Petitioner LP. 5 (five) inclusive costs only, to be paid by the second Respondent.

Delivered this 23rd day of December, 1946, in presence of Mr. Goldberg for Petitioner and of Mr. Saba Said for Respondents.

British Puisne Judge.

CIVIL APPEAL No. 79/45.

(CIVIL APPEAL No. 133/45).

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

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

IN THE APPEALS OF :—

C. A. 79/45:—

Antoine F. Albina. APPELLANT.

v.

1. Mrs. Agnes, wife of Antoine F. Albina,
2. Bassam Fawzi Ghussein & an. RESPONDENTS.

and

C. A. 133/45:—

Bassam Fawzi Ghussein & an. APPELLANTS.

v.

1. Agnes Michal Takountieff (alias Agnes Antoine Francis Albina),
2. Antoine F. Albina. RESPONDENTS.

Land Transfer Regulations — Transfer to wife of Arab Palestinian on behalf of her husband — Retransfer in Land Settlement — Form of application, L. S. Ord., secs. 33(4), 26(1) *— Revision of Schedule of Rights — What constitutes an application for revision — Time within which it may be filed.*

Appeal from the decision of the Settlement Officer, Jerusalem Settlement Area in AR/1/Kiryat el Inab dated 31.1.45, allowed and case remitted:—

An application for the substitution of a husband's name for his wife in the Schedule of Rights comes under sec. 33 (revision of entry) and not sec. 26 (new claim).

(*A. M. A.*)

ANNOTATIONS:

1. For authorities on the Land Transfers Regulations see C. A. 117/46 (*ante*, p. 164) and note 2.

2. On secs. 26 & 33(4) of the Land (S. of T.) Ord. *cf.* C. A. 160/46 (*ante*, p. 57) and note.

(*H. K.*)

(*C. A.* 79/45):—

FOR APPELLANT: Olshan.

FOR RESPONDENTS: No. 1 — G. Elia.
Nos. 2 and 3 — A. Atallah and A. Michaeli.

JUDGMENT.

These are two consolidated appeals. The history of the case is a peculiar one. It concerns land which was the subject matter of settlement. There were two applications to the Settlement Officer to review his decision in regard to the Schedule of Rights. Each of the applications was refused and each side appeals from that.

We now turn to examine the background.

In 1940 Fawzi Ghussein, acting as father and guardian of his minor

sons and daughters disposed of some property at Kiryat El Inab to the 2nd Respondent in C. A. 79/45, Mrs. Agnes Albina. This disposition was made for valuable consideration which was paid to Fawzi Ghussein, and presumably when he made the disposition he was acting in the best interest of the minors. Now Mrs. Agnes Albina was the wife of Mr. Antoine F. Albina who, for reasons connected with the war, was at that time interned. Mrs. Albina says that in this land transaction she was acting solely for her husband who by reason of the fact that he was interned was unable to act for himself. In support of that statement she submitted a letter which she addressed to the Registrar of Lands, Jerusalem, for the purpose of getting the property registered. The letter was in the following terms:—

> "Sir,
> I the undersigned Agnes, wife of Antoine Francis Albina, of Jerusalem, do hereby declare that I am not an enemy subject and that I am Palestinian citizen, holder of British Passport No. 87/89.
> I desire to accept transfer of the property at Enab bought by my husband, the subject of file No. 1024/40 and to pay the balance of the price due as directed by my husband who has given me the money to this effect and for reasons beyond his control is unable to attend himself and accept the transfer in his name, being interned.
> Yours faithfully,
> (sgd.) Agnes Albina."

The inference clearly to be drawn from this letter was that she was acting for her husband. For some reason, however, the land was registered in her name. At this point, it is well to remark that up to this stage there was no question whatever of the possibility of any technical flaw in Mrs. Albina's right to accept transfer of this land. When Mr. Albina was released from internment he discovered that the entry in the register was in his wife's name, and he asked to have it altered to his own. He supported this by a letter from his wife in which she categorically stated that the transfer was accepted by her in the absence of her husband and on behalf of her husband. The Settlement Officer acknowledged this letter and replied that "when the Schedule of Rights for this block is to be made the matter will be considered". Mr. Albina left it at that.

We now turn back to the later activities of Fawzi Ghussein. He had parted with the land; he had received the money and had, we can assume, applied it in the best interests of his wards. But a peculiar and totally unexpected discovery was now made by him. It was that Mrs. Albina was for the technical purpose of the Land Transfer Regulations a non-Palestinian Arab although her husband was a Palestinian Arab, consequently the transfer to her of this land, which was in

Zone A, would have been null and void. One might well ask what business was this of Fawzi Ghussein. We do not think he would suggest that he was prompted purely by motives of good citizenship. As far as the personal interests of his wards were concerned, his conscience must have been clear; he had received full value for the property; he had disposed of it because presumably the cash was more useful to them than the land. The answer cannot but force itself upon this Court, and it is that meanwhile the land had sky-rocketed in value. It is reasonable to assume that if the Registrar of Lands or the Settlement Officer had the slightest idea as to the status of Mrs. Albina *vis-à-vis* the Land Transfer Regulations they would have registered the land in the name of her husband. The Schedule of Rights was published on the 23rd December, 1944, and two questions now arise. They are whether the Settlement Officer can revise his decision so as to substitute Mr. Albina's name for that of Mrs. Albina in the Schedule of Rights, and if he can, whether he should do so.

As far as the merits of the case go, they certainly favour such a revision as Fawzi Ghussein's contention is based on a pure technicality. If the law is on his side, however, he is entitled to benefit from the technicality, and we bear in mind that he has pleaded it not for himself but in the financial interests of his children. Now it seems to us that the whole legal point revolves round "Exh. B" which is the letter dated the 20th January, 1941, which was duly recorded in the Settlement Officer's file. Mr. Atallah for Fawzi Ghussein argues that this letter should be treated as an application to add a new claim under sec. 26(1) of the Land (Settlement of Title) Ordinance. Mr. Olshan for Mr. Albina and Mr. Elia for Mrs. Albina, who for the purposes of those two appeals associates herself on all points with her husband, argues that this letter should be considered as in the nature of an application under sec. 33(4) of the Land (Settlement of Title) Ordinance. In our opinion this conclusion as to the true nature of the letter is the correct one. Here there was no question of a new claim. It was a question of the revision of an entry in regard to a definite piece of land, the object of the revision being the substitution of the husband's name for the wife's name with the full consent of the wife.

The question now arises whether the application can be considered as having been made within the time limit permitted by sec. 33(4). We are of opinion that it can. We have held that Exh. B was such an application. It was filed in the file to be kept there until matters became ripe for its production, that is when the Schedule of Rights had been published. This seems to have been the intention of the

Settlement Officer when he stated in the second sentence of the letter that, when the Schedule of Rights for this block had been made, the matter would be considered. We are of opinion that Mr. Albina was entitled to so interpret it, and consequently he cannot be penalised because he made no further formal application for revision. We think, therefore, that when the Schedule of Rights had been read, the Settlement Officer should have carried out the undertaking given in his letter and dealt with the issue of the revision of the Schedule with a view to substituting the name of Antoine F. Albina for that of his wife Agnes Albina. This would, of course, preclude the revision of the Schedule in response to Fawzi Ghussein's application.

The case is accordingly returned to the Settlement Officer to be dealt with in the light of this judgment. Antoine F. Albina will have LP. 15 (fifteen) inclusive costs against Bassam Fawzi Ghussein and Basima Fawzi Ghussein.

Delivered this 6th day of March, 1947.

Chief Justice.

CRIMINAL APPEAL No. 138/46.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Muhammad Ali Sakhnini. RESPONDENT.

Information — Perjury — Omission to state that false testimony was material in judicial proceedings, CR. A. 34/37 — T. U. I. Ord., Schedule r. 4(3), (5) — No prejudice to accused.

Appeal from the judgment of the District Court of Haifa, dated 7th October, 1946, in Criminal Case No. 158/46, whereby the Respondent was discharged of a charge of perjury, contrary to section 117 of the Criminal Code Ordinance, 1936, allowed:—

An accused should not be discharged on the sole ground that the information charging perjury, does not state that the false statement was material to a question pending in judicial proceedings.

(*A. M. A.*)

DISTINGUISHED: CR. A. 34/37 (4, P. L. R. 208; 1937, S. C. J. (N. S.) 564).

ANNOTATIONS :

1. See, on defective charge sheets, CR. A. 57/43 (10, P. L. R. 291; 1943, A. L. R. 450) and note 2 in A. L. R., CR. A. 106/44 (11, P. L. R. 461; 1944, A. L. R. 485), CR. A. D. C. Ha. 62/45 (1945, S. C. D. C. 319) and note, and CR. A. D. C. Jm. 114/45 (*ibid.*, p. 595).

2. On sec. 117 of the C. C. O. *cf.* CR. D. C. Ha. 146/45 (1945, S. C. D. C. 499) and CR. A. D. C. T. A. 87/46 (*"Hamishpat"*, 1947, p. 5 — *in Hebrew*).

(*H. K.*,

FOR APPELLANT: Crown Counsel — (Hooton).

RESPONDENT: In person.

JUDGMENT.

This is an appeal by the Attorney General against the order, dated 7th October, 1946, of the District Court, Haifa, in Criminal Case 158/46, discharging the Respondent on the ground that the information was defective.

The charge was one of perjury under section 117 of the Criminal Code Ordinance, and the learned Judge held that the information was defective because it was not specifically alleged therein that the false testimony was material to a question pending in the judicial proceedings in which the evidence was given. The Court relied on the judgment in CR. A. 34/37 (4, P. L. R. 210).

Rule 4(3) in the Schedule to the Trial Upon Information Ordinance (Cap. 36) provides that the statement of offence shall describe the offence shortly in ordinary language, and without necessarily stating all of the essential ingredients of the offence. Rule 4(5) provides that the forms set out in the appendix to the rules, or forms conforming thereto as nearly as may be, shall be used in cases to which they are applicable. The appendix (see 1939 Laws of Palestine, Vol. I, p. 134) actually contains a specimen information for use in the case of a charge of perjury. These rules are of later date than the judgment in Criminal Appeal 34/37. It may also be observed that Criminal Appeal 34/37 did not decide that the failure to allege materiality was a fatal defect. The point was dealt with very shortly by saying that "this allegation should, of course, have appeared in the information". The real *ratio decidendi* was that inadmissible evidence had been admitted.

It is, of course, incumbent upon the prosecution to prove that the false evidence was material, and it does not appear to us that a mere allegation of materiality in the information is of any great importance, or that its absence is likely to cause prejudice to the accused person. What is more important is that the information should indicate the materiality of the false evidence. In the present instance the informa-

tion did not state what was the charge in respect of which the false evidence had been given. We think that it would have been more satisfactory if it had done so, in order that it might be immediately obvious why the evidence was material. We do not, however, consider that this defect is sufficient to warrant the discharge of the accused person, as we do not think that he has been prejudiced by it, and as the information sufficiently complied with the rules. It is of interest to observe that a form of indictment for perjury is given in the appendix to the rules which follow the Indictments Act, 1915 (see Chitty's Statute, 6th Ed., p. 694), and that form does not indicate that an allegation of materiality is necessary or even that it should be made clear therein why the evidence was material.

In the result we find that the learned Judge erred in discharging the Accused. The appeal must be allowed and the case remitted to the Court below for trial.

Delivered this 17th day of February, 1947.

British Puisne Judge.

CIVIL APPEAL No. 278/46.

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

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

IN THE APPEAL OF:—

Ahmad Muhammad Shayeb. APPELLANT.

v.

Hussein Ismail Sakaji. RESPONDENT.

Action for dispossession from masha' shares in land — Defendant unsuccessfully invoking a decision of Special Commission in a dispute between him and other co-owners that he is a statutory tenant — Execution of a judgment of dispossession from masha' shares.

Appeal from the judgment of the District Court of Haifa, dated 21st July, 1946, in Civil Appeal 87/46, from the judgment of the Magistrate's Court of Beisan, dated 2nd May, 1946, in Civil Case 747/44, allowed:—

1. Decision of Special Commission (appointed to determine claims of persons alleging to be statutory tenants) in a dispute regarding certain shares in *masha'* land that Defendant is a statutory tenant is no bar to order of dispossession in an action brought by a person who owns other shares and who was not a party to the dispute before the Special Commission.

2. A judgment of dispossession from common shares, enabling as it does

the decree holder to enjoy possession of the shares jointly with the other co-owners or with their statutory tenants, can be executed.

(*M. L.*)

ANNOTATIONS: On recovery of possession of *masha'* shares see C. A. 109/46 (1947, A. L. R. 48) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANT: M. Yahya.

FOR RESPONDENT: K. Dajani.

JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa, dated 21st July, 1946, which, sitting in its appellate capacity, set aside the judgment of the Magistrate's Court of Haifa and dismissed the Appellant's action filed by him against the Respondent with a claim for dispossession of the latter from his *masha'* shares in the lands, the subject-matter of the claim.

The facts of this case are shortly as follows. The Appellant filed an action in the Magistrate's Court of Haifa against the Respondent asking for the dispossession of the Respondent from certain shares in the lands set out in his statement of claim. At the hearing the Respondent produced to the Magistrate's Court a decision, dated 13th April, 1938, given by a Special Commission appointed to determine claims of persons who allege to be statutory tenants, and relying on this decision he stated in evidence that he was a statutory tenant of the land. In his judgment the Magistrate held that the decision of the Special Commission does not bar him from ordering dispossession, since the decision relates to lands bought by other persons; and in the result the Court dispossessed him from the shares of the Appellant in the lands in issue.

The Defendant (the present Respondent), having been dispossessed appealed against the judgment of the Magistrate's Court to the District Court, Haifa. As a result of the pleadings before it, the District Court, on 21.7.46, set aside the judgment of the Magistrate's Court and dismissed the action of the Plaintiff (the present Appellant). In its judgment the Court said that "the decision declaring any person to be a statutory tenant of a holding owned in common covers the whole land and is not confined exclusively to certain *masha'* shares owned by a co-owner."

The counsel for Plaintiff appealed to this Court against the judgment of the District Court of Haifa in its appellate capacity and raised before us several points, the most important of which — a point the consideration of which is sufficient for the purposes of this appeal —

was that the District Court of Haifa, in its appellate capacity, erred in holding that the Respondent is a statutory tenant of the shares claimed, and in basing itself on the decision of the Special Commission dated 13.4.38, because the decision of the Special Commission was the result of a dispute which took place between the Respondent and other persons in whose presence the decision was made and in respect of lands owned by those persons, the decision does not cover the shares of his client who was not a party to the litigation before the Commission.

We agree with the counsel for the Appellant on this point. We find that the District Court erred in its decision with regard thereto, since the decision of the Special Commission is not clear as to whether it covers the shares of the Appellant and it is also unreasonable that it should cover these shares inasmuch as the persons who owned the shares of the Appellant at the date of the decision of the Special Commission and who later sold to him their shares were not a party to the dispute before it. We cannot assume that the Special Commission would decide that the Respondent is a statutory tenant of the shares of the Appellant without a dispute arising between the Respondent and the vendors of the Appellant on this subject and without calling the latter (the vendors of the Appellant) to appear before it for the purpose of defending themselves and adducing their evidence in regard to the dispute. Our finding on this point is in harmony with the finding of fact arrived at by the Magistrate's Court that the decision of the Special Commission relates to land purchased by other persons.

We do not agree with the contention of the Respondent relating to the non-possibility of executing the judgment of the dispossession from common shares, for this judgment amounts to enabling the Appellant to enjoy possession of *masha'* shares jointly with the other co-owners or with their statutory tenants; and this is in conformity with the provision of Article 26 of the Ottoman Magistrates Law.

For these reasons the appeal is allowed, the judgment of the District Court is set aside and that of the Magistrate's Court confirmed. The Appellant will have his costs at LP. 15 inclusive.

Delivered this 27th day of March, 1947. No appearance for the parties.

Chief Justice.

HIGH COURT No. 30/44.

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

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

IN THE PETITION OF:—

Dr. Hussein el Khaldi & 2 ors. PETITIONERS.

v.

1. The Director of Land Registration, Jerusalem,
2. The Registrar of Lands, Jerusalem. RESPONDENTS.

Waqfieh including unregistered mulk land — Director, Land Registration, refusing registration without a judgment to that effect from Land Court — Sec. 5 Land Courts Ordinance dispensed with.

Return to an order *nisi*, dated 30th May, 1944, directed to Respondents to show cause why certain property enumerated in a *Waqfieh*, dated 7th July, 1942, should not be registered in the names of the *Mutawallis* of the *Waqf;* order made absolute:—

> Where High Court finds that starting proceedings in Land Court for a formal judgment would cause Petitioner undue hardship it may in special circumstances, where there would be no miscarriage of justice, order such proceedings to be dispensed with.
>
> (*M. L.*)

ANNOTATIONS: For previous proceedings between the parties see C. A. 251/43 (1944, A. L. R. 104; 10, P. L. R. 646) and P. C. A. 52/44 (1946, A. L. R. 402; 13, P. L. R. 271).

(*A. G.*)

FOR PETITIONERS: F. Haddad.

FOR RESPONDENTS: Assistant Government Advocate — (Khalaf).

ORDER.

As far back as 1942 the Petitioners wrote to the Director of Land Registration requesting that this property, amongst others, might be registered as *waqf* property. At first the Director agreed thereto, but subsequently on the 18th February, 1944, he wrote to the Petitioners saying that in view of the judgment in Civil Appeal 251/43 he was precluded from granting his consent to the transaction. The judgment in Civil Appeal 251/43 in brief held that as the dedicator had died before registration, the property dedicated as *waqf* could not be so registered. Thereupon the Petitioners applied to this Court for an order *nisi*. In March, 1944, return to the rule *nisi* was issued directed to the present Respondents calling upon them to show cause why the

property should not be registered in the name of the Petitioners. Meanwhile Civil Appeal 251/43 had gone on appeal to the Privy Council, and thus it was that this Court on the 30th of May, 1944, made an order that the hearing should be adjourned *sine die,* pending the decision of the Judicial Committee of the Privy Council on the point at issue. On the 14th May, 1946, in Privy Council Appeal No. 52/44 it was held that although Sitt Amineh died before registration could take place, that did not prevent the disposition being a valid one, capable of being registered after her death. His Majesty was therefore advised that the appeal should be allowed. Naturally, the Petitioners armed with this Privy Council judgment thought that at long last they would be successful in getting registration of the property. However the Director now raised a fresh objection to registration on the ground that as only a small part of this *mulk* land had been registered in the name of Amineh, and the great majority of the land was unregistered, he was not in a position to register the land until section 5 of the Land Courts Ordinance had been complied with. That section enacts that the Department of Lands shall carry out the instructions of the Land Court as regards the registration of unregistered land.

Whilst we are in agreement with the Director of Lands that in the ordinary course of events the Petitioner would be required to go to the Land Court and get a declaratory judgment, in the special circumstances of this case, however, *viz.* the fact that until now the only objection to registration was the question of the validity of the *waqf* which has now been held to be valid and capable of registration, it would, in our opinion, be causing the Petitioner undue hardship to require him at this late stage to start proceedings in the Land Court for what would be in the nature of a formal judgment. Further, being satisfied that no miscarriage of justice will result in our making the order absolute, but on the contrary that it would be in the interest of justice to do so, we have decided to grant the prayer of Petitioner.

Order to be made absolute, as prayed. No order as to costs.

Given this 27th day of March, 1947, in the presence of R. Eff. Haddad, for Petitioners, and Hanna Eff. Khalaf for Respondents.

Chief Justice.

CIVIL APPEAL No. 359/46.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Josephpraff & Co. Ltd. — APPELLANTS.

v.

Jacob Katz & Co. Ltd. — RESPONDENTS.

Powers of attorney — Ratification — When should be made to be effective in Court proceedings — C. P. R. 24, 242, 361; Advocates Ord., sec. 21 — Ancona v. Marks.

Appeal from the judgment of the District Court of Haifa dated the 17th day of September, 1946, in Civil Case No. 89/46, allowed:—

If the Court registry has accepted documents signed by an unauthorised advocate, the Court may consider the documents on the application of the advocate holding a valid ratification.

(*A. M. A.*)

APPLIED: Ancona *v.* Marks, 1862, 31 L. J. (Ex.) 163, 5 L. T. 753, 126 Rev. R. 646.

ANNOTATIONS: *Cf.* Annotated Laws of Palestine, Vol. 1, pp. 190—1, heading "*Ratification*".

(*H. K.*)

FOR APPELLANTS: A. Gross.

FOR RESPONDENTS: A. Werner.

JUDGMENT.

This is an appeal from the judgment dated 17.9.46 of the District Court of Haifa in Civil Case 89/46, ordering the Appellants to pay the sum of LP. 2739.740 mils together with interest at 9% from 20.5.46, and costs.

Dr. Gross, who has appeared for the Appellants, has explained to us that the Appellant Company has a board of directors which consists of two groups, each of which holds 50% of the share capital, and any transaction has to be concurred in by both groups.

The statement of claim was endorsed "Summary Procedure", as laid down in Rule 241 of the Civil Procedure Rules, 1938, and a summons was issued requiring the Appellant Company (who were the Defendants to the action) to obtain leave to appear and defend the action within ten days.

An application for leave to appear and defend was filed but, owing to a difference of opinion between the two groups, Dr. Gross's power of attorney was only signed by a member of one group. That power of attorney was given at the end of May, 1946.

In June 1946 Dr. Gross appeared in Court, and of course he then held a power of attorney which was signed by a member of one group only.

An objection was taken that there was no proper power of attorney, and the case was adjourned.

On 21.7.46 a purported ratification of the power of attorney was given, and on 23.7.46 Dr. Gross again appeared before the Court. There was a hearing, and the case was then adjourned till after the vacation.

On 17.9.46 there was a further hearing, and judgment was given on the same day.

We are not at present dealing with the question whether the purported ratification was or was not valid. All that we are setting out to decide is whether the ratification if it was valid, was given too late to be effective.

It must be observed that when the objection was first made, in June, 1946, it was not immediately upheld, and Dr. Gross has conceded that if the objection had then been upheld he might not have come to this Court.

The position that we have to deal with is that the objection was upheld on 17.9.46 when Dr. Gross had a power of attorney (which may or may not be valid) on the ground that the purported ratification was too late.

Rule 242 of the Civil Procedure Rules does not itself fix the time within which the application for leave to appear and defend must be obtained, but the form of summons (Form No. 18 of Schedule 1) contains the words "within ten days". Rule 242 lays down that that form shall be used "with such variation as the circumstances may require", and we therefore think that the time allowed is capable of being enlarged under the provisions of Rule 361, even though the period originally fixed may have expired.

Section 21 of the Advocates Ordinance No. 32/1938 provides that:—

> "No advocate and no person permitted to practise before the Moslem Religious Courts shall appear before any Civil Court or any Moslem Religious Court, as the case may be, or any Execution Officer, unless he is the holder of a power of attorney authorising him to appear in such proceedings.
>
> Provided that in proceedings before the Supreme Court sitting as

> a Court of Admiralty the Court may, if it deems fit, allow an advocate to appear notwithstanding that he is not the holder of such power of attorney."

And Rule 24 of the Civil Procedure Rules provides that:—

> "Any application to or appearance or act in any Court required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by an advocate duly appointed to act on his behalf: Provided that any such appearance shall, if the Court or Judge so directs, be made by the party in person.
>
> Where corporations are concerned a duly authorised officer of the corporation may do on behalf of the corporation all things which the corporation itself could do under these rules if it were an individual."

There is, we think, no doubt that Dr. Gross was precluded, by the terms of Rule 24, from filing the application for leave to appear and defend, but that application was, in fact, accepted and put before the Court. It is also clear that Dr. Gross could not, on the strength of an invalid power of attorney, even apply for an extension of time. He could only do so on the strength of a valid power of attorney, which he might or might not have been able to get before the ten days had expired. The circumstances were unusual and difficult, and although we must give effect to the law if it is clear that it provides for no way out of the difficulty we think that it would be unfortunate if no relief could be given in a case like the present.

We have been referred to the English case of Ancona *v.* Marks, Vol. 126 Revised Reports, p. 646. The following passage appears in the judgment of Pollock C. B. at page 649:—

> "We are all of opinion that the rule ought to be discharged. There is no doubt that the Plaintiff, at the time the action was brought, did not know that his name was used, but the question is whether, the securities having been delivered to Greville and Tucker (who on a previous occasion had the Plaintiff's permission to use his name) for the purpose of the action being brought on them in the Plaintiff's name, and the action having been so brought, and the Plaintiff having subsequently ratified the proceedings, he is entitled to retain the verdict. I think he is. In my opinion it makes no difference whether the ratification is before action, or after."

So it is clear that in England a plaintiff can ratify proceedings which had been started without his knowledge. Of course the position in England differs from the position in this country since in England an advocate need not have a power of attorney.

We think that the proper course for us to follow is to consider the

position as it was on 23.7.46 when Dr. Gross held what purported to be a ratification of the power of attorney which had been given by Mr. Cohen. The Court then had before it an application which had been accepted by the Court office, and it had before it an advocate who held what purported to be a good power of attorney.

We think that in these circumstances the Court should have held that the ratification (if good) related back to the time when the application for leave to appear and defend was filed.

We accordingly allow this appeal, and remit the case to the lower Court for deciding whether the ratification was or was not valid, and for further hearing on the merits if that point is decided in the Appellant's favour.

The costs of this appeal will follow the event. These costs will be on the lower scale with LP. 10 advocate's attendance fees.

Delivered this 17th day of March, 1947.

British Puisne Judge.

HIGH COURT No. 112/46.

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

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

IN THE MATTER OF :—

McKesson & Robbins Incorporated. PETITIONERS. (APPELLANTS).

v.

The Administrator General, Registrar of Trade Marks, Jerusalem. RESPONDENT.

Application for registration of a certain term as trade mark — Lack of distinctiveness — Term registered as trade mark in country of origin — Scope of privilege under the International Convention.

Appeal by way of petition from the decision of the Registrar of Trade Marks, dated 8th November, 1946, in Application No. 7130 in Class 5, refusing to register a mark under section 11 of the Trade Marks Ordinance, 1938, dismissed:—

1. User as a trade mark means, not what a person who uses has in his own mind about it, nor what he has registered in a foreign country, but what the public would understand when the trade mark, or so-called trade mark is impressed upon the goods, or upon some wrapper or case containing the goods, to be the trade mark.

2. Where mark or term sought to be registered as trade mark have no distinctive character Registrar is right in refusing to register, even if it has been registered in the country of origin which is among the subscribing countries to the International Convention.

(*M. L.*)

REFERRED TO: Richards *v.* Butcher (2), (1891) 2 Ch. 522, 532.

ANNOTATIONS: On the 1st point see Sebastian's Law of Trade Marks, 5th edition, p. 62.

(*A. G.*)

FOR PETITIONER: E. Katzenstein.
(APPELLANTS)

FOR RESPONDENT: J. Gavison.

JUDGMENT.

This is an appeal under section 11 of the Trade Marks Ordinance against the refusal of the Registrar to register a trade mark. The Appellants made two applications to the Registrar, one was for registration as a trade mark of the term "McKesson's". This was application 7129. It was accepted, and registered accordingly. The second application was made on the same day and was for the registration of the term "McKesson & Robbins". This second application was refused on the ground that it was lacking in distinctiveness in that it consisted of an ordinary combination of two surnames. A certificate, duly authenticated, was produced from the Department of Commerce of the United States Patent Office, testifying that the name "McKesson & Robbins" was registered in the United States as a trade mark on January 6, 1931, under registration No. 279146.

It appears to us that two questions arise. One is a question of fact and the other a question of law. The question of fact is whether the term McKesson & Robbins does lack the distinctiveness which would justify the Registrar in refusing the registration, and the question of law is, whether by the fact that the term is registered as a trade mark in the United States, the Registrar in Palestine is barred from refusing registration here.

Dealing first with the question of fact: we have been referred to the case of Richards *v.* Butcher, which, although an old case, is still authoritative. There it was stated that user as a trade mark means, not what a person who uses has in his own mind about it, nor what he has registered in a foreign country, but what the public would understand when the trade mark, or so-called trade mark, is impressed upon the goods, or upon some wrapper or case containing the goods, to be the trade mark. The Registrar had before him, and we have before

us in this Court, several paper labels and packages in which the products of McKesson & Robbins are contained. They all have this element in common that the term "McKesson's" in large letters with underneath the words "Standard of Quality" is clearly impressed in a prominent position. In addition both the labels also have the writing "McKesson & Robbins Incorporated, New York, Bridgeport and Montreal".

Now the first question that forces itself is why use the name "McKesson" twice. We think that the impression which must be left on the mind of any person looking at those labels or packages is that "McKesson's" is used to give a distinctive quality, and "McKesson & Robbins" is inserted solely to indicate the address and name of the manufacturing company. It is also to be observed that in the case of the packets which were produced the name "McKesson & Robbins" and their address is inserted on the front of the packages, but where the firm desired to invite attention to their products other than those contained in the package, they do so on the side of the package, and they describe all those other products as "McKesson's". It seems to us, therefore, that on the pure question of fact the Registrar was right in concluding that the real trade mark of this firm was "McKesson's".

Turning now to the question of law. It is, as we have said, clear that the term "McKesson & Robbins" has been registered as a trade mark in the United States since 1931. It is true that Article 6 of the International Convention entitles a person who has a registration in the country of origin to claim registration in any of the subscribing countries, but the proviso to the Article excludes from this privilege marks which have no distinctive character.

As we have decided that the term "McKesson & Robbins" lacks distinctiveness, it follows that registration in the United States would not preclude the Registrar from refusing registration here.

The appeal must therefore be dismissed, with inclusive costs of LP. 10.

Delivered this 3rd day of March, 1947, in the presence of Dr. E. Katzenstein for Petitioners, and of Mr. J. Gavison for Respondent.

Chief Justice.

CIVIL APPEAL No. 348/46.

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

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

Abraham Halperin, *alias* Abraham Moshe. APPELLANT.

v.

Michael Halperin. RESPONDENT.

Licensing — Allegation that licensee not owner of business — Application for alteration of licence — Trades and Industries (Regulation) Ordinance — H. C. 14/46 — Proof of ownership.

Appeal from the judgment of the District Court of Tel-Aviv given on the 25th October, 1946, in Civil Case No. 180/46, dismissed:—

1. A licence under the Trades and Industries (Regulation) Ordinance need not be issued only to the owner, but may be given to an authorised agent.

2. Judgment will not be given that the licence should be given to one person rather to another without going into the question of ownership of the business.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, *Hamishpat*, p. 262 (*in Hebrew*).

2. For recent authorities on the Trades and Industries (Regulation) Ord. see CR. A. 156/46 (*ante*, p. 54) and note.

3. *Vide* Art. 1398 of the *Mejelle*.

(*H. K.*)

FOR APPELLANT: Scheftelowitz.

FOR RESPONDENT: Eliash.

JUDGMENT.

This appeal was dismissed on the 21st February after we had heard the learned advocate for the Appellant. Mr. Eliash, for the Respondent, was not called upon to address the Court.

The Appellant is the Respondent's son. The difficulty between father and son is that the latter contends that he is entitled to have the licence of a certain shop situate at Tel-Aviv issued in his name. It is not disputed that for several years the grocery and coffee-roasting business at the said shop has been carried on under a licence issued in Respondent's name. Such a licence is necessary by reason of the provisions of the Trades and Industries (Regulation) Ordinance, Cap. 143, section 4(1) of which enacts that no person shall carry on any trade

mentioned in the Schedule to the Ordinance in any area to which the Ordinance applies unless he is the holder of a licence granted under the Ordinance.

According to the Appellant's statement of claim, he became lessee of the shop premises in 1939, bought furniture and machines for the business, and then applied for a licence under the Trades and Industries (Regulation) Ordinance. At that stage, says the Appellant, members of the family persuaded him to allow his father to join in the business, and promised him (the Appellant) that he would receive one-third of the profits of the business. The statement of claim goes on to recite that, out of respect for his father, the Appellant agreed to the proposal and had the licence issued in his father's name.

It would seem that in 1945 trouble arose between the present Appellant and members of his family, and the Appellant then requested the Municipal Authority (which is the licensing authority of Tel-Aviv) to issue the licence for 1946 in his name. This request was refused, and the Town Clerk pointed out that unless the licensee (*i. e.* Appellant's father) agreed to the change, or unless there was an order of a competent Court, the licence would not be issued in Appellant's name. The Appellant then applied to the High Court (H. C. 14/46) for an order directed against the Municipal Authority and others to show cause why their decision should not be set aside, and why the licence for the shop should not be issued in his (Appellant's) name. An order *nisi* was granted, but, after cause shown, the order was discharged with the remark that the Petitioner had come to the wrong Court. The next step taken by the Appellant was to lodge a statement of claim against his father and the Municipal Authority, praying for a declaration that he and not his father was entitled to obtain the licence for the shop. At the trial of the action the case against the Municipal Authority was abandoned and the case was fought out between Appellant and his father.

The striking feature in this case is that the Appellant (then Plaintiff) chose to force an issue on the question of licence. As pointed out above, the statement of claim indicated that the shop was really run as a family concern. Therefore, after the breakdown of the arrangement, the real issue was whether the Plaintiff-Appellant was the person entitled to carry on the business. In other words, the licence question was clearly secondary, and Plaintiff's failure to appreciate that fact has caused much confusion.

The learned Judge in the Court below laid stress on the fact that the Plaintiff had not asked for a declaration of ownership, and before

us mention was made that the probable root of the trouble was that the Plaintiff wished to avoid paying the Court fees which would have been due had the claim been one for the ownership of a business worth two or three thousand pounds. It seems to us that the Plaintiff has conducted his case in such a way that the real issue could not be decided, and, for this reason alone, he should not succeed.

On the facts of the case, the learned trial Judge reached the conclusion that it was not possible for him to grant the declaration prayed for, because he was not satisfied that the Plaintiff-Appellant was the sole owner of the business. The learned Judge added that "without such proof it cannot be decided that only the Plaintiff is entitled to be issued with a permit ...". We agree that, in the circumstances of this case the question of ownership was of paramount importance. We do not, however, go so far as to say that a licence could be issued only to an owner: the law does not say so, and we do not think that there is any legal objection to an authorised agent taking out a licence in his own name.

We would mention here with regard to the facts that both in the statement of claim and when giving evidence, the Plaintiff-Appellant indicated clearly that the business had been worked as a family concern: thus it was admitted by the Plaintiff-Appellant that up to March, 1944, the rent was paid from the joint cash. In view of such a state of affairs it is not to be wondered at that the learned Judge refused to grant the declaration prayed for.

For the above reasons we have dismissed the appeal, with costs on the lower scale to include LP. 5 (five) advocate's attendance fee.

Delivered this 18th day of March, 1947.

British Puisne Judge.

CIVIL APPEAL No. 280/46.

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

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Nahume Isaac Merkin. APPELLANT.

v.

Miriam Merkin. RESPONDENT.

Time for appeal — Judgment delivered in absence, C. P. R. 321(a), Form 32 — Decree under Form 12 — Curfew, C. P. R. 324.

Appeal from the judgment of the Land Court of Haifa in Land Case No. 20/43, dated 21.5.46, delivered in the absence of Appellant, dismissed:—

A notification of judgment under Form 32 need not comply with the formal requirements of a decree under Form 12.

(*A. M. A.*)

ANNOTATIONS:

1. Note that — as was pointed out in H. C. 97/43 (10, P. L. R. 569; 1944, A. L. R. 41) — the provisions as to reducing judgments into the form of decrees have "been allowed to remain a dead letter".

2. *Cf.* Misc. Appl. 56/43 (10, P. L. R. 465; 1943, A. L. R. 520) and note 10 in A. L. R.

(*H. K.*)

FOR APPELLANT: S. Fellman.

FOR RESPONDENT: Y. Eisenberg.

JUDGMENT.

The Respondent has taken the preliminary objection that this appeal was lodged out of time. Notice of the objection was duly given on the 11th October, 1946.

The appeal was lodged on the 4th August, 1946, by the present Appellant who was the Defendant in the Court below. Judgment in the Court below was delivered on the 21st May, 1946, in Defendant's absence. The present Respondent alleges that on the 30th June, 1946, a certified copy of the judgment was served on the Appellant.

Rule 321(a) of the Civil Procedure Rules, 1938, provides that where judgment has been delivered in the Appellant's absence, the period within which notice of appeal may be lodged is thirty days from the date of service upon the Appellant of a notification in the form No. 32 of Schedule I to the Rules.

Form 32 is a short intimation signed by the Registrar of the Court to the effect that judgment was delivered on a certain date. So far as we know, no such notification was served in the present instance. What was served was a document purporting to be the judgment reduced to the form of a decree, and the Appellant's advocate does not dispute that service of such a document was in fact effected on the 30th June, 1946.

The learned advocate for the Appellant (Mr. Felman) has resisted the preliminary objection on the ground that the notification in form 32 was not served and that the delay fixed by rule 321 for lodging the appeal never began to run. With regard to the document served on

the 30th June, 1946, Mr. Felman has pointed out that it was a certified copy of what purported to be a decree but that unlike a proper decree according to form 12 of Schedule I to the Civil Procedure Rules, 1938, it did not indicate that the original had been signed by the members of the Court who gave the judgment. Undoubtedly, in the present case, a decree of the Haifa Land Court should have been signed by the two Judges who gave the judgment. Mr. Felman's criticism is therefore to a certain extent justified, and we agree that the document served on his client did not clearly show that it was a certified copy of a formal decree.

We do not, however, agree with Mr. Felman's submission that the period for lodging an appeal did not begin on the 30th June, 1946; we consider that the document served on his client on that date amply fulfilled the object of the short notification mentioned in rule 321. We therefore hold that rule 321(a) has been sufficiently complied with and that, consequently, the appeal was lodged out of time.

We would add that Mr. Felman has mentioned that the appeal would have been lodged in time had there not been a curfew order at Tel-Aviv from the 30th July to the 2nd August, 1946, which made it impossible for him to fulfill the necessary formalities at the Registry of the Supreme Court, Jerusalem. Mr. Felman has sworn an affidavit to the above effect. The question which has to be considered is whether the incidence of the curfew order does save the Appellant from the consequences of the belated lodging of the notice of appeal. In this respect we would point out that rule 324 of the Civil Procedure Rules provides for applications for extension of time to be made to the appellate Court or to a Judge or to the Registrar thereof within 30 days of the date upon which the period fixed for appealing has expired. No such application was made in the present case.

For the above reasons, we are of opinion that the objection must succeed and we therefore dismiss the appeal with costs on the lower scale and we allow ten pounds (LP. 10) attendance fee to the Respondent's advocate.

Delivered this 25th day of February, 1947.

British Puisne Judge.

CIVIL APPEAL No. 113/46.

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

BEFORE: Curry and Hubbard, A/JJ.

IN THE APPEAL OF:—

Abdul Hafez Mohammad Ribri Abu Awad Shahin. APPELLANT.

v.

Ahmad Mohammad El Sharif. RESPONDENT.

Illegal disposition —L. T. Ord., secs. 4, 11 — Point may be raised by the Court, C. A. 104/45 — Construction — Assignment, right of assignee to recover purchase price.

Appeal from the judgment of the District Court of Jerusalem in Civil Case No. 78/44, delivered on 12.3.46, allowed:—

The assignee of a contract which is an illegal disposition acquires no rights and cannot sue for the return of purchase price paid under the contract by the assignor.

(*A. M. A.*)

FOLLOWED: C. A. 104/45 (12, P. L. R. 382; 1945, A. L. R. 572).

ANNOTATIONS:

1. On the rule that a point of illegality may be taken by the Court itself see, in addition to the case cited, C. A. 150/45 (12, P. L. R. 345; 1945, A. L. R. 455) and note 2 in A. L. R.

2. *Vide*, on the position of assignees, C. A. D. C. Jm. 67/45 (1946, S. C. D. C. 396) and note 6, and L. C. Jm. 46/46 (*ibid.*, p. 638).

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: T. Moghannam.

JUDGMENT.

The Plaintiff (Respondent) sued the Defendant (Appellant) in the District Court for the sum of LP. 200 allegedly paid under an agreement of the 4th of November, 1935, whereby it was alleged the Defendant undertook to sell to one Mohammad Jidawi Arafi 3 pieces of land for the price of LP. 200. The document bears an endorsement whereby Mohammad Jidawi Arafi transferred all his rights under the agreement to the Plaintiff. The action was fought in the trial Court upon the issue as to whether or not the document of sale had in fact been signed by the Defendant, the present Appellant. The trial Court held that the Appellant had signed the document and gave judgment in favour of

the Plaintiff. On appeal the first point taken by Mr. Goitein on behalf of the Appellant is that the document is an out and out sale and not an agreement to sell, and therefore void, as the necessary consent of the Director of Lands had not been obtained to the disposition. Although this point was not raised in the Court below or in the written grounds of appeal we hold, following the judgment in C. A. 104/45 12, P. L. R. p. 382, that the question as to the validity of a contract is a point the Court ought to take of its own motion even if not raised by the parties. It is often not easy to determine whether a document is in fact a contract for sale or an agreement for sale. This document contains some clauses which might leave a doubt in one's mind. However, we think that the reference in clause 1 to the vendor having sold finally and the fact that nothing remains to the vendor in the whole of the lands; the reference in clause 11 to the undertaking by the purchaser to accept the land sold at any time, and again in clause 18 the admission of the vendor that he has no right after the signature of the agreement to sell the said lands and finally the fact that the whole of the purchase money was paid on the signing of the document, indicate clearly that the contract was one of sale and not an agreement for sale. We perhaps should mention that the purchaser drew up the document and that the vendor is entirely illiterate, and therefore if there is any doubt in the construction of the document the vendor should be given the benefit thereof.

Although every disposition to which the consent required by section 4 of the Land Transfer Ordinance has not been obtained is null and void, nevertheless section 11 provides that any person who has paid money in respect of such a disposition may recover that money by action in Court.

It is clear, therefore, that the purchaser would have a right of action for the recovery of the money paid by him to the vendor. The point that arises, however, is whether the Respondent who is the assignee from the purchaser also has that right. Clause 21 of the contract provides that the purchaser has the right to assign the agreement without reference to the vendor. There is an endorsement on the document to the effect that by virtue of clause 21 the purchaser has assigned the contract and all the contents thereof to the Respondent. It is clear that the contract being void the assignor transfers nothing to the assignee. Whilst it is true an assignee stands in the shoes of an assignor, the assignor's right to recover the purchase money is not given to him by the contract but it is a statutory right which has not been transferred by the assignment. For these reasons this appeal

must succeed. In view of the fact that this point was not raised before the trial Court and the Appellant has therefore caused unnecessary litigation, Appellant is entitled to costs in the Court below but each side will bear its own costs in respect of this appeal.

Delivered this 26th day of March, 1947.

A/British Puisne Judge.

HIGH COURT No. 73/46.

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

BEFORE: Edwards and De Comarmond, JJ.

IN THE PETITION OF:—

Ali Tewfik el Khalil. PETITIONER.

v.

1. Chief Execution Officer, Tel Aviv,
2. The Land Settlement Officer, Haifa,
3. Keren Kayemeth Leisrael Ltd., Haifa. RESPONDENTS.

District Court of Tel Aviv confirming award of arbitrator concerning registration of land situate in Haifa area — Petition to High Court for an order not to execute District Court's judgment — Attorney General intervening in support of Petitioner — Judgment given without jurisdiction — Power of High Court.

Return to order *nisi*, issued on 23rd July, 1946, directed to the 1st Respondent, calling upon him to show cause why he should not refrain from executing the judgment, dated 17.6.46 of the District Court of Tel-Aviv in consolidated Motions Nos. 252/46 and 253/46 lodged in Execution File No. 163/46, and why he should not cancel his order to second Respondent of 25.6.46 to substitute the name of the 3rd Respondent for Petitioner's name in the Schedules of Rights of Buteimat Village, and why the second Respondent should not refrain from making any rectification in the said Schedules:—

1. Where Attorney General has intervened in proceedings before High Court and Court thinks the petition is not purely a matter between individual citizens but one in which public interest is involved, it may deal with the petition, even if it should appear that Petitioner himself has no grievance whatever and he has only agreed to lend his name to the proceedings, and even where Petitioner has or had alternative remedies.
2. High Court has power to order Chief Execution Officer not to execute a judgment of a Court which had no local jurisdiction, even where no party ever raised point of jurisdiction.

3. After posting of Schedule of Rights only a Land Court can deal with rights in lands under settlement.

(*M. L.*)

REFERRED TO: C. A. 62/27 (1, P. L. R. 177; 2, C. of J. 496); C. A. 300/44 (12, P. L. R. 49; 1945, A. L. R. 11); C. A. 228/41 (8, P. L. R. 624; 11, Ct. L. R. 222); C. A. 38/34 (3, P. L. R. 20); H. C. 18/41 (8, P. L. R. 140; 9, Ct. L. R. 131; 1941, S. C. J. 117); H. C. 29/30 (1, P. L. R. 462; 5, C. of J. 1610); H. C. 103/42 (1942, S. C. J. 582; 9, P. L. R. 121); H. C. 100/41 (1942, S. C. J. 85; 11, Ct. L. R. 74; 9, P. L. R. 121); H. C. 101/42 (1942, S. C. J. 569; 12, Ct. L. R. 209; 9, P. L. R. 553); H. C. 81/44 (1944, A. L. R. 648); C. A. 47/41 (8, P. L. R. 172; 10, Ct. L. R. 16; 1941, S. C. J. 179); C. A. 208/42 (9, P. L. R. 748; 1942, S. C. J. 785); C. A. 245/41 (9, P. L. R. 24; 1942, S. C. J. 3; 11, Ct. L. R. 97); C. A. 455/44 (12, P. L. R. 388; 1945, A. L. R. 525); Farquharson *v.* Morgan (1894) 1 Q. B. D. p. 552 at pp. 556 & 557; Rex *v.* Stepney Corporation (1902) 1 K. B. p. 317 at p. 321; Rex *v.* Poplar Borough Council (1922) 1 K. B. pp. 72, 90 & 94; Halsbury Laws of England, Hailsham Ed. Vol. 9, p. 826, para. 1402.

ANNOTATIONS:

1. *Cf.* the following judgments where Court held that acquiescence estops from raising point of lack of jurisdiction *i. e.* M. A. 28/44 (1944, A. L. R. 807; 11, P. L. R. 396); S. T. 162/45 (1946, A. L. R. 747; 13, P. L. R. 325); H. C. 83/46 (1947, A. L. R. 71) and annotations in A. L. R. On the other hand see C. A. 370/44 (1945, A. L. R. 231), which decided that consent cannot give a District Court jurisdiction regarding ownership of land.

2. On non interference of High Court when there is another remedy see H. C. 69/44 (1944, A. L. R. 746; 11, P. L. R. 371) and annotations.

3. On point 3 see cases referred to (C. A. 245/41 and C. A. 455/44).

(*A. G.*)

FOR PETITIONER: H. Cattan and E. Koussa.

FOR RESPONDENTS: Nos. 1 & 2 — M. Hooton.
No. 3 — Eliash, Scharf and Benshemesh.

ORDER.

This is the return to an order *nisi* calling upon the 1st Respondent, the Chief Execution Officer, District Court of Tel-Aviv, to show cause why he should not be ordered to refrain from executing a judgment of the District Court of Tel Aviv given on 17th June, 1946, in Consolidated Motions 252 and 253 of 1946 and also calling upon the 2nd Respondent to abstain from effecting any rectification in the schedule of rights of Buteimat village in the manner directed by the first Respondent. The District Court had in effect confirmed the award of an arbitrator, Mr. J. Salamon, of 29th May, 1946.

The facts as found by the arbitrator were, shortly stated, as follows, namely: — In 1935 the late Tewfiq Bey Mustafa Pasha el Khalil

entered into an agreement in writing with Zur Development Co. Ltd. whereby he undertook to sell to the Company all the lands to which he was entitled in the villages of Buteimat and Khubbeize. In furtherance of this agreement Tewfiq Bey on 2nd February, 1938, executed an irrevocable Power of Attorney appointing Aharon Ben-Shemesh and Meir Polly jointly and severally as his attorneys for the purpose of carrying out all Land Registry and other transactions in connection with the transfer of the said lands. It was provided in the said agreement that the rights of the Zur Company should be transferable by them and that upon the assignment of such rights Tewfiq Bey would become liable to the assignee in respect of all his undertakings and that the assignee together with the Zur Company would jointly and severally be liable towards Tewfiq Bey in respect of the obligations of the Zur Company. The said agreement and Power of Attorney provided for the transfer of the lands to the Zur Company or as the said Company might direct. This agreement, shortly after its execution, was assigned to the 3rd Respondents who became entitled to the right of Zur and liable jointly and severally with Zur to Tewfiq Bey. Tewfiq Bey was entitled to substantial areas of land in the two villages but not all these areas were registered, as he had acquired rights by virtue of *"hijjehs"* and other written documents as well as by possession. No up-to-date survey had been made at the time of the execution of the agreement and of the irrevocable power of attorney and thus, it is said, it was not possible to fix at the time the total purchase price of these lands. It was agreed that Zur, or its assignee, the 3rd Respondents, should become entitled to all the rights and interests of Tewfiq Bey in both villages and that final accounts between the parties would be adjusted after an up-to-date survey and delimitation of the lands whether such survey was privately effected or in the course of Land Settlement operations. Certain transfers were effected in 1938 from the name of Tewfiq Bey in respect of lands in the two villages which were registered in the name of "Tewfiq Bey" and steps were taken for the ascertainment of the exact areas of the lands covered by the agreement and the Power of Attorney. Substantial amounts were paid by Zur and the 3rd Respondents to Tewfiq Bey exceeding the price of the areas mentioned in the registered areas which were transferred to the 3rd Respondents (hereinafter called the "K. K. L."). By agreement with Tewfiq Bey and, after his death which took place on 21st October, 1939, with Ali Bey Khalil (Petitioner) as representing the heirs (the said Ali, Ahmed, Mahmoud and Maryam) the K. K. L. secured possession of the lands, the subject matter of the agreement. The heirs acknowledged the undertakings of the late Tewfiq Bey and received further amounts

pending the final verification of the areas comprised in the agreement of sale. Among the lands in Buteimat village agreed to be sold by Tewfiq Bey in 1935 there were comprised the lands at the time registered in the name of the Haddad family which lands had been purchased before then by Tewfiq Bey from the Haddad family. Settlement notices under section 7 Land (Settlement of Title) Ordinance were issued in respect of Buteimat and Khubbeizi lands and notification of commencement of settlement was published in Palestine *Gazette* No. 1236 of 3rd December, 1942, and surveys were made in the course of settlement proceedings which enabled the final delimitation of the areas comprised in the agreement of sale of 1935. At settlement the K. K. L. claimed 64,527 shares out of 100,000 shares in the lands of Buteimat. These shares, which are set out in Para. XVII of the arbitrator's award, comprised 64055 shares out of 100,000 shares in certain parcels, of which 43,512 shares out of 100,000 shares, representing an area of 3516 dunums. 061 now appear in the Schedule of Rights in the name of Ali Tewfiq Mustafa Khalil and 2543 shares out of 100,000 shares representing an area of 205 *dunums* 484 metres appear in the Schedule of Rights in the name of Agriculture and Produce Co. Ltd. The said 46.055 shares represents the area acquired from the Haddad family of which 43,312 shares had, by arrangement between the heirs, been registered in the existing registers in the name of Ali Tewfiq el Khalil. The heirs admitted throughout and also confirmed before the arbitrator that these shares were comprised in the original sale to Zur and, through it, to the K. K. L. in 1935 and were, in fact, the property of the K. K. L. In addition, in the course of land settlement operations, Ali Tewfiq el Khalil confirmed that the shares originally belonging to the Haddad family and registered in his name were comprised in the original sale by Tewfiq Bey to the K. K. L. and Ali admitted the title of the K. K. L. to these shares. The arbitrator held that no question arose in the arbitration regarding the 2543 shares appearing in the name of the Agricultural and Produce Co. Ltd. as the share capital of that company is held by the K. K. L. or its nominees. In regard to the remaining 43,512 shares out of 100,000 shares, these seemed to the arbitrator to appear wrongly in the Schedule of Rights in the name of Ali Tewfiq because he (the arbitrator) found them to be the property of the K. K. L. The arbitrator held that the K. K. L. had an equitable title to 43,512 shares out of 100,000 shares as owner and that the K. K. L. are entitled to secure registration of these shares in their name and are also entitled to be entered in the Schedule of Rights and in the Land Registry Registers as owners of these shares and of the lands which these shares represent. The arbitrator ascer-

tained the state of accounts and, in effect, awarded and found that the K. K. L. are entitled to 3,516.061 *dunums* in the Buteimat lands representing 43,512 shares out of 100,000 shares in parcels and blocks which he specified in Para. XXVII 6(2) of his award and he directed that the name of K. K. L. be substituted for the name of Ali Mustafa Khalil in the Schedule of Rights of Buteimat village in respect of the aggregate area of 3516 *dunums* .061 in all the specified parcels representing 43,512 shares out of 100,000 shares and that K .K. L. be substituted for Ali in the existing registers in respect of the same shares. He also directed that an attachment in Execution File No. 560/43 be removed concurrently with the registration of the said shares in the schedule of rights and in the existing registers. He also directed that Zur and the K. K. L. pay to Ali, Ahmed, Mahmoud and Maryam (heirs of Tewfiq Bey), in equal shares, on the registration of the said lands in the name of K. K. L., the sum of LP. 2312.057. It is not denied that this sum has been paid into the Execution Office and no question arises therefrom. This award was given as the result of a deed of submission dated 9th May, 1946, signed by Ali on his own behalf and on behalf of Ahmed, Mahmoud and Maryam, heirs of Tewfiq Bey in his own and their personal capacities and as heirs of Tewfiq of the first part and by Zur of the second part and by the K. K. L. of the third part. The submission recited that, as disputes had arisen between the parties or some of them in connection with the claim of the Khalils for accounts in respect of lands in Buteimat and Khubbeize villages, and as K. K. L. claims the lands of the villages still registered in the name of Ali and Zur and as it was desired to settle such disputes, the parties to the deed of submission appointed Mr. Jacob Salomon of Haifa, Barrister-at-law, to be sole arbitrator and so on. As I have said, judgment was given by the District Court of Tel-Aviv on 17th June, 1946, confirming the award of 29th May, 1946. On 25th June, 1946, the Execution Officer, Tel-Aviv, sent letters to the Land Registrar and Land Settlement Officer, Haifa saying that he (the Execution Officer) was directed to "inform you that His Honour the Chief Execution Officer (presumably at Tel-Aviv) has ordered that the attached judgment of 17th June, 1946, be executed and registered in accordance with the terms of the judgment." On 12th July, 1946, Mr. E. N. Koussa, advocate of Haifa, on behalf of Ali Bey el Khalil, wrote to the Land Settlement Officer protesting against the proposed entry in the Schedule of Rights of the name of K. K. L., the allegation of Mr. Koussa being that it was in flagrant violation of Regulation 3 of the Land Transfer Regulations, 1940, as the land was in Zone A, and as the K. K. L. were not "Palestinian Arabs", Mr. Koussa asked the Settlement Officer

to refrain from amending the Schedule of Rights. On the same day (12th July, 1946) the Land Settlement Officer, Haifa, sent a written reply to Mr. Koussa stating that he regretted that he had no option but to obey the order of the Chief Execution Officer of Tel Aviv. I would add that Mr. Koussa sent on 12th July, 1946, a letter to the Chief Execution Officer, District Court, Tel Aviv, couched in terms similar to that of his letter to the Land Settlement Officer, Haifa. In the result on 16th July, 1946, Mr. Koussa, on behalf of Ali (Petitioner), filed the present petition. On the return day many matters were dealt with by Dr. Eliash showing cause on behalf of the 3rd Respondents. Dr. Eliash says that the Petitioner is not an aggrieved party inasmuch as he was quite content with the arbitrator's award, he even going the length of approaching the Execution Officer, Tel Aviv, on 25th June, 1946, with a view to uplifting the money paid in by the 3rd Respondents in accordance with the award. It is also said that the petition is bad in form inasmuch as the other co-heirs of the Petitioner, who were also parties to the submission to arbitration, have not joined in the petition. To put it bluntly, the suggestion is that the Petitioner himself is quite satisfied with the result of the arbitration but has been induced to lend his name to these proceedings by others who feel strongly that a breach of Regulation 3 of the Land Transfer Regulations, 1940, will be committed and condoned if the judgment confirming the award of the arbitrator is allowed to stand and to be enforced. Now, whatever merit there may be in this contention of Dr. Eliash we feel that, as the Attorney General has intervened in these proceedings by virtue of section 6 Law of Procedure (Amendment) Ordinance, 1934, and has appeared by Crown Counsel and argued in favour of our allowing the petition, I feel that we cannot refrain from enquiring into and deciding some, at least, of the substantial grounds of complaint raised by the Petitioner's advocate. In other words, this is not purely a matter or dispute between individual citizens but is one in which the Public interest is involved and one in which there is a possibility or fear of the provisions of a statute of general importance being contravened and set at naught. The same reply must be given to the argument that the Petitioner has failed to disclose all the facts, more particularly the fact that on 27th June, 1946, he had commenced in the District Court of Tel Aviv an action for the setting aside of the judgment of that Court of 17th June, 1946. But here I wish to guard myself by saying that I accept Mr. Cattan's assurance that this fact was disclosed to this Court before it granted the order *nisi* in the present proceedings. Another point taken by Dr. Eliash is that the Petitioner had an alternative remedy by pursuing the action commenced by him in the District Court of Tel Aviv

on 27th June, 1946, (C. C. 299/46). This contention has given me some anxiety; but, for the reasons which I am about to give, I am of the opinion that it must fail. I consider that, if the Petitioner has satisfied us that the judgment of the District Court of 17th June, 1946, was given without jurisdiction, it would be farcical and indeed unnecessary to allow the proceedings in C. C. 299/46 to proceed because, if the District Court of Tel Aviv had on 17th June, 1946, no power to deal with the subject matter, quite obviously the same Court would have no power to deal with the same subject matter, that is to say, in C. C. 299/46.

Now, has Mr. Cattan, for Petitioner, satisfied us that the District Court of Tel Aviv had no jurisdiction to deliver the judgment of 17th June, 1946? Firstly, Mr. Cattan says that, even although the arbitrator has awarded a sum of money that sum of money was merely a *quid pro quo*, or the price of land which he was awarding to the 3rd Respondent and this land was situated entirely within the jurisdiction of the Haifa District and quite outside the jurisdiction of the District Court of Tel Aviv, having regard to the provisions of Rule 5 Civil Procedure Rules, 1938.

It is not, and cannot, be contended that the case came within the provisions of Rule 4 Civil Procedure Rules, 1938. But, says Dr. Eliash, the judgment of 17th June merely confirmed the award of an arbitrator. This is a slender argument because, although it is true that such was the effect in form, all that the award purported to do was to grant certain land situated in the Haifa District to the 3rd Respondents on payment of a certain sum of money. Apart from the legal question whether the award of an arbitrator in a private extra judicial arbitration regarding land should or may be confirmed by a Land Court and not by a District Court, I incline to the view that in the case now before us, neither the District Court of Tel-Aviv nor the Land Court of Tel-Aviv had jurisdiction seeing that the land was all within the area of the Haifa District or Haifa Land Court. I refer to section 6(1) and section 6(3), Land Courts Ordinance and to the definition of "Court" in section 2(c) Arbitration Ordinance. On this ground alone I think that the petition should succeed. As to whether a District Court can confirm an award of an arbitrator in a private arbitration dealing with land the only authority which I can find nearly touching the matter is C. A. 62/27 Vol. I, P. L. R. page 177; but, in that case, no reasons are given in the very short judgment and it does not appear from the report that the matter was even argued. The following cases do not deal with the point directly, namely, C. A. 300/44 Vol. 12, P. L. R.

page 49, C. A. 228/41 Vol. 8, P. L. R. page 624 and C. A. 38/34 Vol. 3, P. L. R. page 20.

But, even assuming that a District Court has jurisdiction in such a matter, I fail to see how the District Court of Tel Aviv could be the appropriate forum.

I now wish to refer to the following decided English authorities, to which we were referred by Mr. Cattan, namely, Farquharson *v.* Morgan (1894) 1 Q. B. D. p. 552 at pp. 556 and 557 and to Hailsham "Laws of England" Vol. 9, page 826, para. 1402 Rex *v.* Stepney Corporation (1902) 1 K. B. page 317 at p. 321 and Rex *v.* Poplar Borough Council (1922) 1 K. B. pages 72, 90 and 94.

I think that the case of Faruhasson *v.* Morgan is very relevant to a consideration of the facts of the case now before us. I lay stress on the remarks of Lopes, L. J., at page 559 and also on Lord Halsbury's judgment at pages 556 and 557.

Mr. Cattan has also referred us to the following decisions of this Court, *viz.* H. C. 18/41 Vol. 8, P. L. R. p. 140, H. C. 29/30 Vol. I, P. L. R. page 462, H. C. 103/42 Supreme Court Judgments (1942), p. 582, H. C. 100/41 Supreme Court Judgments (1942), p. 85 and H. C. 101/42 Supreme Court Judgments (1942), p. 569, H. C. 81/44 Annotated L. R. (1944), p. 648 and C. A. 47/41 Vol. 8, P. L. R. p. 172 and C. A. 208/42 Vol. 9, P. L. R. page 748.

Mr. Cattan argues further that, after the posting of the schedule of rights, only a Land Court can deal with rights to land under settlement and, in support of his contention, he relies on section 60 and 66 Land (Settlement of Title) Ordinance and on C. A. 245/41 Vol. 9, P. L. R. page 24 and C. A. 455/44 Vol. 12, P. L. R. page 388. I consider that this submission also is sound.

I next wish to deal with Dr. Eliash's submission that this Court, before granting an order to the Chief Execution Officer under sec. 6(b) Courts Ordinance, 1940, must be satisfied that that officer has done something wrong. Dr. Eliash says that the Chief Execution Officer was bound to obey an order of a Court, in this case, the judgment of 17th June, 1946, and that in so obeying it he (the Chief Execution Officer) has done nothing wrong. The position, however, is not exactly as Dr. Eliash says. I need only refer to the cases decided by this Court which I have just cited. I would also refer to the actual words of sec. 6(b) Courts Ordinance namely, "orders directed to public officers or public bodies in regard to the performance of their public duties and requiring them to do or refrain from doing certain acts".

In my view, since, for the reasons which I have given, the District Court of Tel Aviv acted without jurisdiction when delivering its judg-

ment of 17th June, 1946, the order *nisi* must be made absolute. For obvious reasons, I refrain from dealing with the other matters argued by Dr. Eliash, Mr. Hooton and Mr. Cattan respectively. In particular, I refrain from dealing with Dr. Eliash's interesting contention that his clients had already, before the passing of the Land Transfer Regulations, 1940, obtained an equitable interest in the land, the subject matter of the submission to arbitration and that the land had, in fact, already been transferred to them.

The 3rd Respondents must pay the Petitioner's costs of this petition, namely, fixed (or inclusive) costs of LP. 10.—.

Given this 27th day of November, 1946, in the presence of Mr. Cattan for Petitioner and Messrs. Hooton & Eliash for Respondents.

British Puisne Judge.

CIVIL APPEAL No. 305/46.

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

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

IN THE APPEAL OF:—

Ijmai'an Salem El Humran. APPELLANT.

v.

Salim Salem El Humran & an. RESPONDENTS.

Appeals from Magistrates — M. C. J. O. sec. 11, effect of repeal of sub sec. (7) — Effect on proviso — M. C. P. R. 163 — Application to set aside default judgments — Affidavits, C. A. 48/43.

Appeal from the judgment of the Magistrate's Court of Beersheba, sitting as a Land Court in Motion No. 27/46 in Land Case No. 41/46, dated 4.9.46, dismissed:—

1. A Magistrate may refuse to set aside an *ex parte* order if the application is not supported by affidavit.
2. An appeal lies from such refusal, as of right.

(*A. M. A.*)

FOLLOWED: C. A. 48/43 (10, P. L. R. 251; 1943, A. L. R. 374).

ANNOTATIONS:

1. On the first point *vide* C. A. 366/46 (*ante*, p. 24).
2. On the second point *cf.* C. A. 382/45 (13, P. L. R. 159; 1946, A. L. R. 505) and C. A. D. C. Ja. 137/45 (1946, S. C. D. C. 581) and note 1.

(*H. K.*)

FOR APPELLANT: P. Karmi.

FOR RESPONDENTS: A. Nusseibi.

JUDGMENT.

A preliminary objection was taken that there could be no appeal before this Court because the proviso to sub-section 7 of section 11 of the Magistrates' Courts Jurisdiction Ordinance had been repealed. In regard to this we would point out that the effect of sub-section 7 was to deny an appeal from certain forms of judgments, and the only effect of the proviso was to modify in other respects the complete prohibition contained in sub-section 7. Sub-section 7 has been repealed and with that repeal goes the proviso. That being so the only test as to whether an appeal lay or not is to be found in the answer to the question whether the order appealed against finally determined the issue between the parties. Being of opinion that it did, we decide that the appeal lies as of right.

Turning now to the merits of the case this involves consideration of the effect of Rule 163 of the Magistrates' Courts Procedure Rules. This rule gives a discretion to a Magistrate to set aside an order made by him *ex parte* or in default of appearance. The learned Magistrate in this case refused to exercise his discretion because the application was not supported by an affidavit. He refers to C. A. 48/43, which emphasised the desirability of all such applications being supported by an affidavit. With respect we entirely concur in this general principle, and we can well believe that a Magistrate would be most reluctant to exercise the discretion given to him under Rule 163 in the absence of such an affidavit. Turning now to the order complained of, it seems clear to us that the reason for the Magistrate's refusal was that he accepted the general principle enunciated in Civil Appeal 48/43 that all such applications should be supported by an affidavit. We are unable to concede that in so deciding he acted in a manner which was unreasonable or which would justify us in interfering with his order. The appeal must therefore be dismissed. Inclusive costs of LP. 10.

Delivered this 10th day of February, 1947.

Chief Justice.

CRIMINAL APPEAL No. 137/46.

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

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

IN THE APPEAL OF:—

Elias Mousa Abboud & an. APPELLANTS

v.

The Attorney General. RESPONDENT.

Town Planning — Secs. 35(1)(a), (2), (7), (8) — Effect of owner's death on order of demolition — Parties to appeal.

Appeal from the judgment of the District Court of Haifa in its appellate capacity, dated 13.5.46, in Criminal Appeal No. 58/46, from the Order of the Acting British Magistrate, dated 26.3.46, in Criminal Case No. 1551/45 made under section 35(7) of the Town Planning Ordinance, 1936, as amended in 1941, allowed:—

1. Sec. 35(7) of the Town Planning Ordinance does not apply to cases where the person against whom an order for demolition has been made dies before the expiry of the period within which he was ordered to effect the demolition or obtain a permit.

2. If in such circumstances an order under sec. 35(7) is obtained *ex parte*, the heirs may appeal under sec. 35(8).

(*A. M. A.*)

ANNOTATIONS:

1. See the previous appeal referred to in the judgment: CR. A. 128/45 (12, P. L. R. 440; 1945, A. L. R. 759).

2. On appeals under the Town Planning Ordinance *cf.* CR. A. 107/46 (13, P. L. R. 504; 1946, A. L. R. 671) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANTS: J. Habiby.

FOR RESPONDENT: M. Ashoush (By Power of Attorney from the Attorney General).

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 13.5.46 of the District Court of Haifa in Criminal Appeal No. 58/46.

Mousa Elias Abboud (now dead) was convicted on 21.3.45 in the Chief Magistrate's Court of Haifa in Criminal Case 155/45, of an offence under section 35(1)(a) of the Town Planning Ordinance, 1936, as amended by the Town Planning Ordinance, 1941. That case was taken on appeal to the District Court, and on 25.5.45 the District Court (in Criminal Appeal 79/45) ordered Moussa Abboud to demolish one wall, one partition wall, and to remove the gate on the stairs leading to the basement where the said walls are situate in his premises at 124, Jaffa Road, Haifa, unless he succeeded in obtaining a permit from the Town Planning Commission within six months as from 25.5.45. Moussa Abboud did not obtain a permit and he did not demolish the walls or remove the gate. He appealed to the Supreme Court, but died on 27.7.45 before his appeal had been disposed of, and the appeal was accordingly dismissed on 19.9.45.

The Attorney General thereafter applied under the provisions of section 35(7) of the Town Planning Ordinance, 1936, as amended by

the Town Planning Ordinance, 1941, for an order that the work be carried out by the Local Building and Town Planning Commission, Haifa, and that the costs and incidental expenses be recovered by sale of the materials of the walls and gate in question.

That application was made and heard *ex parte* by the Acting British Magistrate, Haifa. The Attorney General's representative contended that although the owner (Moussa Abboud) was known to be dead the competent authority was nevertheless entitled to ask for a demolition order. The Magistrate held that section 35(7) did not apply, and he dismissed the application. He observed that the general principle of law in this country is that when a person dies he is succeeded by his heirs, and that the prosecution had not proved or alleged that Moussa Abboud had left no heirs.

An appeal was made *ex parte* to the District Court, Haifa, in Criminal Appeal No. 58/46. The District Court allowed the appeal, and in so doing it relied particularly on the words "or that it is impossible or impracticable to serve him with a summons ... or that the offender has divested himself of the ownership of the building or structure since the commission of the offence" which appear in section 35(7).

The point to be decided is whether section 35(7) is applicable in a case such as this, where the person against whom an order for demolition has been made dies before the expiry of the period within which he was ordered to effect demolition in case he should be unable to obtain a permit, and before this appeal could be heard.

Having considered the submissions of Jamil Eff. Habiby, advocate for the Appellants, and Mr. Ashoush for the Attorney General, we consider it to be highly improbable that the legislator, when drafting section 35(7), intended to provide for the very unusual circumstances that have arisen in the present case. Under section 35(1)(i) the District Court, Haifa, had the power to order the demolition to be effected by the Local Commission, but the Court made the demolition order against Moussa Abboud himself whose death, in July, 1945, deprived him of the possibility of obtaining a permit within the six months allowed by the District Court.

Mr. Ashoush has conceded that if Moussa Abboud had not died action would not have been taken *ex parte*. If Moussa Abboud had not died the Attorney General would presumably have proceeded under the provisions of section 35(2). We rule therefore that section 35(7) has no application in the present instance. In so ruling we wish to make it clear that our decision is strictly limited to the peculiar facts of the present case. We must not, for instance, be taken to have decided

that the provisions of section 35(7) could not have been made use of if Moussa Abboud had left Palestine for an unknown destination.

Mr. Ashoush took the preliminary point that leave to appeal ought not to have been granted. He submitted that the present Appellant was not a party to the proceedings. It is not denied that the Appellants are heirs of the late Moussa Abboud, and we think that for the purposes of section 35(8) they come within the category of owners aggrieved by the order appealed against. The property is said to have been registered in their names in March, 1946.

In the result the appeal must be allowed.

Delivered this 19th day of February, 1947.

British Puisne Judge.

CRIMINAL APPEAL No. 151/46.

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

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

IN THE APPEAL OF:—

Mahmoud Mohammad Awad. APPELLANT.

v.

The Attorney General. RESPONDENT.

Corroboration — Single witness — Medical conclusions as corroboration.

Appeal from the judgment of the District Court of Haifa, dated 10.12.46 in Criminal Case No. 251/46, whereby Appellant was convicted of Attempted Murder, *contra* section 222 of the Criminal Code Ordinance, and sentenced to ten years' imprisonment, dismissed:—

Medical deductions as to the manner in which a wound was inflicted may serve to corroborate the evidence of a witness.

(*A. M. A.*)

ANNOTATIONS: On the power of the Court to convict on the evidence of a single witness see CR. A. 17/46 (1946, A. L. R. 188) and note; *cf.* CR. A. 104/46 (1946, A. L. R. 627).

(*H. K.*)

FOR APPELLANT: G. Salah.

FOR RESPONDENT: Crown Counsel — (Heenan).

JUDGMENT.

In this case the trial Judge convicted, as he was entitled to convict, on the evidence of a single witness. There is no reason to believe that

the Judge did not appreciate the responsibilities involved. He saw the witness in the box, and he was in the best position to gauge his credibility. Being satisfied as we are, that the Judge duly appreciated that he was convicting on the evidence of a single witness, this Court will not interfere. Moreover, the single witness was not without some corroboration as his description of the circumstances in which the wound was inflicted coincided with the medical deductions from an examination of the wound.

Turning now to the question of sentence, the Judge came to the conclusion that this shooting was premeditated. That is a finding of fact which we see no grounds to criticize. This being the case, we cannot say that the sentence he imposed was excessive. The conviction and sentence are therefore confirmed and the appeal is dismissed.

Delivered this 29th day of January, 1947.

Chief Justice.

CRIMINAL APPEAL No. 162/46.

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

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

IN THE APPEAL OF :—

Husni Shaker Awwadeh & an. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Compensation under C. C. O., sec. 43 — More than one accused, "satisfaction or compensation" — Evidence of common purpose — Amendment of information at the end of the trial, T. U. I. Ord., sec. 52.

Appeal from the judgment of the District Court, Nablus, dated 18.12.46 in felony No. 71/46, whereby each of the two Appellants were convicted of charges *contra* sections 238 and 250 of the Criminal Code Ordinance and sentenced to three years' imprisonment and ordered to pay a sum of LP. 100 each as compensation under sec. 43 of the Criminal Code Ordinance; appeal allowed in respect of the amount of compensation:—

1. The maximum of LP. 100 which may be awarded under sec. 43 of the C. C. O. applies irrespectively of the number of persons accused in the trial.
2. The existence of a common purpose between two persons jointly indicted may be inferred from a consideration of the circumstances surrounding the commission of the offence.

3. Although the information may (*semble*) not be amended at the conclusion of the trial, no injustice is caused to the accused if this is done, as he may, under sec. 52 of the T. U. I. Ordinance, be convicted for an offence different from that charged.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* CR. A. 96/37 (4, P. L. R. 286; 1937, S. C. J. (N. S.) 493) where a similar conclusion was arrived at in respect of compensation under sec. 6(2) of the Civil and Religious Courts Jurisdiction Ordinance.

2. On the second point *vide* CR. A. 30/43 (10, P. L. R. 188; 1943, A. L. R. 308) and note 4 in A. L. R., and CR. A. 39/43 (*ibid.*, pp. 212 & 357).

3. On amendment of informations *cf.* CR. A. 99/46 (1946, A. L. R. 45) and note 2.

(*H. K.*)

FOR APPELLANTS: No. 1 — N. Toukan.
No. 2 — A. Khouri.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

In this appeal two questions arise, one as to the conviction generally of the Appellants and the second as to the interpretation of section 43 of the Criminal Code Ordinance. The only point that can arise out of the conviction generally is the question as to whether those two were engaged in a common purpose and whether the injury which resulted can be said to have flowed naturally from that common purpose. Now, the existence or otherwise of a common purpose between two persons jointly indicted, must be inferred from a consideration of the surrounding circumstances of the offence. We think that in the circumstances of this case there can be no doubt that the trial Judge came to a correct conclusion when he decided that the two were engaged on a common purpose.

One other point remains to be dealt with. Naim Bey Touqan raised a technical objection that the Information was amended at the close of the trial. There may indeed be substance in this argument, but the accused could equally have been convicted without the amendment of the Information at all under the provisions of section 52 of the Criminal Procedure (Trial Upon Information) Ordinance.

Turning now to the interpretation of section 43. It will be observed that the Court ordered each of the accused to pay LP. 100 to the injured person making a sum of LP. 200 in all. Naim Bey has argued that the limit which could be awarded under the section to an injured person is LP. 100. We think that the argument is sound because we are of opinion that the dominant words in sub-section 1 are the words

"satisfaction or compensation"; those are the words which are limited by LP. 100.—. We are reinforced in this opinion by the wording of subsection 2. It follows that the decision of the trial Court in this respect must be altered to LP. 50 compensation from each of the accused to the victim.

Delivered this 15th day of January, 1947.

Chief Justice.

CIVIL APPEAL No. 55/46.

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

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

IN THE APPEAL OF :—

Yehuda Leib Finkelstein. APPELLANT.

v.

Mizra' Kibutz Hashomer Hatzair Lehityashvut Shitufit Ltd. Mizra' Settlement Affuleh. RESPONDENT.

Cultivators protection — Special case stated by commissioners — Landlord's consent, C. A. 15/46.

Appeal from the judgment of the Land Court, Haifa, in L. A. 62/45, dated 29.1.46 by way of Special Commission sitting at Nazareth under section 19 of the Cultivators (Protection) Ordinance, allowed:—

Persons who cultivate for a wage are not statutory tenants even if they are also entitled to a share of the produce.

(*A. M. A.*)

FOLLOWED: C. A. 15/46 (*ante*, p. 224).
ANNOTATIONS: See the case cited and the note thereto.

(*H. K.*)

FOR APPELLANT: Eliash.
FOR RESPONDENT: A. Wittkowski.

JUDGMENT.

This is an appeal from a judgment delivered by the Land Court at Haifa by way of special case submitted by a special commission sitting under section 19 of the Cultivators Protection Ordinance. There are two main grounds of appeal. The first is that the Land Court erred in holding that the existence of an original tenancy agreement is not a condition precedent to a claim for protection as a statutory tenant. As

to this, we need only say that Civil Appeal 15 of 1946, judgment in which has been delivered since this appeal was filed, decided that the landlord's consent is not necessary to constitute a person a statutory tenant, all that is required is occupation and cultivation. It follows that this ground of appeal fails. The other ground of appeal is that by the very nature of the second contract between the parties, that is the contract dated the 15.3.44, Mizra' Kibbutz Hashomer Hatzair Lehityashvuth Shitufit Ltd. could not have been statutory tenants. In regard to this ground it seems to us that the learned Judge of the Land Court did not fully appreciate the difference between this 1943 contract, and the contract of 1941 which it replaced.

We agree with him that the 1941 contract might give rise to a statutory tenancy. The 1943 contract, however, puts the matter on a different footing. An examination of clauses 5, 6 and 7 of that contract appear to indicate that Mizra' *etc.* were functioning as a company, which *inter alia* contracted to find labour to till the land. Alternatively, they might be regarded as in partnership with the Appellant, but in so far as they purported to act within the ambit of this contract they were neither tenants nor cultivators of land. It is true that they supplied labour for cultivating the land, but under clause 6 of the contract those labourers were paid a money wage, and the Kibbutz were reimbursed for this payment of wages by a payment in cash by the Appellant. The fact that after all those money accounts had been settled, the Kibbutz under Clause 7 were entitled to receive 50% of the yield harvested from the cultivated area would not, in our opinion, bring them within the definition of statutory tenants in section 2 of the Cultivators Protection Ordinance.

The appeal must therefore be allowed with LP. 15 inclusive costs. Costs in the lower Court to be reversed.

Delivered this 3rd day of March, 1947.

Chief Justice.

CIVIL APPEAL No. 183/45.

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

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

IN THE APPEAL OF :—

Hanna Menahem Messa. APPELLANT.

v.

Moses Benin Menahem Messa & an. RESPONDENTS.

Succession — Revision of order under Succession Rules, r. 25(1) — Time within which application may be made.

Appeal from the judgment of the District Court of Jaffa in Estate Case No. 45/32 and Application No. 2/47/44, dated 4th May, 1945, dismissed:—

Application for an alteration of an order of succession may be made under Rule 25(1) only before the order has been carried into effect and the case file closed (De Comarmond, J., *dissentiente*).

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 37/46 (*ante*, p. 185) for somewhat similar considerations in connection with sec. 66 of the Land (S. of T.) Ordinance.

See also Pr. D. C. T. A. 334/44 (1945, S. C. D. C. 329).

(*H. K.*)

FOR APPELLANT: Goitein and Wittkowski.

FOR RESPONDENTS: Eliash.

JUDGMENT.

FitzGerald, C. J.: This case presents some unique features. Twelve years ago, in 1935, the President of the District Court at Jaffa, sitting in a matter of Probate, delivered a considered judgment which dealt with complex questions of the Law of Succession. In the event he declared the Respondent (Moses Benin Menahem Messa) the sole heir to all the property, movable and immovable, of one Benin Menahem Messa, a member of the Jewish faith and a British subject, domiciled at Aden.

The question came before the Jaffa Court again ten years later, the presiding Judge this time being an Acting Relieving President, Judge Rogers. His judgment, as I interpret it, purported in fact to review the judgment of Judge Copland; in other words, he treated himself as a Court of appeal from it. He agreed with Judge Copland and he refused to alter the declaration of succession.

It is against Judge Copland's declaration, and Judge Rogers' confirmation of it, that an appeal is now made in this Court, — twelve years, be it remarked, after the delivery of Judge Copland's judgment.

This appeal is possible, says Mr. Goitein, under Rule 25(1) of the Succession Rules. If his interpretation of Rule 25(1) is correct, it would mean that there is nothing to prevent a person, except of course the ordinary prescriptive law, from coming to Court years after the settlement of property has been effected and vested interests have been created, and demanding the setting aside of the settlement and a declaration that interests enjoyed for years under the authority of a judgment should be declared null and void. I am unable to believe that Rule 25(1) of the Succession Rules ever contemplated any such state of affairs. The Rule reads:—

> "After an Order declaring the succession to a deceased person has been made, any person may apply for an alteration of the Order."

I interpret this as meaning before the Order has been carried into effect and the case file closed, insofar as the Courts are concerned. It does not, in my opinion, create a right to re-open the whole case *de novo*.

I ask myself the question — what does Rule 25(1) of the Succession Rules purport to do? It seems to me that it purports to grant nothing more than an extension of the legal right given by Rules 20 to 24, that is, a legal right to make an application for a declaration of succession. In my opinion the right can only exist so long as the question of succession can be said to be *"lis pendens"*, so long as the property, as it were, is in the melting pot awaiting division between the heirs. The right must cease some time, or there would be no finality in succession. In my view the right ceases when practical effect has been given to an Order of Succession declared by a Court, that is, when the property the subject-matter of succession, has been finally handed over to the person whom the Court declared a successor.

I therefore agree with Edwards, J., that the learned Relieving President, Judge Rogers, should have dismissed the application out of hand, and should not have dealt with the merits.

Delivered this 19th day of March, 1947.

Chief Justice.

Edwards, J.: On 26th January, 1935, the then President of the District Court of Jaffa (Judge Copland as he then was) declared one Moses Benin Menahem Messa to be the sole heir to certain property movable and immovable of the deceased Benin Menahem Messa, and declared Moses to be entitled to be registered as sole owner in the Land Registry. In 1946, that is to say more than ten years after Judge Copland had made his order, Hannah Menahem Messa, a daughter of the testator, applied to the District Court of Jaffa under Rule 25(1) of the Succession Rules for an alteration of the order of 26th January, 1935. The learned Acting Relieving President (Judge Rogers) dealt with the application on its merits and came to the same conclusion as Judge Copland had done, and on 4th May, 1946, dismissed the application for an alteration of the order of 26th January, 1935.

The question that at once occurs to one's mind is whether, after a lapse of over ten years after an order has been made declaring the succession to a deceased person, a person claiming to have an interest in the estate can apply under Rule 25(1). The words in Rule 25(1) are, "after an order has been made". Does this mean "at any time after an order has been made"? It cannot be suggested that Judge Rogers

purported to act as an appellate Court from Judge Copland. There is no suggestion in the present case that new facts had come to light after Judge Copland had made his order. The only suggestion that can be made in favour of the present Appellant is that in January, 1935, and possibly for some time afterwards, she was ignorant of the terms of the order that Judge Copland had made. Even assuming that she was thus ignorant, is it reasonable to interpret Rule 25(1) in such a way as to enable a person more than ten years later to try to upset arrangements made consequent on the order of 26th January, 1935? In my view, the answer must be in the negative. Even supposing the present Appellant had not been properly cited as a party to the application which resulted in the order of 26th January, 1935, one would have expected her to make due inquiries at the Registry of the District Court of Jaffa at any time after January, 1935, to see what was happening to the estate.

In my view, it would be an abuse of process to enable a person to make use of Rule 25(1) over ten years after an order declaring succession has been made. I consider that the learned Relieving President (Judge Rogers) should have dismissed the application out of hand, and should not have dealt with the merits.

In the result I would dismiss this appeal.

British Puisne Judge.

De Comarmond, J.: The Appellant, Hannah Menahem Messa, filed a petition in the District Court, Jaffa, in December, 1944, praying for the alteration of an order made by the same Court on the 26th January, 1935, in the matter of the succession of Benin Menahem Messa, her father.

The petition was dismissed on the 4th May, 1945, by the learned R/President, Judge Rogers, and the present appeal was then lodged.

When the appeal was heard, Mr. Eliash for the Respondents pointed out that Hannah's petition was made under Rule 25(1) of the Succession Rules, which reads as follows: "After an order declaring the succession to a deceased person has been made, any person claiming to have an interest in the estate of the deceased may apply for the alteration of the order". Mr. Eliash submitted that in 1944 Hannah could not apply under Rule 25(1) for a variation of an order made in January, 1935.

Curiously enough, this point was not raised before the learned Relieving President, although in my opinion it is of importance in the circumstances of this case.

My learned brothers have reached the conclusion that Mr. Eliash's

contention is correct and have upheld it. For my part I do not feel satisfied that there are enough data to enable me to reach a similar conclusion.

Mr. Goitein, for the Appellant, (who was the Applicant in the Court below) has drawn attention to certain features of the earlier litigation which, according to his submission, shows that his client was not a party to the proceedings which resulted in the order made by Judge Copland in January, 1935. Mr. Goitein told us that the Appellant's stepmother, Miriam, had been the first person to apply in 1932 for the appointment of an administrator, and that she (the Appellant) signified her agreement to that application. Subsequently, however, Miriam withdrew or abandoned her application, and according to Mr. Goitein his client then lost touch with the matter.

It would seem that, although Miriam had abandoned her application for the appointment of an administrator, the proceedings were in some way kept going by or on behalf of deceased's son (Moses) and ultimately, in 1935, an order was made to the effect that the said son was the sole heir to all the property left by the deceased.

I consider that it would be advisable to scrutinize the proceedings which led up to the making of the order in 1935, so as to find out what part, if any, the present Appellant played in them. It would also appear necessary to find out whether the rescision or variation of the order made in 1935 could possibly have any practical effect with regard to the property left by the deceased.

Were this appeal to be dismissed on the ground that the learned Relieving President's decision in correct, it would not matter whether or not Appellant's application was made in time. But if, as seems advisable and necessary, the first question to be decided is whether in the circumstances of this case the Appellant was entitled to rely on Rule 25(1), I am of opinion that all the facts should be investigated on the lines indicated above.

I therefore consider that the better course in this case would be to remit it back to the Court below.

British Puisne Judge.

PRIVY COUNCIL APPEAL No. 43/46.

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

BEFORE: Lord Wright, Lord Porter, Lord Uthwatt, Sir Madhavan Nair and Sir John Beaumont

IN THE APPEAL OF :—

Eliezer Zabrovsky. APPELLANT.

v.

The General Officer Commanding Palestine
& an. RESPONDENTS.

Deportation order under Emergency Regulations — Detention in Eritrea — Habeas corpus application — Binding force of Mandate — Essential requirements for interference with an order of deportation or detention.

1. The Mandate whereby the Council of the League of Nations entrusted to Great Britain the territory of Palestine is still treated as *de facto* operative *quoad* the duties it imposes, though the League of Nations may no longer function.

2. For an application in the nature of *habeas corpus* to succeed it is not enough to show that there has been interference with the liberty of the subject, it is essential that it should be shown to be illegal.

3. Detention or confinement affecting the liberty of a person is not illegal so long as it conforms to the requirements of the statute or order on which it is based.

4. Neither the High Court nor the Privy Council have jurisdiction to enquire into the legality of an order made by the responsible governing authority in a territory outside Palestine in pursuance or assumed pursuance of the laws or orders of that territory.

(*M. L.*)

REFERRED TO: Jerusalem Jaffa District Governor *v.* Suleiman Murra (1926) A. C. 321, 1 P. L. R. 71; 5, C. of J. 1818, Michel Habib Raji Ayoub *v.* Sheikh Suleiman El Taji El Farouqi (1941) A. C. 274, 8 P. L. R. 116, Secretary of State for Home Affairs *v.* O'Brien (1923) A. C. 603, Liversidge *v.* Anderson (1942) A. C. 206, Greene (1942) A. C. 284, Rex *v.* Halliday (1917) A. C. 200, A. G. for Canada *v.* Cain (1906) A. C. 542. The Co-operative Committee on Japanese Canadians *v.* The Attorney General of Canada, Barnado *v.* Ford (1892) A. C. 326.

ANNOTATIONS:

1. For previous proceedings in this case see H. C. 89/45 (1946, A. L. R. 174; 12, P. L. R. 556).

2. On point 2 see H. C. 94/46 (1946, A. L. R. 719) and annotations.

(*A. G.*)

JUDGMENT.

Wright, L. J.: In this appeal Their Lordships, after hearing arguments from counsel on both sides, announced that they had decided to advise His Majesty that in their judgment the appeal should be dismissed, and added that they would give their reasons later. This they now proceed to do.

The appeal was brought by special leave from an Order, dated the 18th December, 1945, of the Supreme Court of Palestine sitting as a

High Court of Justice which discharged a rule *nisi,* granted on the Appellant's petition for an Order in the nature of *habeas corpus* in respect of Arie Ben Eliezer, the Appellant's son.

The Appellant's son is a Palestinian citizen, and had arrived in Palestine at some date prior to the 17th April, 1944, from the United States of America. On that date he was arrested by the Police Authorities in Palestine acting by virtue of an Order made under Regulation 15B of the Emergency Regulations, 1936, and on or about the 19th October, 1944, was removed from Palestine to Eritrea under custody of the Respondents and personnel under their command acting by virtue of an Order of deportation made under Regulation 15 of the Emergency Regulations, 1936, and of a Direction made under Regulation 17G of the Defence Regulations, 1939. From and after his arrival in Eritrea he was detained in a detention camp in that country but was later transferred for a period of time to a detention camp in the Sudan from which he was eventually brought back to the detention camp in Eritrea where at the inception of these proceedings he was and he still is detained.

On the 26th October, 1945, the Appellant filed in the Supreme Court of Palestine, sitting as a High Court of Justice, Jerusalem, a petition dated the 4th September, 1945, praying for an Order in the nature of *habeas corpus* to be directed to the Respondents in respect of his son and on the 6th November, 1945, that Court made an Order *nisi* directing the issue of a summons in the nature of *habeas corpus* to the Respondents as prayed by the Appellant and ordering the Respondents to file their reply, if so advised, within fifteen days from the date of service of the Order.

Before referring to the documents and Orders in the case it may be useful to indicate shortly what is the Constitutional or international position of Palestine. That topic was discussed by this Board in Jerusalem-Jaffa District Governor *v.* Suleiman Murra (1926) A. C. 321, when the question at issue was whether an Ordinance issued by the High Commissioner for the expropriation for public services of certain property was *ultra vires* as not providing for adequate compensation. The Board held that the Ordinance was not *ultra vires.* Lord Cave, delivering the judgment of the Board, referred to the Mandate for Palestine dated the 24th July, 1922, whereby the Council of the League of Nations acting under Article 22 of the Covenant of the League entrusted to Great Britain the territory of Palestine. That Mandate is still treated as *de facto* operative quoad the duties it imposes, though the League of Nations may no longer function. It imposes (*inter alia*) the responsibility on the Mandatory of "safeguarding the civil and

religious rights of all the inhabitants of Palestine irrespective of race and religion". Lord Cave at p. 325 stated the general position thus:—

> "By the Palestine Order-in-Council dated August 10, 1922, provision was made for the administration of Palestine by a High Commissioner with full executive powers; and authority to make Ordinances for the peace, order and good government of Palestine was entrusted to a Legislative Council, subject to a provision that no Ordinance should be passed which should in any way be repugnant to or inconsistent with the provisions of the Mandate. The institution of a Legislative Council did not prove successful; and on May 4, 1923, an amending Order-in-Council was made by which the legislative authority was transferred to the High Commissioner, who was thereby authorised to promulgate such Ordinances as might be necessary for the peace, order and good government of Palestine, subject to a condition that no Ordinance should be promulgated which should be in any way repugnant to or inconsistent with the Mandate."

As to what law is administered in Palestine, light may be derived from the judgment of this Board in Michel Habib Raji Ayoub *v.* Sheikh Suleiman El Taji El Farouqi (1941) A. C. 274, where the dispute had reference to the construction of a contract. Lord Atkin quoted in full sec. 46 of the Palestine Order-in-Council of 1922 as follows:—

> "The jurisdiction of the civil courts shall be exercised in conformity with the Ottoman law in force in Palestine on November 1, 1914, and such later Ottoman laws as have been or may be declared to be in force by public notice, and such Orders-in-Council, ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary."

Lord Atkin was dealing with a dispute whether the Common Law doctrine of the difference between penalty and liquidated damages could be applied to the words of a Palestine contract; it was claimed that the bond must be enforced in full and could not be treated as being

a penalty according to the Common Law distinction. Lord Atkin went on to say at p. 281:—

> "The code speaks in a legal system which does not know penalties as such — in which an agreement to pay damages must, therefore, be strictly enforced 'no more and no less'. But when the difference between penalty and liquidated damages is introduced into the legal concepts which now, owing to sec. 46 of the Order-in-Council, form the jurisprudence of Palestine, the terms of Art. III can be given a plain and just meaning."

These general principles must be kept in mind when the effect of the Ordinance and Order out of which the case arises is being considered. *Habeas corpus* is perhaps the most characteristic writ known to the English Common Law. As Lord Birkenhead said of that writ in Secretary of State for Home Affairs *v.* O'Brien (1923) A. C. 603, at p. 609: "It is perhaps the most important writ known to the Constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege". It is accordingly clear that the Common Law rules which have been evolved on this topic by the English Courts will be applicable in the Court in Palestine, and that these rules will govern the decision. But the detention must be illegal as Lord Birkenhead emphasises by repeating the word. That lies at the root of the whole matter. It is for "illegal restraint or confinement" that "the swift and imperative remedy" may be invoked. It is not enough to show that there has been interference with the liberty of the subject: it is essential that it should be shown to be illegal, as it manifestly was in the O'Brien case (*supra*). In the troublous times of war and in the chaotic post-war conditions the scope of legal .and permissive interference with personal liberty has been extended and restraints have been legalised by the legislature which would not have been accepted as legitimate in normal times. Thus in England in what are called the Regulation 18B cases Liversidge (1942) A. C. 206 and Greene, *ibid.*, p. 284, the House of Lords upheld the legality of a detention of the Applicants by the executive without trial and also held that the executive could not be compelled to give its reasons for the detention. The executive was in these respects exercising an emergency power vested in it by the legislature. There was a restraint outside the ordinary course of law but it was not illegal because it was justified by the terms of the Statutory Regulation which gave the power and imposed the duty

for the purpose of securing the defence of the realm during the world war which has recently ended. A somewhat similar rule of law applied during the war of 1914—1918 — see Rex *v.* Halliday (1917) A. C. 200.

In these and many similar cases the restraint or confinement was held not to be illegal, and the effect of the decisions is to vest a plenary discretion in the executive, affecting the liberty of the subject and *pro tanto* to substitute for the judgment of the Court based on ordinary principles of Common Law right, the discretion of the Executive acting arbitrarily in the sense that it cannot in substance be inquired into by the Court. This is a serious interference with the liberty of the subject but it is not illegal so long as the detention conforms to the requirements of the statute or order on which it is based. It has sometimes been said that the remedy of *habeas corpus* is suspended during these temporary and emergency laws. But that is not so. There is no occasion in such cases for its suspension because, as was pointed out in the House of Lords in Greene's case (*supra*) at p. 308, there is no illegality. The British nations have borne these temporary encroachments on their Common Law freedom because they were necessary for the safety of the country and were required by the paramount need of preserving its peace and good government.

But these considerations do not dispose of the case; the mandate requires the Government of Palestine to make Ordinances for that purpose and therefore the Order of deportation was legal as being within the powers so given. Nevertheless it is said that detention in Eritrea is outside the competence of the Executive in control of Palestine and that that Executive is in fact detaining the Petitioner's son and can if they wish bring about his release even though the Eritrean authorities are the nominal jailors and though they assert that the detention in Eritrea is not illegal according to the law of that country.

The Order of arrest, as already stated, purported to be made under the Palestine (Defence) Order-in-Council, 1937, and the Emergency Regulations, 1936. It was dated the 18th October, 1944, and is headed Order of Deportation. It is signed by the officer administering the Government of Palestine and recites that Regulation 15 of the Emergency Regulations, 1936, empowers the High Commissioner of Palestine to make a Deportation Order requiring any person to leave and remain out of Palestine and that it is necessary and expedient that a Deportation Order should be made in respect (*inter alios*) of Eliezer. It then proceeds to require him to leave and thereafter remain out of Palestine, and orders him to be kept in the custody of the Commander-in-Chief, Middle East, and the Inspector-General of Police and Prisons, Palestine, and personnel under their command while awaiting deportation and

while being conveyed out of Palestine. On the same day the same officer issued a Direction under Regulation 17G of the Defence Regulations of Palestine, 1939, which provides that where under any Ordinance or other law for the time being in force in Palestine any person has been lawfully ordered to be deported from Palestine the High Commissioner may make arrangements with the appropriate authorities of any territory outside Palestine for the reception of the persons ordered to be deported. After reciting the Order of Deportation just refered to this direction stated that arrangements had been made with the appropriate authorities in the territory of Eritrea, and that the officer administering the Government of Palestine was of opinion that it was necessary in the interests of public safety and the defence of Palestine that the person in question ordered to be deported should be kept in custody while being conveyed from Palestine to Eritrea.

These directions were duly carried out, and Eliezer and the other persons named in the Orders were conveyed to Eritrea and kept there under military custody. In ordering these persons to be deported and in arranging for the place of deportation to be Eritrea, and for their conveyance there, the Government of Palestine purported to exercise the emergency powers vested in them. Though the exact organisation adopted for governing Eritrea at the material date has not been shown in evidence, it is sufficiently clear that it is territory, captured from the Italians during the war, and was at all material times held by the British under military government. It was and is in no way subordinate to the Palestine Government but is under the control of a Chief Administrator, who is the head of the Military Government. It is not suggested that any Court in Palestine had authority to issue the writ or ensure its execution in Eritrea, and it does not seem to be disputed that Eliezer came under the control of the military authorities there.

The documents produced show that Brigadier McCarthy, on the 23rd June, 1945, issued a Proclamation No. 54, dated Asmara, the 23rd June, 1945, which contained the following provisions:—

> "WHEREAS it is necessary to make provision for the arrest and detention of suspected persons,
>
> NOW THEREFORE I, Charles D'Arcy McCarthy, Officer of the Most Excellent Order of the British Empire, Brigadier, hereby proclaim as follows:—
>
> 1. Arrest and Detention of Person on Security Grounds.
> The Chief Administrator may order the arrest and detention of any person whom he has reasonable cause to believe to be or to have recently been concerned either inside or outside the occupied territory in acts prejudicial to public safety or to the interests and safety of

any of the British or Allied Armed Forces, or in the preparation or instigation of such acts.

2. DETENTION OF PERSON TRANSFERRED FROM ANOTHER TERRITORY. Where any person has been ordered to be detained or deported by the authorities of any British Colony or Protectorate or of any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty or of any other territory occupied by the British or Allied Armed Forces and has by order of a competent authority been transferred to the occupied territory, the Chief Administrator may order his detention after arrival in the occupied territory.

3. POWER TO CANCEL OR SUSPEND ORDER OF ARREST OR DETENTION. The Chief Administrator may at any time cancel any order made hereunder or may direct that the operation of such order be suspended subject to such conditions as he may think fit.

Given under my hand at Asmara, this 23rd day of June, 1945.

(Sgd.) C. D. McCARTHY,
Brigadier,
Chief Administrator."

The Crown contends that this law, acted upon with specific reference to Eliezer by an Order of the Eritrean Military Government dated the 4th October, 1945, made under the provisions of Proclamation No. 54, shows that the detention in Eritrea was legitimate according to the law of the place of detention: that the Court in Palestine had no evidence before them to the contrary: that the law itself was so far as the Courts in Palestine were concerned a foreign law: and that those Courts had no jurisdiction to adjudicate upon the validity of acts done under a foreign law in a foreign country or to order the release of persons detained in a foreign country.

The petition filed in the Court of Palestine by the father of Eliezer was dated the 4th September, 1945. It named as Respondents (1) the General-Officer-Commanding, Palestine, representing the Commander-in-Chief, Middle East; (2) the Inspector-General of Police and Prisons. It recited the facts of Eliezer's arrest by the Police Authorities under Regulation 15B of 1936, his removal from Palestine and his detention in a detention camp in Eritrea and later in the Sudan and concluded as follows:—

"6. On the 23rd July, 1945, a reply was sent by the Acting Chief Secretary of the Government of Palestine to Messrs. M. Seligman and Co., a copy of which as well as of the enclosures mentioned therein is also attached hereto and marked 'B'.

7. It is respectfully submitted that Petitioner's said son is being unlawfully detained by Respondents or one of them as they had no power to detain abroad and/or keep in custody abroad and/or

order to be kept in custody abroad persons who have been ordered to leave and remain out of Palestine."

There was no evidence before the Court which would justify the allegation that Eliezer was being detained by the Respondents or one of them. At the date when the petition was filed he had been brought back to Eritrea, and the fact of his temporary detention in the Sudan could not be and has not been treated as material in *habeas corpus* proceedings which were not begun until after its termination.

On the petition coming before the Court in Palestine, it was ordered that a summons should issue directed to the Respondents calling them to show cause why they should not produce Eliezer before the Court and to await further orders from the Court.

Now it is true that the Order of Deportation already quoted ordered that the deported man should be placed in the custody of the Commander-in-Chief, Middle East and of the second Respondent while awaiting deportation and while being conveyed out of Palestine, but that period had long since expired at the date of the petition and when the Court made the Order neither Respondent had the deportee in his custody or control nor had either of them any power to produce the body. The Commander-in-Chief, Middle East, was not within the jurisdiction of the Palestine Court, his headquarters being then at Cairo, nor could the General Officer commanding Palestine be deemed to represent the Commander-in-Chief so as to make him a respondent.

In these circumstances affidavits in opposition to the granting of the petition were filed, one by the Acting Assistant Superintendent of Police, Palestine, who set out true copies of the Orders already quoted herein under the Emergency and Defence Regulations and deposed that in accordance with these Orders Eliezer was on the 19th October, 1944, deported from Palestine and was at the time in Eritrea, held in detention by virtue of an Order of the Chief Administrator of that territory. In addition Major Wickstead, an officer of Security Intelligence, produced a copy of the Eritrean Declaration already referred to and deposed that he found on examination of the records relating to persons in respect of whom orders of detention had been made in Eritrea that Eliezer was under detention there by virtue of an Order made on the 4th October, 1945, by the Chief Administrator of Eritrea under Proclamation No. 54. When the former deponent was cross-examined on behalf of the Petitioner he deposed that Eliezer had been kept in Palestine in detention from October to November, 1944, that he was then removed by the military authorities to Eritrea, that some detainees had been released and returned to Palestine and that Eliezer's case had been examined from time to time by an Advisory Committee set up

by the Government of Palestine. Major Wickstead was also cross-examined and said that his headquarters were in Cairo, that he had seen the committing document of Eritrea in his capacity as already deposed to, and he swore that the document of the 4th October, 1945, was an order of detention signed by the Chief Administrator of Eritrea.

On the 18th December, 1945, after hearing the arguments and discussing the evidence, the High Court, the Chief Justice of Palestine and Shaw, J., sitting as its members, emphasised the grave questions of constitutional importance involved and observed that it was of as serious concern to the High Court of Palestine that a Palestine citizen should be exposed to summary arrest, transported to Eritrea and imprisoned there without any conviction or order of a Court of Justice as a similar case *mutatis mutandis* would have been in England, and said that the Palestine Court would be no less assiduous in insisting that the Executive Government should establish step by step legal justification for the arrest than the English Court. The Court went on to say that neither the legality of the orders quoted above of arrest and deportation nor the legality of the Order to the Respondents to convey Eliezer to Eritrea and keep him in custody while being so conveyed was questioned. As to the detention in Eritrea, the Chief Justice declared that no order of the Palestine Government could justify the detention of a Palestine subject in a foreign country and cited O'Brien's case (1923) 2 K. B. 361 as his authority. But in his view that case was distinguishable from the present one in as much as Eliezer was not being detained by the Palestinian authorities. His words were:—

"I have no doubt that if we, in this Court, were satisfied, as the Judges were in the O'Brien case, that the person who made the order of deportation, in this case the Officer Administering the Government, had no power to make the order, and if, again, as in the O'Brien case, no authority in the country, to which he had been deported had made an order of detention, we would not accept that part of the argument of the Solicitor General which sought to establish that as Arie Ben Eliezer had passed out of the control of the Respondents no rule should issue against them. I for one would have followed precedent in the O'Brien case and made the rule absolute, merely for the purpose of testing the truth of the matter, because, as I have indicated, I am persuaded that the Palestine Authorities can exercise far more effective control over the movement of Arie Ben Eliezer than Dr. Barnado could over the movements of Harry Gossage (in the case of Barnado *v.* Ford, Appeal Cases 1892) or than the Home Secretary could in the case of O'Brien. But here the further question as to whether the body could be produced does not arise because I am unable to resist the conclusion

that the orders made by the Officer Administering the Government, which were effective to deprive this man of his liberty up to the borders of the territory of Eritrea, were lawfully made. It appears to me also that the order of detention made by the Chief Administrator in Eritrea was lawfully made, but as to this I make no judicial pronouncement because neither the Chief Administrator nor the Territory of Eritrea is within the jurisdiction of this Court, and no writ of *Habeas Corpus* could issue out of Palestine by authority of any Judge or Court here into Eritrea. If the Petitioner wishes to question the validity of this order he must do so in the courts of Eritrea. The rule is therefore discharged."

Shaw, J., concurred for similar reasons.

Their Lordships have approached the questions at issue here with the greatest anxiety, because the freedom of a Palestinian citizen is involved. The difficulties always present in such cases of detention without trial under Emergency Powers are, they may here repeat, increased in the case under review where the detention complained of takes place in a territory outside and independent of the country whose Courts are invoked. The Palestine Court has accepted the legality of the orders of deportation which are clearly within the competence of the Palestine Government. While the deportation order stands and its legality is not overruled its effect is that Eliezer is required to leave and remain thereafter out of Palestine. Such an order is not *ultra vires* of a limited territorial power like Palestine nor are the further or ancillary powers of providing a place to which the deportee may proceed (see A. G. for Canada *v.* Cain (1906) A. C. 542, recently followed and applied by this Board in the case of The Co-operative Committee on Japanese Canadians *v.* The Attorney General of Canada). The order indeed so long as it remains in force renders it unlawful for Eliezer to seek to enter Palestine, and no Court in Palestine has authority to require his production in that country in defiance of an order lawfully made by its responsible government. In legal strictness the Palestine Government is not concerned beyond the express terms of the order with events in Eritrea. What was to be done there was left to be dealt with by the law of that country and the complaint can only be that the detention in Eritrea is not lawful. The law of Eritrea justifying according to its terms the detention has been produced and the Order specifically detaining Eliezer has been sworn to in affidavit and orally in cross-examination under oath by an official who gives the source of his information. The actual order has not been produced but there does not appear any reason why, in a proceeding like the present, effect should not be given to the sworn testimony of the

responsible deponent. In these circumstances the Palestine Court has no jurisdiction to enquire into the legality of an order made by the responsible governing authority in Eritrea, under which Eliezer is detained in that country and in any case has no ground for questioning that order.

Counsel for the Appellant has felt the difficulty which this aspect of the case presents. But he has sought to overcome it by a reliance on the decision of the Court of Appeal in R. *v.* Secretary of State for Home Affairs, *Ex parte* O'Brien (*supra*). That authority was relied upon for two purposes (1) to support an argument that on the facts of the present case the Palestine Government could properly be ordered to produce the body and (2) that the proper order was not to discharge the order *nisi* but to make an order *nisi* which would enable the Court without deciding the question whether the Palestine Government had control of Eliezer to clear up any doubts there might be as to the facts. In their Lordships' view, however, O'Brien's case does not when carefully considered afford any help in this appeal. The central feature in that case was that there never was an effective legal order. The order relied upon was made by the English Secretary of State for internment of O'Brien in the Irish Free State after the setting up of an Irish Constitution and an Irish executive. The Court of Appeal held that the order was illegal. Scrutton, L. J., who at p. 391 gave as one reason for his opinion that there was never any power to order internment in a place over which the Government or person issuing the order had no control, thus summed up his conclusion at p. 393. "It may be that on hearing that in the opinion of this Court the order was issued without legal authority, the Home Secretary, with the assistance of the Irish Free State Government, will produce the body as it is hardly in the interest of either Government to act illegally. For these reasons I think the rule should be made absolute for the writ to issue on the terms of the decree *nisi*." The other Lords Justices gave judgment to the same effect. The Secretary of State thereupon produced the body of O'Brien, giving as their justification, the order of internment which the Court had held to be bad; the Court made the order absolute and O'Brien was released. The Secretary of State sought to appeal to the House of Lords. It was not contended that an order of release could be the subject of a further appeal, but it was argued that the order in question did not direct O'Brien's discharge and hence might be appealed against. The House of Lords refused to draw this distinction and said that the actual order had determined the illegality of the Applicant's detention and his right to liberty and was final though it did not direct his discharge. Accordingly it was

held that no appeal lay. The House distinguished Barnado *v.* Ford (1892), A. C. 326, as being a case of a different type not involving the question whether a person in prison ought to be set at liberty, but the entirely different question, which of several persons ought to have custody of a child. Lord Finlay at p. 618 said, "The matter was really disposed of in the present case when the Court of Appeal delivered judgment to the effect that the order of internment was invalid. O'Brien was entitled to his discharge and a custody which the Court had declared to be illegal could not properly be continued at any time beyond what was necessary for carrying through the formal proceedings culminating in the order for discharge." Lord Birkenhead to the same effect at p. 610 said that if upon the return of the writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody.

In the present case the Palestinian Court has found itself unable to say that the detention was illegal. They have said that it was beyond their competence to decide on the illegality of the detention in Eritrea. Their Lordships as they have indicated agree with this view but offer no opinion as to the further suggestion of that Court, that, if the Petitioner wishes to question the validity of the order made in Eritrea, he must do so in the Courts of Eritrea. The validity and effect of the Eritrean law and order may raise many difficult questions of Constitutional or other law. The legality of acts done or of detention enforced in that country in pursuance or assumed pursuance of its law or orders is, however, clearly beyond the jurisdiction of the Palestine Court and of this Board on appeal.

In their Lordships' opinion the judgment appealed from was right in dismissing the petition. On the issue whether the Petitioner's son can be deemed to be detained in Eritrea by authority of the Palestinian Government it is clear that the whole position is different from that in O'Brien's case. The Palestinian Government could not legally make an order for detention in Eritrea, nor could the Eritrean Government justify detaining a man in their territory on the ground that it was done at the request of the Palestinian Government. Indeed it is not contended that they could. What is asserted, is that the detention is exercised under the lawful authority of the Eritrean Administration and the legality of the detention must be judged by the law of the place of detention. In any case, O'Brien's case is so different in its facts and its real *ratio decidendi* that it can afford no precedent for this case.

Their Lordships have abstained from expressing any opinion about what was done in Eritrea or in the Sudan. These matters are outside the competence of the Palestinian Court and therefore of this Board,

which is only a Court of Appeal to determine whether the Respondents or either of them have acted contrary to Palestinian law.

Their Lordships would only add that certain preliminary objections taken in the Court in Palestine were properly over-ruled.

They have accordingly for the reasons they have stated humbly advised His Majesty that the appeal should be dismissed.

Delivered this 4th day of December, 1946.

CIVIL APPEAL No. 28/47.

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

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

IN THE APPEAL OF:—

Miss Nabiha Audi. APPELLANT.

v.

Ismail Hassan Karram. RESPONDENT.

Claim of eviction against a contractual tenant — Tenant making unreasonable profit by sub-letting.

Appeal by leave from the judgment of the District Court of Jerusalem, in C. A. 78/46 of 7.1.47, dismissed:—

1. Where a landlord who granted a lease seeks to evict the lessee during the currency of the lease on the ground that he requires the premises for his own use, eviction should not be granted except in very special circumstances.

2. A new landlord suing under sec. 8(1)(c), Rent Restrictions (Dwelling Houses) Ordinance cannot succeed if, when he acquired the house, he knew of the existence of the contractual tenancy.

3. Even a contractual tenant may be evicted if by taking lodgers or by sub-letting he makes an unreasonable profit.

4. Where landlord sues for eviction on ground of excessive profit, sub-tenants or lodgers need not be made parties.

5. (*Obiter*): Sec. 8, Rent Restrictions Ord., was enacted with the aim *inter alia* of preventing inflation of rents even where the persons concerned are willing to pay unconscionably high rents.

(*M. L.*)

REFERRED TO: C. A. 293/45 (1946, A. L. R. 225; 13, P. L. R. 322).

ANNOTATIONS:

1. On point 2 see C. A. 264/43 (1943, A. L. R. 751; 10, P. L. R. 639, Gorali's Law of Landlord and Tenant, p. 78).

2. On point 3 see case referred to (*supra*) and annotations in A. L. R.

3. On unreasonable profit under sec. 8(1)(b) see C. A. 323/45 (1946, A. L. R. 133; 13, P. L. R. 80) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: Nuseibeh.

JUDGMENT.

This is an appeal from a decision of the District Court of Jerusalem whereby the said Court in its appellate capacity dismissed an appeal lodged by the present Appellant against a judgment of eviction granted against her in the Magistrate's Court.

The facts which are of interest for the purposes of the appeal are the following: the Respondent became in June, 1946, the registered owner of a house in Jerusalem which he acquired from one Hanna Khalil Ja'arah. The Appellant was at the time of the purchase, and still is, in occupation of one floor of that house consisting of six rooms. She began occupying the premises as lessee of the previous owner paying LP. 70 per year. In June, 1946, when the present Respondent bought the house he knew that the Appellant had a written lease which was to expire on the day preceding the next first *Muharram,* but he says, and there is no evidence to the contrary, that he did not pay much attention to the contents of that lease. The Respondent agreed to allow his vendor to receive the rent from the Appellant until the end of the current *Hejira* year: his explanation in that respect is that the amount involved was negligible. The new owner then sought to obtain possession of the flat occupied by the Appellant and the Appellant refused to give up possession.

The lease granted to the Appellant by the previous owner allowed her to sublet to her father, to her brother, and other members of her family on condition that they would leave when she left. There was also a further condition that the Appellant would have to pay an additional LP. 30.— per year if she sublet to strangers, and to this condition was appended the stipulation that the tenant (Appellant) would be responsible for them.

Five rooms of the flat were sublet to strangers when the Respondent bought the house, and four of the rooms contained furniture supplied by the Appellant. The sixth room was occupied by the Appellant herself and the Respondent has made it clear that he was prepared to let her retain her room. The Appellant was receiving (and probably still receives) LP. 28.500 per month from her sub-tenants or lodgers so that from a total payment of LP. 100 to her lessor she collected LP. 302

by sub-letting (not counting the value of the room occupied by her).

The Respondent sued before the Magistrate's Court for eviction on two grounds:—

(a) that the Appellant was making an unreasonable profit from her sub-tenants or lodgers, and

(b) that (the Respondent) required the flat for his own use.

The Magistrate gave judgment in favour of the Plaintiff on both grounds and the District Court upheld the judgment on appeal.

On appeal before us, one of the main points urged on the Appellant's behalf, was that the claim for eviction was lodged and judgment given while she was still a contractual tenant and that she held her lease from the former owner to whom she was paying rent until the end of the term. Another point was that no alternative accommodation had been offered for the sub-tenants or lodgers.

The question whether section 8 of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, affects contractual tenants was answered in the affirmative in C. A. 293/45 (1946) A. L. R. page 225. I, personally, consider that where a landlord has granted a lease and then seeks to evict the lessee during the currency of the lease on the ground that he requires the premises for his own use, eviction should not be granted except in very special circumstances. In the present instance, I am of opinion that the learned Magistrate did not exercise his discretion properly because he failed to give due importance to the fact that the Plaintiff knew of the existence of a lease when he acquired the house. I, therefore, am of opinion that the order of eviction based on section 8(1)(c) of the aforementioned Ordinance must be set aside and it is not necessary to decide whether the sub-tenant or lodger should have been made parties with regard to this particular ground of eviction.

With regard to the other ground, however, the position is different because it has been held in C. A. 293/45 that even a contractual tenant may be evicted if by taking lodgers he makes an unreasonable profit, having regard to the rent paid by him. In the present case, the learned Magistrate found that the profit made by the Defendant-Appellant was unreasonable and with that finding I will not interfere, the more so as the Defendant made no serious attempt to show that the net profit was in fact much less than the gross profit admitted by her. I therefore consider that the decision of both the Courts below were correct in so far as eviction on the ground of excessive profit is concerned and I see no merit in the contention that the sub-tenants or lodgers should have been made parties; in fact two of them were heard as witnesses in the case. I would like to add a few remarks with regard to the afore-mentioned Ordinance and specially section 8 thereof. It would

seem that many persons lose sight of the fact that the object of the Ordinance as set out in the long title are "to restrict the increase of the rent of dwelling-houses and the eviction of tenants therefrom, and for purposes in connection therewith". It would indeed be illogical if a lessee who is charged the standard rent were at liberty to exact an extortionate rent from sub-tenants or lodgers without fear of losing his or her position as head tenant. I am aware of the rather specious argument that tenants or sub-tenants need not pay more than the standard rent, but the proper view is that the legislator enacted section 8 with the aim *inter alia* of preventing inflation of rents even where the persons concerned are willing to pay unconscionably high rents: such persons do a great disservice to the community as a whole and promote the upward trend of the cost of living.

For the foregoing reasons, the appeal is dismissed with costs on the lower scale and LP. 10.— advocate's attendance fee.

Delivered this 18th day of April, 1947, in the presence of Mr. Caspi for the Appellant and Mr. Scharf for the Respondent.

British Puisne Judge.

HIGH COURT No. 28/47.

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

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

IN THE APPEAL OF :—

1. David M. Rosenbaum,
2. Abraham Alcahi,
3. Benzion Mizrahi-Kashani. PETITIONERS.

v.

1. Commissioner of Prisons, Jerusalem,
2. Officer in charge, Central Prison, Jerusalem,
3. General Officer Commanding, British Troops in Palestine,
4. Colonel M. E. Fell, President of the Military Court, Jerusalem,
5. Major D. Lee-Hunter, member of the Military Court, Jerusalem,
6. Captain I. D. Stewart, member of the Military Court, Jerusalem. RESPONDENTS.

Charge of carrying firearms and ammunition — Magistrate remanding 3 times but failing to remit to Military Court — Judgment of Military Court challenged in High Court.

Petition for an order in the nature of *Habeas Corpus* in respect of Dov Rosenbaum, Mordekhai Allcashi (Alcahi) and Eliezer Kochani; petition dismissed:—

Regulation 18, Defence Emergency Regulations, as amended in 1946, only traces out procedure to be followed by Magistrate in respect of bail and remands; any failure to comply with provisions thereof cannot affect jurisdiction conferred on Military Court.

FOR PETITIONERS: Seligman and Kritzman.

RESPONDENTS: *Ex-parte.*

ORDER.

The Petitioners' sons were tried together with Haim Gorovevsky by the Military Court on charges of carrying firearms and ammunition contrary to regulation 58(c) of the Defence Emergency Regulations, 1945. The said charge is within the exclusive jurisdiction of the Military Court (see regulation 57(2)).

Mr. Seligman for the Petitioners relies on regulation 18 of the aforementioned Regulations as amended in 1946 (see Supplement 2/46, p. 1302). He pointed out that in the present instance the alleged offenders were brought before a Magistrate and remanded three times in custody but were never remitted for trial before a Military Court. Mr. Seligman's submission is that unless there has been such a remittal to a Military Court that Court has no jurisdiction.

We cannot accede to such a proposition where, as in this case, the offences for which the persons concerned were tried were within the exclusive jurisdiction of the Military Court. Regulation 18 traces out the procedure to be followed by the Magistrate in respect of bail and remands and any failure to comply with the provisions thereof cannot affect the jurisdiction clearly conferred on Military Court. We therefore find no ground for doubting that the Military Court had jurisdiction, and in view of regulation 30 which lays down that no judgment of a Military Court shall be liable to be called in question or challenged whether by writ or in any other manner whatsoever, we find no grounds for issuing a summons to show cause as prayed for by the Petitioner.

The petition is dismissed.

Given this 18th day of March, 1947.

British Puisne Judge.

HIGH COURT No. 9/47.

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

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

IN THE PETITION OF:—

Jonathan Bergmann. PETITIONER.

v.

The Military Commander, East Sector Palestine, Force Headquarters, Jerusalem & 3 ors. RESPONDENTS.

Detention order by Military Commander and sentence by Magistrate to imprisonment for breach of a supervision order — Alleged duplicity of punishment.

Petition for an order to issue to the Respondents and each of them, directing them to produce the Petitioner before this Court on a date to be fixed and to show cause why he should not be released and to await the further order of this Court, alternatively, why the conviction and sentence dated 8th November, 1946, in Jerusalem Magistrates' Court Criminal Case No. 11741/46 should not be quashed; order refused:—

1. Although production of detention order is desirable, there is no legal provision requiring it, and the High Court will not interfere in case of non-production.

22. Detention orders made by Military Commander are not *ultra vires* Palestine (Defence) Order-in-Council, 1937.

(*M. L.*)

FOR PETITIONER: Weyl.

RESPONDENTS: *Ex parte.*

ORDER.

Frumkin, J.: The Petitioner in this case is being detained in Latrun allegedly for a period of six months by a detention order issued by an authority unknown to the Petitioner. The Petitioner was also brought before the Magistrate's Court and sentenced to a certain period of imprisonment beginning from the date of detention and to furnish a bond and surety for non-compliance with a supervision order issued previously, under which he was to report at given periods before a Police Station in Jerusalem.

The main argument on behalf of Petitioner is twofold:—

(a) that there is a duplicity of punishment inasmuch as the detention order arises out of the same breach of the supervision order; or

(b) that the judgment of the Magistrate's Court could not stand because all the facts were not before him. The sequence of events seems to be thus:—

First the Police supervision order was issued, then the breach occurred, then the Petitioner was detained and sent to Latrun and simultaneously brought before the Magistrate under a charge of breaking the supervision order. Now not having the detention order before us, we cannot know whether in fact this detention order was issued as a punishment for the breach. It looks more likely that the authorities having seen that the previous measure of supervision was not sufficient to keep the Petitioner under control, they took the more drastic measure of taking the Petitioner away from town. The detention was thus in the nature of a precaution for the future. Simultaneously the Attorney General thought proper to prosecute the Petitioner for the breach of the order of supervision and the Magistrate in passing the sentence made the period of imprisonment to run concurrent with the period of detention but not instead thereof.

It is not disputed on behalf of Petitioner, subject to another objection with which we will deal later, that if the detention is not merely a punishment for the breach this Court would not be able to interfere.

This being the case we are left with the second part of the argument on this point, and it is enough to say that this Court is not a Court of Appeal from the Magistrate and if in the view of counsel for Petitioner the judgment was bad he should have taken steps to have that judgment set aside by a competent Court.

Two more arguments were advanced by Petitioner. One is that he is entitled to an order on the mere ground that the detention order was not produced. There is no legal provision for the production of a detention order, and much as I do agree with the view expressed previously that it is desirable to have the detention order produced and that such production could avoid much trouble, I cannot go further than that, in the absence of a legal provision to that effect.

The last argument was based on the assumption that the order was issued by a military authority. On this point Mr. Weyl for Petitioner argued that the High Commissioner cannot delegate the power of detention to other than civil officials and he submitted that any defence regulations vesting military authorities with the power to issue detention orders are *ultra vires* the Defence Order-in-Council.

Now the law on this point is very clear and I need only refer to the general provisions of Article 6(1) of the Palestine (Defence) Order-in-Council, 1937, and particularly to sub-section 2(a) of the same section which clearly provides for Regulations to be made by the High Com-

missioner in his unfettered discretion for the detention of persons and to Regulation 111 of the Defence (Emergency) Regulations, 1945, under which a Military Commander may by order direct that any person shall be detained for any period not exceeding one year *etc.*

For all these reasons we cannot see our way to issue the order prayed for.

Given this 24th day of January, 1947.

Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 214/46.

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

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

IN THE APPEAL OF :—

Mamour Awqaf, Jaffa. APPELLANT.

v.

Haj Ali Kassas & an. RESPONDENTS.

Order of eviction from property belonging to Waqf — Action in nature of third party opposition by new Mutawalli — Scope of Rule 285, Magistrates' Courts Procedure Rules.

Appeal from the judgment of the District Court, Jaffa, in Civil Case No. 89/44, dated 29th January, 1946, allowed:—

1. In view of Rule 285, Magistrates' Courts Procedure Rules coupled with sec. 28(2), Mag. Courts Jurisdiction Ordinance, Arts. 53 and 54 of Ottoman Magistrates Law are no longer in force so far as principal third party opposition is concerned. Art. 53 only helps to explain Rule 285.

2. "Competent Court" at end of Rule 285, Magistrates' Courts Procedure Rules cannot be interpreted as referring exclusively to Magistrate's Court which gave the judgment against which opposition is lodged; the action in nature of opposition must be entered before the Court which is competent to try the issue raised by opposer.

(*M. L.*)

REFERRED TO: C. A. 191/41 (1941, S. C. J. 536); C. A. 279/42 (1943, A. L. R. 88; 10, P. L. R. 96); C. A. 84/46 (1946, A. L. R. 781).

ANNOTATIONS:

1. See cases referred to.

2. The judgment under appeal is reported in 1946, S. C. D. C., at p. 87.
(*A. G.*)

FOR APPELLANT: Nazzal.
FOR RESPONDENT: Absent — served.

JUDGMENT.

This is an appeal, by leave, from a decision given by the District Court of Jaffa in its appellate capacity. The sequence of litigation is as follows: In Civil Case 1240/42 between El Haj Ali el Kassas and Abdul Salam Arafat Nahhas, the Jaffa Magistrate's Court ordered, on the 16th September, 1942, the eviction of the latter from a certain property; then the *Mamour Awqaf* of Jaffa, in his capacity as acting *Mutawalli,* relying on Rule 285 of the Magistrates' Courts Procedure Rules, 1940, entered an action (No. 1558/42) before the same Magistrate's Court seeking to set aside the judgment in Case 1240/42 on the ground that it was prejudicial to the *Waqf* el Zakari el Jabali. Judgment in Case 1558/42 was given in Plaintiff's favour on the 8th May, 1944. On appeal to the District Court, the learned President set aside the Magistrate's judgment of 8th May, 1944, and restored the judgment of the 16th September, 1942, and the learned President subsequently granted leave to appeal to the Supreme Court. At the hearing before us the Respondents left default.

It is necessary to set out briefly a few facts before examining the decision now under appeal.

In the first case before the Magistrate's Court of Jaffa, *i. e.* Civil Case 1240/42, the present first Respondent, El Haj Ali el Kassas, was the Plaintiff, and Abdul Salam Nahhas, who is the present second Respondent, was the Defendant. The Plaintiff claimed the eviction of the Defendant for non-payment of rent. The Defendant averred in his statement of defence that when he had taken the property on lease from Kassas, the latter was acting in his capacity of *Mutawalli* of the Zakari el Jabali *Waqf,* and that Kassas, having been subsequently discharged from his functions, had no right to bring the action. At the hearing, however, the Defendant merely admitted his failure to pay rent, and did not further question the Plaintiff's right to sue. The Plaintiff therefore obtained judgment on the 16th September, 1942.

Case No. 1558/42 was then entered by the present Appellant, in his capacity of acting *Mutawalli* of the aforesaid *Waqf,* against the two parties in Case 1240/42. This second action was in the nature of a principal third party opposition, and its object was to set aside the judgment of the 16th September, 1942, which obviously implied that Haj Ali el Kassas was the owner of the property.

The procedure of principal third party opposition, which is set out in Articles 53 and 54 of the Ottoman Magistrates' Law, was designed to enable a person who had not been a party to an action to have the judgment set aside or modified if he established that it was prejudicial to his rights.

Fayez Eff. Nazzal, who appeared before us for the Appellant, submitted that Articles 53 and 54 had never been expressly repealed and were still in force. On this point the learned President has stated his view that Rule 285 of the Magistrates' Courts Jurisdiction Ordinance, 1939, must be construed as repealing the aforementioned two Articles of the Ottoman Magistrates' Law.

Fayez Eff. Nazzal was eager to maintain the authority of Articles 53 and 54 of the Ottoman Law, because the last mentioned Article provides that a principal third party opposition is made to the Magistrate who rendered the judgment against which opposition is made, whereas the learned President held that under Rule 285 of the Magistrates' Courts Procedure Rules, 1940, the action in the nature of an opposition must be entered before the Court which is competent to try the issue raised by the opposer.

Rule 285 of the Magistrates' Courts Procedure Rules reads as follows:—

> "Where, under the law heretofore in force, any person would be entitled to claim or to enforce any right by way of a third party opposition to an order of any court, such person shall be entitled to claim or to enforce such right by action in the competent Court."

I am of opinion that Rule 285, coupled with section 28(2) of the Magistrates' Courts Jurisdiction Ordinance, make it clear that Articles 53 and 54 of the Ottoman Magistrates' Law are no longer in force so far as principal third party opposition is concerned.

I am also of opinion that the words "competent Court" occurring at the end of Rule 285, cannot in that context be interpreted as referring exclusively to the Magistrate's Court which gave the judgment against which an opposition is lodged. It may be that when Rule 285 was drafted, sufficient attention was not paid to the object and meaning of third party opposition, but effect must be given to the rule as it stands.

I should perhaps mention that Fayez Eff. Nazzal called our attention to Civil Appeal 191/41 (1941) Supreme Court Judgments, Vol. II, page 536, where it was stated that a party who applies by way of third party opposition under Rule 285 had to rely on Article 53 of the Ottoman Magistrates' Law. My view is that that statement does not mean more than that the said Article 53 supplies the background which helps to explain Rule 285. Neither does Civil Appeal 270/42 (1943)

Annotated Law Reports 88, help the Appellant's contention. Another case quoted by Fayez Eff. is Civil Appeal 84/46, which however is against him because it approves the principle that under Rule 362 of the Civil Procedure Rules, 1938, (which is the exact equivalent of the aforementioned Rule 285) an action was properly entered before the Land Court of Nablus by a person who "opposed" a judgment of the District Court in a civil case and sought to establish his ownership of a certain piece of land.

It now remains to examine whether the learned President was right in holding that the present Appellant should have gone to the Land Court, because his "opposition" was based on the averment that the land from which the second Respondent had been evicted belonged to the *Waqf* and not to the first Respondent, whereas the latter resisted this averment of ownership and claimed that he was the owner.

I am of opinion that the learned President failed to give due importance to the fact that the action brought by the present Appellant (in his representative capacity) was merely to set aside the judgment of eviction. Admittedly, the said action could not succeed unless the Magistrate were satisfied that the *Waqf* had, at least a colourable title to the land; but I consider that such a question is within the Magistrate's jurisdiction by virtue of section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1939, where the value of the land does not exceed LP. 250. As rightly pointed out by Fayez Eff., the parties agreed that the value was below LP. 250 (see page 9 of typed record in Civil Case 1558/42, which relates to the hearing of 21.10.43).

I am therefore of opinion that, in the present instance, the action could be entertained and decided by the Magistrate, and I therefore allow the appeal, reverse the decision of the District Court, and restore the decision given by the Magistrate in Civil Case No. 1558/42 of the Jaffa Magistrate's Court.

The Appellant will have the costs in this Court and in the Court below. Costs of this appeal to be on the lower scale together with LP. 5 advocate's attendance fee, the said costs to be paid by the present first Respondent.

Delivered this 25th day of March, 1947, in the presence of P. Carmi for Appellant, and in absence of Respondents.

British Puisne Judge.

HIGH COURT No. 27/47.

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

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

IN THE PETITION OF:—

Raphael Tourgeman, Managing Director of the British Engineering & Trading Company Ltd. PETITIONER.

v.

Sir Henry L. C. Gurney, Chief Secretary, Government of Palestine & 8 ors. RESPONDENTS.

Querying legal basis for closing Law Courts in Palestine.

Petition for an order commanding the first, fourth and fifth Respondents to show cause why the imposition of "Statutory Martial Law" should not be set aside and why the Petitioner should not be at liberty to leave and re-enter the controlled area at his discretion and for an order commanding the Respondents or any of them to show cause why government offices in Tel-Aviv shall not be open to the public and continue to provide the community with supplies and services essential to the life of the community; petition dismissed:—

1. Defence Regulation 151 (providing for closing of Law Courts) is *intra vires* High Commissioner's powers under Art. 6, Palestine Order-in-Council, 1937, authorising him to suspend operation of any law.

2. Where an authority is vested in a person giving him power to do what he considers necessary for public safety or defence of Palestine, High Court will not go behind his order to enquire whether in fact the measures taken were necessary for those purposes. High Court would only interfere if *mala fides* was established.

(*M. L.*)

REFERRED TO: Chester *v.* Batson, Law Times, Vol. 122, p. 684.

ANNOTATIONS:

1. On point 2 see H. C. 107/46 (*ante*, p. 15) and H. C. 110/46 (*ante*, p. 28) and annotations.

2. On martial law and closing of Law Courts see A. B. Keith's Constitutional Law, pp. 438—441; see also Halsbury's Laws of England, Hailsham Ed. Vol. 6 (p. 499—502).

(*A. G.*)

FOR PETITIONER: Hake.

RESPONDENTS: *Ex parte.*

ORDER.

This in effect is a petition for an order calling upon the Government to vindicate their legal authority to impose on Tel Aviv and on parts of Jerusalem what is known as statutory martial law.

It raises, as Mr. Hake has emphasised, a question of great importance to many persons in Palestine. It is of equal importance that the inhabitants should be aware that the High Court still functions, and that it will enquire into the legal authority of the Executive to do any act complained of. It is for this reason that we take the unusual course of giving reasons for rejecting this petition.

Once again we would emphasise that this Court will not usurp the functions of the Executive. Our duty is to decide whether there is legal authority for acts of the Executive, not to speculate as to whether the acts were desirable or necessary.

Mr. Hake has argued that the closing of the Courts, which is the principal act complained of, was so contrary to the fundamental principles of justice that it could not be done unless the High Commissioner were cloaked with specific legal sanction for so doing, and he quoted in support of his arguments the case of Chester *v.* Batson, Law Times, Vol. 122. The principle enunciated in that case was that an executive authority, in that instance the Minister of Munitions could not deprive the King's subjects of a right of access to the Courts unless he was specifically authorised by a statute of the Realm to do so. The Minister had inferred his right to make the prohibition from a general power vested in him to take any action to prevent the successful prosecution of the war being endangered. With respect we entirely accept the principle, but applying it to this case we cannot escape the conclusion that the High Commissioner is specifically empowered by the legislature. The Courts which have been closed function by virtue of legislative enactments which are the Palestine Order-in-Council and the Courts Ordinance, 1940.

Article 6 of the Palestine Order-in-Council, 1937, authorises the High Commissioner to make such regulations as appear to him in his unfettered discretion necessary for securing public safety *etc.* and Article 6(2)(d) in the most specific terms empowers him to amend any law, suspend the operation of any law, or apply any law with or without modification. Article 2 defines law as including any order of His Majesty in Council. It cannot, therefore, be open to doubt that the High Commissioner was empowered to suspend the operation of the law which created the Courts in Tel-Aviv. It follows that Defence Regulation 151 was clearly *intra vires* his powers.

Mr. Hake then went on to argue that even if the Order-in-Council purported to give those powers, the Order-in-Council itself must be declared *ultra vires* as it would be inconsistent with sec. 12(1) of the Foreign Jurisdiction Act, in that the powers conferred by the Order-in-Council were repugnant to Magna Carta, to the Bill of Rights and to the Statutes of Northampton. We are unable to discover any repugnancy. There is nothing in Magna Carta, or the Bill of Rights or the Statutes of Northampton to curb the power of the legislature, to limit or restrict the rights of the subject. What those foundation Bills of British Rights do enjoin is that the Crown or the Executive, as it might now be termed, cannot restrict the rights of the subject unless it has been granted by Parliament or the legislature which takes the place of Parliament, legal authority so to do.

The next point raised by Mr. Hake arises out of the wording of the regulation and the term "statutory martial law". He again quoted the Bill of Rights and various cases in support of his contention that the issue of a commission of martial law in time of peace is illegal. It is unnecessary for us to enquire into the substance of Mr. Hake's argument on this issue, because whatever these regulations may be called by way of short title or for the purpose of convenience or perhaps for impressing the seriousness of the situation on the inhabitants, they are in fact and in law Defence Regulations made under the authority of the Order-in-Council, and the only function of this Court is to enquire into whether they are *intra vires* the Order-in-Council. In regard to Regulation 151 which closed the Courts we have already held that it is *intra vires*. In regard to the other inconveniences which the regulations impose on the inhabitants of Tel Aviv, Mr. Hake argues that they are unreasonable and contrary to the principles of justice in that they hit at innocent people.

Now, as we have already emphasised in several of these cases, where an authority is vested in a person as it is in the High Commissioner under Article 6 of the 1937 Order-in-Council, giving him powers to do what he considers necessary for the public safety or the defence of Palestine, this Court will not go behind his order to enquire whether in fact the measures he has taken were necessary for the public safety and defence of Palestine. The question as to the necessity of those measures is left by the legislature to his discretion and we would only interfere if *mala fides* was established, and in this case *mala fides* has not even been alleged.

The legal authority of the High Commissioner to take the action that he has taken has been so clearly established by these appreciations

of the law and facts that it would be unreasonable for this Court to call upon the Respondents to show cause.

The prayer of the Petitioner must be rejected.

Given this 12th day of March, 1947.

Chief Justice.

HIGH COURT No. 87/46.

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

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

IN THE PETITION OF:—

Hamaneh Arousi & an. PETITIONERS.

v.

His Worship the Magistrate Mr. S. Kassan & 2 ors. RESPONDENTS.

Magistrate ordering accused to give a personal bond for good behaviour — Petition to High Court accompanied by affidavit sworn to by Petitioner's advocate — Application and enlargement of Rule 3, High Court Rules.

Return to an order *nisi*, issued on 7th of October, 1946, directed to the first Respondent, calling upon him to show cause why his decision and/or order and/or judgment given by him on the 25th of June, 1946, in Criminal Case No 8735/45 of the Magistrate's Court of Tel Aviv, whereby Petitioners were ordered to give a personal bond in the sum of LP. 20 for good behaviour for one year or 20 days arrest should not be set aside; order *nisi* discharged:—

1. Only in exceptional circumstances where counsel is in a better position to depose as to the facts than his client, can Rule 3, High Court Rules, be enlarged, but where such facts are as much within Petitioner's own knowledge as that of his advocate, Rule 3 must be strictly complied with.

2. It is most undesirable that a person should be an advocate and a witness in the same cause.

(*M. L.*)

REFERRED TO: H. C. 67/38 (5, P. L. R. 611; 1938, 2 S. C. J. 225); H. C. 58/46 (1946, A. L. R. 787; 13, P. L. R. 501).

ANNOTATIONS:

1. On point 1 see cases referred to.

2. On point 2 *cf.* CR. A. D. C. Ha. 130/46 (1946, S. C. D. C. 805) and annotations.

(*A. G.*)

FOR PETITIONERS: Buchhalter.
FOR RESPONDENTS: Nos. 1 & 3 — Crown Counsel — (Hooton).
No. 2 — Absent — served.

ORDER.

This is a return to an Order *nisi* directed to the learned Magistrate to show cause why his order of the 25th June, 1946, in Tel Aviv Criminal Case No. 8735/45 whereby the Petitioners were ordered to give a personal bond in the sum of LP. 20 for good behaviour for 1 year, should not be set aside.

Learned Crown Counsel raised the preliminary objection that no proper petition was before the Court in that the affidavit in support had not been sworn to by the Petitioners but by their advocate. Rule 3 of the High Court Rules provides that the Petitioner shall depose as to the facts in the petition that they are true, or true to the best of his knowledge and belief. In spite of the very clear limitation of this Rule the High Court has in certain circumstances enlarged its provisions by accepting affidavits deposed to by Petitioner's advocate instead of the Petitioner. In High Court 67/38 this Court ruled that it had no objection to the practice where the facts deposed to were within the personal knowledge of the advocate and in fact where as in those execution proceedings, the advocate probably was in a better position to depose as to the facts than the Petitioner himself. I think, however, this does not permit an indefinite enlargement of the Rule, and the Petitioner is the person who must depose as to the facts, save in the exceptional circumstances which exist, for example, in execution matters, where the advocate is in a better position so to do than his client.

In High Court 58/46 an assistant accountant of the Municipal Corporation of Jerusalem swore that to the best of his knowledge and belief matters contained in the application signed by Mr. Saba Said, the advocate of the Corporation, were true. This Court there stated:—

> "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 our opinion no good reason has been shown in this case why

the Petitioners and not their advocate did not depose to the facts stated in the petition. It would appear that the facts were quite as much within their own knowledge as that of the advocate. Apart from the necessity of as strict a compliance with the rule as is possible, the swearing of affidavits by advocates in such matters is most undesirable, as they may be required to go into the witness box to be cross-examined thereon. That a person should be an advocate and a witness in the same cause is a practice to be condemned.

On this ground alone the order must be discharged. Apart therefrom, however, we would mention that there is no merit in the petition. Clearly in this matter the learned Magistrate made an order within the discretion given him by section 45(2) of the Criminal Code Ordinance, and this Court has time and time again ruled that it would only interfere in matters of discretion if satisfied that it has been exercised in bad faith, or the officer has not directed his mind to the case personally. There is no evidence of any bad faith on the part of the Respondent. He has considered the facts and decided that the order was necessary to avoid a breach of the peace, and we will certainly not interfere.

In our opinion in all the circumstances of the case, *viz.* that Petitioners were merely required to enter into a bond to be of good behaviour, which in fact they did and which expires in less than two months, we consider the application frivolous.

Order *nisi* to be discharged.

Given this 18th day of April, 1947, in the absence of Petitioner and in the presence of Mr. Kokia for Respondent.

A/British Puisne Judge.

CIVIL APPEALS Nos. 324 & 340/46.

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

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPEAL OF:—

Esther Buksdorf & 16 ors.
Yachiel Kleinman. APPELLANTS.

V.

Hericlis Politis. RESPONDENT.

Action by "enemy" — Authority of Custodian under sec. 3(2) proviso, Trading with the Enemy Ord. — Effect of war upon P/A, C. A. 300/43, P. C. L. A. 43/36, C. A. 89/40, Sovracht Case, Hugh Stevenson and Sons Ltd. v. A. G. für Cartonnagen Industrie, Tingley v. Müller, Hagedorn v. Bell, Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (G. B.) Ltd. — Effect of subsequent ratification, Ancona v. Marks — Prescription — Onus of proof — Absence as an excuse — L. A. 43/36, Mejelle 1635, 1663, 1665, 1666, 1674, Ibrahim Mehmet v. Hadji Panayoti Kosmo & ors., Land Code Art. 20, 28, L. A. 49/32, C. A. 231/45 — Interruption of prescription by action in the competent Court — Declaratory judgment by the Land Court, C. P. R. 52(4) — Functions of Land Court and Magistrate's Court.

Appeal from the judgment of the Land Court of Tel Aviv given in Land Case No. 5 of 1941, dated 23rd September, 1946, and from the interlocutory order given in the same case in Motion No. 232/45, dismissed:—

1. The fact of a person becoming an "enemy" suspends the operation of a power of attorney. It does not cancel the power.

2. Residence out of the country, like absence on a journey, operates as an excuse interrupting the period of prescription under Arts. 1663—5 of the *Mejelle*.

3. The Land Court may give declaratory judgments.

(*A. M. A.*)

REFERRED TO: L. A. 64/24 (2, C. of J. 646); L. A. 49/32 (4, C. of J. 1221); L. A. 43/36 (4, P. L. R. 73; 1937, S. C. J. (N. S.) 36); P. C. L. A. in L. A. 43/36 (not reported); C. A. 89/40 (7, P. L. R. 258; 1940, S. C. J. 152; 8, Ct. L. R. 150); C. A. 300/43 (11, P. L. R. 121; 1944, A. L. R. 376); C. A. 231/45 (13, P. L. R. 10; 1946, A. L. R. 95); Mehmet *v.* Kosmo, 1884, 1 Cyprus L. R. 12; Sovfracht (V/O) *v.* Van Udens Scheepvaart en Agentuur Maatschappij, (1943) A. C. 203, (1943) 1 All E. R. 76, 112 L. J. (K. B.) 32, 168 L. T. 323, 59 T. L. R. 101; Stevenson (Hugh) & Sons *v.* Aktiengesellschaft für Cartonnagen Industrie, (1918) A. C. 239, 87 L. J. (K. B.) 416, 118 L. T. 126, 34 T. L. R. 206; Tingley *v.* Müller, (1917) 2 Ch. 144, 86 L. J. (Ch.) 625, 116 L. T. 482, 33 T. L. R. 369; Daimler Co., Ltd. *v.* Continental Tyre & Rubber Co., Ltd., (1916) 2 A. C. 307, 85 L. J. (K. B.) 1333, 114 L. T. 1049, 32 T. L. R. 624; Ancona *v.* Marks, (1862) 31 L. J. (Ex.) 163, 5 L. T. 753, 126 Rev. Rep. 646.

ANNOTATIONS:

1. The judgment of the Land Court is reported in 1946, S. C. D. C., at p. 683; see also the previous proceedings, L. A. 43/36 (*supra*).

2. On the first point see the cases cited and *cf.* Halsbury, Vol. 1, p. 314, para. 509 with footnote (*c*).

3. As regards the ratification of the power of attorney *vide* C. A. 359/46 (*ante*, p. 244), applying Ancona *v.* Marks (*supra*).

4. On *mudet safer* see note 5 to the judgment under appeal in 1946, S. C. D. C., at p. 685, and on prescription generally *cf.* L. C. Ja. 10/43 (1946, S. C. D. C. 790) and notes 2 & 3.

5. On the last point *vide* C. A. 294/44 (12, P. L. R. 28; 1945, A. L. R. 58) and C. D. C. Ha. 163/46 (1946, S. C. D. C. 800) and note 1 thereto.

(*H. K.*)

FOR APPELLANTS: Goitein, Rotenstreich and A. Hamburger.

FOR RESPONDENT: Eliash and Karwassarsky.

JUDGMENT.

Shaw, J.: These are two appeals from the judgment dated 23.9.46 of the Land Court, Tel Aviv, in Land Case No. 5/41.

In C. A. 324/46 Mr. Goitein and Dr. Rotenstreich appeared for the Appellants and in C. A. 340/46 Mr. Hamburger appeared for the Appellant. In both appeals Dr. Eliash and Mr. Karwassarsky have appeared for the Respondent (original Plaintiff). Mr. Hamburger asked that the appeals should be consolidated, and Dr. Eliash agreed to this proposal. After the first hearing Mr. Hamburger did not again appear, so it must be taken that he wished C. A. 340/46 to abide the result of C. A. 324/46.

The facts have been fully set out in the judgment of the trial Court, and it is unnecessary for me to recapitulate them. I shall refer to them later where necessary.

Mr. Goitein has argued the appeal under five heads, and it will, I think, be convenient to deal with it accordingly. Mr. Goitein submits, in the first place, that the appeal must succeed because there was never any proper action before the Land Court. This point was raised in the trial Court in Motion No. 232/45 and a decision was given by Judge Windham on 6.7.45. When that application was made the Respondent was admittedly an "enemy", as she was a Greek subject domiciled in Greece before the time when that country was declared to be enemy territory. On 14.7.36 the Respondent had given to her advocate Mr. Karwassarsky a general power of attorney to act on her behalf. Before this action was instituted (on 19.9.41) the Custodian of Enemy Property, in two letters dated 29.8.41 and 4.9.41 respectively, had authorised Mr. Karwassarsky to continue to act on behalf of the Respondent in her claim against Esther Buksdorf and others "for recovery of possession and ownership in respect of her property situated at Shekhunat Brener or Kerem Isteriades". This authorisation was given under the first proviso to section 3(2) of the Trading with the Enemy Ordinance No. 36/39.

Judge Windham held, and in my opinion held correctly, that the Custodian had power to authorise the Respondent to institute her action here. But he further held, on the strength of the decision in

C. A. 300/43 (11, P. L. R. 121), that as soon as the Respondent became an "enemy", that is to say, upon the enemy occupation of Greece in May, 1941, this power of attorney became void. The learned Judge went on to say:—

> "Consequently when the Custodian purported, in August, 1941, to authorise advocate Karwassarsky to continue to act for the Respondent under his power of attorney, it was too late, for the power had expired more than three months before. And the Custodian could not take it upon himself to authorise Karwassarsky to act for the Respondent in the absence of any authorisation by the Respondent herself, nor did he purport to do so."

On these grounds Judge Windham held that the Custodian's letters purporting to authorise Mr. Karwassarsky to conduct Land Case 5/41 were ineffective for that purpose.

Mr. Goitein submits that the learned Judge had then no alternative but to dismiss the action. Instead of doing so Judge Windham, taking as a precedent the Order dated 21.5.37 in P. C. L. A. 43/36, adjourned the hearing of the action so as to enable the Respondent to come to Palestine and give a fresh power of attorney to her advocate.

If I found that the power of attorney had already expired I would agree with Mr. Goitein that there was no case before the Court, and if there was no case before the Court then I think that the action ought then and there to have been dismissed. In addition to the case referred to by Judge Windham (*viz.* C. A. 300/43) Mr. Goitein has referred us to C. A. 89/1940 (7, P. L. R. 258) where the Court, after reciting Rule 24 of the Civil Procedure Rules, 1938, said (see p. 260):—

> "Counsel argues, and we consider with force, that this Rule must be strictly interpreted and that therefore under it a litigant must act either in person or by an advocate duly appointed on his behalf. Counsel for the Appellants contends that a person who holds a power of attorney steps into the shoes of the litigant in person. We do not consider that Rule 24 is open to this construction and are strengthened in our view by Civil Procedure Rule 69(1) and section 4(2) of the Advocates Ordinance, 1938. In both instances an exception is provided, to what is evidently regarded as a general rule that a person must conduct his litigation either in person or by an advocate. The inference from this seems to me to be that in the absence of any such provision the general rule must apply."

Mr. Goitein has referred to the Sovracht Case (1943, A. C. 203). In that case (see p. 254) Lord Porter said:—

> "Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse. That

> the representatives, legal or non-legal, of a litigant may require to have such intercourse with their principal in the litigation is, I imagine, clear, and I do not think it is an answer to say that in the event it may not be found necessary for the one to communicate with the other. At any moment the necessity may arise. The very relationship requires it even if it is desired only to terminate the mandate itself."

And later, with reference to the case of Hugh Stevenson and Sons Ltd. *v.* Aktiengesellschaft für Cartonnagen Industrie (1918, A. C. 239) Lord Porter said:—

> "Both Courts below had held the agency determined and the point was not even contested on appeal to Your Lordships. It is true, that in that instance the agency was a mercantile one, but the prohibition of intercourse with an enemy is not confined to trade, and would, therefore, apply to a solicitor, who, at any rate in this country, is the mandatory of his principal for the purposes of litigation."

It is beyond doubt that, as held in C. A. 300/43, the power of attorney to Mr. Karwassarsky had become inoperative as soon as the Respondent became an enemy. That is to say Mr. Karwassarsky could not, at the request of the Respondent, have acted under the power of attorney. But the power of attorney still existed. Its operation was, in my view, simply suspended. Mr. Karwassarsky's authority to act under the power of attorney had not been withdrawn by his principal. He had been validly appointed in time of peace, as was the case in Tingley *v.* Müller (1917, 2 Ch. 144). The present case can be distinguished from C. A. 308/43, where no authority had been given by the Custodian to the agent to act under the power of attorney. I can see no reason why the fact that the Respondent had become an "enemy" should put an end to the power of attorney any more than it would put an end to any other juridical relationship that might exist, such as the relationship existing between an "enemy" and an agent who is in charge of his property in this country. In dealing with the property the agent would, of course, be subject to any order made, for example, under the provisions of section 9 of the Trading with the Enemy Ordinance, 1939. But subject to any such law the juridical relationship would, in my judgment, subsist.

In the Sovracht case to which I have already referred the following appears in the judgment of Lord Porter at the top of page 94:—

> "Before your Lordships no question arises as to the validity of the contract sued upon. It was made with a company incorporated and carrying on business in a friendly state in time of peace. The only question is as to the procedural capacity of the Respondents to sue at the present time."

It is, I think, quite clear that His Lordship did not hold that the contract had been invalidated and abrogated on the outbreak of hostilities. The contract still subsisted. At page 98 of Lord Porter's judgment there is the following quotation from the judgment of Le Blanc, J., in the case of Hagedorn *v.* Bell:—

> "The principle, upon which the policy of the law interferes, is this, that all trading with an enemy tends to strengthen and assist the enemy, and is, therefore, calculated to defeat the object for which the war was entered into..."

The mere existence of the power of attorney which Mr. Karwassarsky held clearly did not offend against this principle. The position would have been quite different if Mr. Karwassarsky had accepted the power of attorney from Mrs. Politis after she had already become an "enemy". Such acceptance, unless authorised by the Government of Palestine, would have been a trading with the enemy and punishable as such and in those circumstances I would hold the power of attorney to be void *ab initio*.

In the case of Daimler Co. Ltd. *v.* Continental Tyre and Rubber Co. (Great Britain) Ltd. (1916, 2 A. C. 307) the following appears in the judgment of Lord Parmoor, at p. 352:—

> "The principle applicable is well stated in *Ex parte* Boussmaker. A bankruptcy claim was admitted on behalf of an alien enemy, the dividend to be reserved during the continuance of the war. The Lord Chancellor, after referring to the general principle that a contract with an alien enemy would be void, says: — "But if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue: but the contract being originally good, upon the return of peace the right would survive."

A power of attorney is a species of contract of employment, and the power of attorney with which I am dealing was originally good.

In the case of Tingley *v.* Müller the following appears, in the judgment of Lord Justice Scrutton, at page 180:—

> "... for when the contract was entered into Muller was not an enemy within the meaning of the Proclamation. The power of attorney was made while Muller was in England. Acting on it after he left does not necessarily involve any intercourse or trading with Muller provided the money was not paid to him."

I find, therefore, that the Custodian's letters were effective for the purpose of enabling Mr. Karwassarsky to act under the power of attorney, which was only in a state of abeyance or suspension, and that the action was validly brought by a duly authorised agent.

But even if I had found that the action ought to have been dis-

missed, I would have held that it was too late now for the Appellant to ask for the appeal to be allowed on this ground. The objection does not go to the merits and the action has now been heard on the merits, in the presence of the Respondent herself who was represented at the hearing by duly authorised advocates.

In the case of Ancona *v.* Marks, Vol. 126 Revised Reports, p. 646, the following passage appears in the judgment of Pollock, C. B. at page 649:—

> "We are all of opinion that the rule ought to be discharged. There is no doubt that the Plaintiff, at the time the action was brought, did not know that his name was used, but the question is whether, the securities having been delivered to Creville and Tucker (who on a previous occasion had the Plaintiff's permission to use his name) for the purpose of the action being brought on them in the Plaintiff's name, and the action having been so brought, and the Plaintiff having subsequently ratified the proceedings, he is entitled to retain the verdict. I think he is. In my opinion it makes no difference whether the ratification is before action, or after."

The action was not dismissed by Judge Windham — it was adjourned. And the Respondent has now quite clearly ratified the bringing of it. Her ratification of it is shown by the fact that she has continued it and by the fact that Mr. Karwassarsky continues to appear on her behalf.

Mr. Goitein's second submission is that some of his clients have been on the land since 1920 while others have been there since 1922, and that therefore no action by the owner could be heard after 1937, the period of prescription in the case of this (*mulk*) property being fifteen years.

The Respondent was asking for a declaratory judgment — her prayer is set out in para. 10 of the amended statement of claim — and it appears to me to be quite clear that the onus of proving that the Appellants had not been in adverse possession for fifteen years was on the Respondent. If she had brought her action in another form — if she had asked for a declaration of ownership and an order for quiet enjoyment — then undoubtedly the onus of proving fifteen years adverse possession would have been on the Appellants. But the action was one for a declaration, or rather several declarations, and the onus of proof was on the Respondent. It was, of course, open to her to show either that the Appellants had not been in possession for fifteen years or that even if they had been in possession for fifteen years or more there was some lawful excuse sufficient to stop limitation from running against her.

In her statement of claim in the Magistrate's Court in C. C. 5882/39 the Respondent had averred — see para. 4(b) — that the Appellants had entered the land in 1925 and after. But in her amended statement of claim in the present case — see para. 7 — she pleaded (to use her own words) that:—

> "On dates unknown to the second Plaintiff, the Defendants have trespassed on her land."

The Respondent herself had not come to Palestine till 1926, and she was not in a position to give evidence as to the dates of the alleged encroachments. Mr. Rotenstreich, who represented the Appellants in the trial Court, called no evidence, but Mr. Y. Kleinman, who appeared in person before the trial Court and who is the Appellant in C. A. 340/1946, gave evidence on his own behalf. His evidence is very short and it reads as follows (see p. 7 of the record):—

> "Defendant No. 17. My Barrack has been on the land since 1921 — on whose it is I don't know. I have recently heard Court (*sic*) claims the land. In 1921 there were riots in Tel Aviv. Mr. Dizengoff, the then Mayor, told us to go on to the land. We did. *Cross-examined by Linderman*: I can't swear that this land doesn't belong to Plaintiff.
> No cross-examination by Rotenstreich or Frenkel."

So the only evidence as to possession before the trial Court was that of Y. Kleinmann who said that he had been there since 1921, and there was no evidence on which the Court could have found that the Appellants in C. A. 324/46 had not been on the land for more than fifteen years.

It remains, therefore, to be seen whether there was evidence on which the Court could have found that in any event the period of limitation could not have run against the Respondent. This brings me to Mr. Goitein's third point, which is that the Respondent's plea that she was absent in Europe, not having lived in Palestine till 1926, is not good for the purpose of stopping the running of limitation.

The Respondent commenced an action for the recovery of her land in 1926 in the Land Court of Jaffa. She made a lady named Claire Calmy (formerly the wife of Mr. David Moyal) and the Government of Palestine, defendants. The Government adopted the role of a passive defendant; it took the attitude that if the Respondent could prove her claim it had no objection to handing over to her any part of the land ordered by the Court. Mrs. Claire Calmy, on the other hand, strenuously opposed the Respondent's claim. These facts are referred to in the judgment of the Court in L. A. 43/36 (4, P. L. R. 73). It has been submitted by Mr. Goitein that the Respondent

could have joined and ought to have joined the Appellants, as defendants in that action, and that she could, in that action, have asked for an order for quiet enjoyment. He has referred us to Article 1635 of the *Mejelle* which provides that:—

> "In an action relating to some specific piece of property, the person in possession must be made Defendant."

It is true that if the Respondent had joined the Appellants (or as many of them as were then on the land) as defendants, in her action in 1926, this litigation might not have been so protracted. But in fact she did not join them. It was not till 1939, when she filed her two actions — Nos. 5882/39 and 6807/39 — for recovery of possession, in the Magistrate's Court at Tel Aviv, that the present Appellants were sued, and this brings me to Mr. Goitein's fourth submission which is that those actions could not prevent the period of limitation from running against the Respondent.

Article 1663 of the *Mejelle,* as translated in the Civil Law of Palestine and Transjordan by C. A. Hooper, reads as follows:—

> "Limitation which is effective in this connection, that is to say, which prevents an action being heard, relates only to a period of time which has been allowed to elapse without any excuse. The effluxion of time which has occurred by reason of some lawful excuse, such as cases where the Plaintiff is a minor, or a lunatic, or an imbecile, and that whether he has a guardian or not, or where the Plaintiff has gone to some other country for the period of a journey, or where the Plaintiff has been in fear of the power of his opponent, is disregarded. Consequently, limitation begins to run from the time of the cessation or removal of the excuse."

Tyser's translation of this article of the *Mejelle* (1901 edition) differs markedly from this, and it reads:—

> "In this chapter is considered, that is to say, the lapse of time, which prevents the hearing of actions, is the lapse of time which has taken place without excuse alone.
> On the other hand, consideration is not given to time which passes in consequence of one of the excuses allowed by *sher'* law.
> Such as, a person being an infant, or madman or person of unsound mind, whether the Plaintiff has a guardian or not, or a person being in a foreign country a long way off (*muddet safer*) or his opponent being a person in power.
> Therefore, the beginning of the time which elapses is considered to be from the removal of the excuse.
> For example — the time when a person is an infant is not considered in the time passed. The time elapsed from the date when he arrived at full age is considered alone.
> Likewise, when a person's action is with one who is in power, if time elapses in consequence of his not being able to bring his

> action, while the power of his opponent lasts, it does not prevent the hearing of that action.
> The time elapsed in only considered from the date when the power ceased."

I would compare especially the words "without any excuse" with the words "one of the excuses allowed by *Sher'* law", and the words "has gone to some other country for the period of a journey" with the words "being in a foreign country a long way off (*muddet safer*)".

Article 1674 provides that a right is not destroyed by the effluxion of time, so the position is that the ownership of the property is not lost — it only means that the owner is barred by limitation from bringing an action to recover his property.

Mr. Goitein has referred to the Cyprus case of Ibrahim Mehmet *v.* Radji Fanayoti Kosmo and others (Vol. I, Cyprus Law Reports, p. 12). Article 20 of the Ottoman Land Law (see R. C. Tute's book p. 23) was being considered in that case, and in that article too there are the words "absence on a journey". The following passage occurs in the judgment:—

> "Up to about four years ago the owners were resident in Constantinople, and it is impossible to say that either the Sultan or the above-mentioned owners of the *Ghiftlik* have been absent in a distant country or on a journey. We therefore think that they are not entitled to set up their absence in order to prevent the time of prescription running against them."

It would appear that the learned Judges who decided that case would not have held mere residence or, to use Tyser's translation, "being in a foreign country", to be a circumstance which would prevent limitation from running for the purposes of Article 20 of the Land Code. Of course, it is Article 1663 of the *Mejelle* and not Article 20 of the Land Code that we have to construe in the present case, but the two articles are analogous.

Looking at it from the point of view of common sense and consistency I find it difficult to see why absence on a journey should stop the running of limitation while residence in a foreign country would not do so.

In Land Appeal No. 49/32 4 Rutenberg, p. 1221, the following appears in the judgment of Baker, J.:—

> "I am aware that under Article 1663 of the *Mejelle* it is arguable that the time during which a plaintiff was 'a long way off' (*muddet el Safer*) does not count in estimating the period within which a plaintiff is required to bring his action and that Article 1664 defines *Muddet el Safer* as a distance of 3 days' journey or 18 hours at a moderate rate of travelling, also that the Cyprus Courts have

held that residence in a foreign country was not absence on a journey (*muddet el Safer*) for the purpose of prescription (see Mehmet *v.* Kosmo C. L. R. Vol. I, p. 12).

The Court, however, in the case of Estrangin *v.* Tayan* (Official *Gazette* September 16, 1926) has held that where the Defendant was living in a foreign country such absence was a cause for suspension of the running of the period of prescription (even though the person against whom the plea was put forward had a duly authorised agent in Palestine) and that actual presence in Palestine of the Plaintiff during the whole period was required if the period was to run against him.

In accordance with the above decision the judgment of the lower Court must be quashed and the case remitted to enable the Appellant to produce evidence as to the dates he was absent and his return to Palestine and to give a fresh judgment following the law laid down in the above quoted case."

And in the judgment of Frumkin, J. and Khayat, J., in the same case there is the following passage:—

"In view of the provisions of Articles 1663 and 1665 of the *Mejelle*, prescription does not commence to run until the excuse has ceased to exist. Hence if the Appellant or her predecessor in title were not in the country when the house in dispute was built, prescription would not begin to run until their first arrival into this country."

So it is clear that in that case the Court did not follow the decision in the Cyprus case.

In C. A. 231/45 (13, P. L. R. 10) the Court, when considering Article 20 of the Land Code, said (see p. 11):—

"Mr. Scharf has argued that the examples given in Article 20 as barriers against the running of the limitation period are not exhaustive. We agree with him in that contention. We further agree that it might well be that an absence on military service would be an absence on a journey within the meaning of the Article, but we would point out that not all absences on a journey constitute a sufficient excuse within the meaning of the Article to bar prescription. It appears to us that the absence is qualified by the further condition indicated in the opening words of the Article, that is that it must constitute a valid excuse. It is for the Court, therefore, to enquire into each case to ascertain whether in the particular instance the absence on a journey constituted a 'valid absence'."

Having considered the facts stated in the judgment in C. A. 231/45 I am unable to find that that case has overruled the decision in Land Appeal No. 49/32. The latter decision is very clear. And when applied to the present case it means that prescription would not begin to run against the Respondent until her first arrival in this country.

* L. A. 64/24 (2, C. of J. 646).

The only possible qualification might be that prescription would run as from the time when she first came within the statutory distance (*muddet el safar*) of Palestine. The Respondent was in Constantinople in 1925, but the trial Judge held that having regard to the ordinary means of communication in 1925, and in the absence of any evidence to the contrary, the distance between Constantinople and Palestine was more than the period of a journey or *"muddet el safar"*. I am not prepared to say that the learned Judge was not justified in coming to this conclusion.

Assuming therefore that Mr. Goitein's fourth submission is not good, it follows that prescription did not begin to run against the Respondent until April, 1926, and as she filed the possessory actions in 1939, those actions stopped prescription from becoming effective. Even if the period be calculated from 1925 (when the Respondent first came to Constantinople) there would be no prescription in 1939 as the period of fifteen years had not expired.

With regard to Mr. Goitein's fourth submission I find that the Respondent having brought the possessory actions within the period of fifteen years they did stop prescription from running. The law is contained in Article 1666 of the *Mejelle* which reads as follows:—

> "If any person brings an action in Court against any other person in respect to some particular matter once in a certain number of years without the case being finally decided, and in this way fifteen years pass by, the hearing of the action is not barred. But any claim made out of Court does not cause the period of limitation to cease to run. Consequently, if any person makes a claim in respect to any particular matter elsewhere than in Court, and in this way the period of limitation elapses, the hearing of an action by the Plaintiff is barred."

At the time when those actions were brought the Magistrate's Court was, as it still is, the proper Court for giving recovery of possession of immovable property of any value, as provided in section 3(c) of the Magistrates' Courts Jurisdiction Ordinance No. 45 of 1939. The Land Court (Amendment) Ordinance, No. 46/39, which came into force on 1.1.40, empowered a Land Court to give an order for the possession of any land in respect of the ownership of which it gives a judgment. And even before that Ordinance was enacted, a Land Court could, and sometimes did, give an order for quiet enjoyment or non-interference. But the Respondent primarily wanted possession of the land, and it was not encumbent upon her to ascertain whether the Appellants intended to plead limitation. She was quite justified in suing in the first instance in the Magistrate's Court. If the Magistrate

had finally decided those actions, for example, if he had dismissed them, then they would not have been effective for the purpose of stopping limitation from running. But in fact he did not dismiss them — they are still pending.

A fifth point was argued by Mr. Goitein, and this was that the Land Court could not, either at all or in the present circumstances, grant the relief claimed, as the relief was purely declaratory. I would say that I am unable to find that the submission is well founded. The Land Court was not being asked to make declarations in the air. The Magistrate considered them to be necessary for the purpose of enabling him to dispose of the two possessory actions. The position was quite clear — if there was no question of limitation then the Magistrate could deal with the cases, since the Appellants were not claiming ownership. The declarations sought were in regard to rights over land, and therefore a Land Court was the proper Court to give them. And Rule 52(4) of the Civil Procedure Rules, 1938, provides that:—

> "No action shall fail on the ground that the relief claimed is declaratory only."

In the result I find that these appeals fail, the Respondent having shown that she was entitled to a declaratory judgment in the terms of her prayer.

The Respondent must have her costs in each appeal on the lower scale, including an advocate's attendance fee of LP. 12 (twelve) in each appeal.

Delivered this 18th day of April, 1947.

British Puisne Judge.

De Comarmond, J.: The Respondent in these two appeals is a Greek subject who became the owner in 1917 of a certain area of *mulk* land at Tel Aviv. The previous owner was her father and he was a registered owner.

The Respondent came to Palestine for the first time in April, 1926, and she has explained that the reason for her visit was that she had heard that her property was being divided up between Government and Mrs. Claire Calmy. In 1926 she commenced an action before the Jaffa Land Court for the recovery of her land. The Government adopted a passive attitude but Mrs. Calmy opposed the claim. The present Respondent ultimately triumphed in 1936 (L. A. 43/36, 4 P. L. R. 73) and the land was registered in her name in 1939. She

then began two actions in the Magistrates Court of Tel Aviv (Nos. 5882/39 and 6807/39) against certain persons (now Appellants) who, so she alleged, had trespassed on the land. In those actions she prayed for recovery of possession, but the Defendants having pleaded that the actions were time-barred the Magistrate adjourned both cases pending decision of a competent Court on the issue thus raised. I need hardly point out that, in so doing, the Magistrate followed the well-settled jurisprudence which is that when such a plea is raised, the issue must be decided by a Court having jurisdiction in matters of ownership of land; that jurisprudence seems to have been based on the consideration that if the plea succeeds the Plaintiff is in fact, if not in law, deprived of his rights as owner. I would add in this connection that the Land Courts Ordinance, as it stood in 1939, did not expressly empower Land Courts to implement their judgments as to ownership by ordering the owner to be placed in possession; it was by an amending Ordinance which came into force in 1940 that the matter was clearly laid down (*vide* Ordinance 45 of 1939). When in 1939 the present Respondent went to a Magistrate's Court to sue for recovery of possession, she was taking a proper course because that Court had (and still has) power to grant her prayer unless the plea of limitation of action is raised. Such plea having been raised, the Magistrate had to wait until a competent Court decided whether or not the plea was valid.

The next stage in the litigation was the bringing by the present Respondent of an action before the Tel Aviv Land Court against the present Appellants. But shortly, this action was for a declaratory judgment to the effect that the present Appellants (who were the Defendants) were not entitled to succeed on the plea raised by them before the Magistrate's Court, namely that the actions for recovery of possession were time-barred. I will later on deal in greater detail with the declarations sought by the Plaintiff-Respondent. For the present it is sufficient to say that the Plaintiff succeeded before the Land Court of Tel Aviv and that the present appeals were then lodged.

The statement of claim filed in the Tel Aviv Land Court in 1941 was signed by Mr. Karwassarsky, an advocate, to whom a power of attorney had been given by the present Respondent (Mrs. Politis) in 1936. In 1941, Mrs. Politis was residing in Greece and had become an "enemy" by reason of that country having been overrun by the Germans and declared an enemy territory. The Defendants moved to have the action dismissed on the ground that the Plaintiff was an enemy and that the power of attorney held by Mr. Karwassarsky had

become null and void as soon as the principal had become an "enemy". The motion was heard by Judge Windham who held that the power of attorney had become void and inoperative as soon as the principal had become technically an "enemy". It is important to mention that advocate Karwassarsky had, before filing the statement of claim, obtained two letters from the Custodian of Enemy Property conveying permission to carry on the litigation on behalf of his principal, and furthermore, the Custodian stated on the form of declaration filed in pursuance of the Defence (Courts Applications) Regulations, that he had granted a licence under section 3 of the Trading with the Enemy Ordinance to Mr. Karwassarsky to act on behalf of Mrs. Politis in the proceedings before Court. Judge Windham held that the Custodian could not revive a power of attorney which had become void but the learned Judge did not dismiss the action; in view of the fact that there was no clear decision in Palestine on the point he considered it fair to afford the Plaintiff-Respondent the opportunity of regularising her position.

On this question of power of attorney, I have reached the opinion that the permission granted by the Custodian of Enemy Property to Mr. Karwassarsky did have the effect of empowering the latter to continue acting under the power of attorney. I base this opinion on the provisions of the Defence (Courts Applications) Regulations, 1940, which were in force at the material time and which were made under the authority of the Emergency Powers (Defence) Act, 1939, and of the Emergency Powers (Colonial Defence) Order-in-Council, 1939. The relevant provisions of Regulations 2 and 3 of the aforesaid Regulations were that no civil proceedings could be entertained in any Court unless the Plaintiff or his representative filed with the Registrar of the Court a declaration in the prescribed form (to the effect that the Plaintiff is not an enemy *etc.*). When the declaration disclosed that the Plaintiff was an enemy, the Registrar was to inform the Custodian of Enemy Property that proceedings had been instituted by an enemy; if the Custodian signified his consent to such proceedings being entertained or failed to signify his refusal within 30 days, the proceedings could be continued.

It seems to me difficult to interpret the aforementioned provisions otherwise than as contemplating that an enemy would not be debarred from suing unless the Custodian so decided. I would also point out that Regulation 2 provided that the Plaintiff or his representative would have to file the declaration, this provision implied that the representative of an "enemy" was still considered able to act as such

at least for the purpose of the Regulations. I have, of course, paid attention to C. A. 300/43 (11, P. L. R. 121) in which mention is made of the Sovracht case (1943) A. C. 203. In the last mentioned case, Lord Porter said the following:—

> "Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse. That the representatives, legal or non-legal, of a litigant may require to have such intercourse with their principal in the litigation is, I imagine, clear, and I do not think it is an answer to say that in the event it may not be found necessary for the one to communicate with the other. At any moment the necessity may arise. The very relationship required it even if it is desired only to terminate the mandate itself."

I have, of course, to pay the utmost respect to the views expressed by the noble Lord and to bear in mind that he also took into consideration the older case of Tingley *v.* Miller. But I must point out that the excerpt quoted above begins with the word "ordinarily" and that the concluding words of the same passage contemplate that the mandate itself is not automatically terminated. I, therefore, do not consider that Lord Porter's ruling does invalidate the reasoning I have followed with regard to the effect of the Palestine Defence (Courts Applications) Regulations, 1940. I therefore hold that the Appellants cannot succeed in their appeal on the ground that the actions were not properly entered.

The next ground of appeal with which I propose to deal is the very important one concerning the question whether the Plaintiff-Respondent had not left it too late to assert her rights against the alleged trespassers, *i. e.* the present Appellants.

I have already mentioned that it was in 1939 that the Respondent began proceedings before the Magistrate's Court for recovery of possession. The period of limitation for bringing an action in respect of *mulk* property is 15 years (*Mejelle* Articles 1660, 1663, 1664 and 1666). Article 1660 lays down that actions relating to real property held in absolute ownership shall not be heard after the expiration of a period of 15 years since action was last taken in connection therewith. Article 1663 then proceeds to temper the harshness of this limitation by providing that under certain circumstances the period of limitation does not run or is interrupted.

My learned brother Shaw, J., has set out in his judgment the translations of Article 1663 as given in Hooper's Civil Law of Palestine

and Transjordan and in Tyser's translation. There are marked differences between the two but it seems to me that in Hooper's translation the words "or where the Plaintiff has gone to some other country for the period of a journey" do not seem right. Comparison with the translation of Article 1665 by the same learned author shows that in that article reference is made to places separated "by the period of a journey" and this, in my view, indicates that the expression "period of a journey" in Articles 1663 and 1665 is meant to indicate a minimum distance calculated or estimated as laid down in Article 1664.

It is a matter for regret that decisions given by the Courts in Palestine have possibly been based on different translations of Article 1663. In the Cyprus case of Mehmet *v.* Kosmo and others (Cyprus Reports Vol. I, p. 12) it was held that a person who had never resided in Cyprus could not contend that his non-presence in Cyprus was "absence in a distant country on a journey". The Palestine Courts, however, have not adopted the view expressed in Mehmet *v.* Kosmo; the relevant decision is L. A. 49/32 (Fahima Hanen *v.* Sheikh Assad Shukeiri) reported in 4 Rotenberg, p. 1221 and I need only cite the following excerpt from the judgment of Frumkin and Khayat, JJ.:—

> "In view of the provisions of Article 1663 and 1665 of the *Mejelle*, prescription does not commence to run until the excuse has ceased to exist. Hence if the Appellant and her predecessor in title were not in the country when the house in dispute was built, prescription would not begin to run until their first arrival in this country."

My attention has been called to C. A. 231/45 reported in 13, P. L. R. 10 where it was held that absence on a journey in order to bar prescription under Article 20 of the Ottoman Land Code must constitute a valid excuse and that it was for the Court to enquire into each case to ascertain whether in the particular instance the absence on a journey constituted a "valid absence". It is to be noted that Frumkin, J., was again one of the learned Judges who decided C. A. 231/45 and I do not see the slightest justification for the suggestion that C. A. 231/45 establishes the principle that when applying Article 20 of the Land Code (or Article 1663 of the *Mejelle*) a Court would enquire into the reasonableness of the cause of the absence. The facts mentioned in C. A. 231/45 were that the person invoking absence as a bar to the running of the period of limitation was a man who had been in military service from 1908 to 1919 mostly in countries adjacent to Palestine and that he had returned to Palestine for certain periods during his time of service. In such circumstances it is obvious that the Court would have to investigate what portion, if any, of the period of military service could be reckoned as absence within the

meaning of the law and I do not understand the Court to have said or meant anything further.

It seems to me, therefore, that Article 1663 of the *Mejelle*, as already interpreted by this Court, provides that the period of limitation does not begin to run against a person until such person comes to Palestine, unless the foreign country in which such person resides is quite near and therefore within easy reach. Article 1664 lays down what is the minimum distance which justifies absence under Articles 1663 and 1665. It does so in a manner which is the reverse of precise, and I am not surprised that, in the present case, the interpretation of the article has given rise to some difficulty: the difficulty being whether the Plaintiff-Respondent could invoke Article 1663 on the strength of the fact that she had been in Europe until 1926. In L. A. 49/32, already referred to by us, Baker, J., paraphrased Article 1664 as fixing "a distance of 3 days' journey or 18 hours at a moderate rate of travelling". In my opinion, such is the meaning of the article and in the present case I find no reason for disagreeing with the finding of the learned trial Judge that Constantinople was more than 18 hours away at a moderate rate of travelling.

I, therefore, conclude that the period of limitation of action did not begin to run against the Plaintiff-Respondent until she first arrived in Palestine, *i. e.* in April, 1926. In this connection I must say that I do not agree with the learned trial Judge that the period of limitation began to run only in 1939, *i. e.* after the Plaintiff had had the land registered in her name. I am of opinion that time began to run when the alleged trespassers entered on the land and the matter is, I consider, placed beyond doubt by Article 1670 and 1671 of the *Mejelle*.

I will now refer to the statement of claim which was filed in the Land Court with the object of securing a declaration which would enable the Magistrate to dispose of the actions for recovery of possession. In fact, three declarations were sought:—

(a) that Defendants had not acquired any rights of ownership in the land in question by virtue of their possession;

(b) that the Defendants had not acquired any rights as a result of their plea of limitation of action put forward before the Magistrate;

(c) that on 21.5.1939 and 13.6.1939, *i. e.* the dates of the institution of the actions for recovery of possession, the period of limitation of action had not run its full course, *i. e.* 15 years.

The learned trial Judge has rightly pointed out that the first mentioned declaration is superfluous in as much as although an action

is time-barred, the Defendant does not thereby acquire ownership. This is clear from Article 1674 of the *Mejelle*.

The second declaration is also superfluous because a defendant does not acquire a right as a result of a plea of limitation of action except the right of having the action dismissed.

The third declaration is the important and relevant one. However, the Court below granted all three declarations because the learned Judge thought it advisable to grant all three declarations in view of the order of the Magistrate in Civil Case No. 5882/39 and in order to dispose of any further difficulties.

The Appellant's counsel has submitted that the Land Court could not grant the relief claimed because it was purely declaratory. I do not consider that the submission is well founded. Rule 52(4) of the Civil Procedure Rules, 1938, provides that no action shall fail on the ground that the relief claimed is declaratory only. The rule applies to Land Courts and, in the circumstances of this case, I consider that the Land Court could validly grant the relief prayed for.

Another submission made by the Appellant's counsel is that the Plaintiff-Respondent, when bringing a Land Court Action in 1926 to assert her right of ownership, should have also applied for quiet possession as against the Appellants. I concede that the Plaintiff-Respondent might have taken action earlier against the alleged trespassers but, in practice, no result would have been achieved until she had established beyond question that she was the owner of the land. She began Court proceedings, in 1926, as soon as she arrived in Palestine and it was only in 1937 that she obtained a final decision (L. A. 43/36) with regard to her right of ownership. I would very much hesitate to accept the view that the present Appellants did not know about that litigation but I need say no more on this point except that in 1939, when the Plaintiff-Respondent went to the Magistrate's Court to evict the Appellants, she did thereby stop the running of the period of limitation. Being given that the Magistrate adjourned the cases, Article 1666 of the *Mejelle* came into play and time ceased to run.

Learned counsel for the Appellant has touched upon the question that the statement of claim filed in the Land Court was so couched as to place on the Plaintiff the onus of establishing when the period of limitation began to run. This is true, and the Plaintiff might have found herself in a very embarrassing position were it not that, in the circumstances, it has emerged that the period prior to April, 1926, could not be reckoned against her. Whether the Appellants or some of them went on the land as early as 1920 is of no avail

to them and all that matters is that in 1939 the period of 15 years fixed by Article 1663 of the *Mejelle* had not elapsed when the Plaintiff took steps to obtain possession of her land as against the Appellants. Armed with the declaration which she has obtained she may now go back to the Magistrate's Court and the cases there will be decided on any issues which may properly arise there, not including, of course, any issue concerning her right of ownership or any issue as to the actions being statute-barred, which issues have now been disposed of in her favour.

In conclusion I dismiss the appeals on the terms specified by my learned brother Shaw, J.

CIVIL APPEAL No. 92/46.

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

BEFORE: Shaw and Hubbard, JJ.

IN THE APPEAL OF :—

Farideh Jiries Naser & 6 ors. APPELLANTS.

v.

Michael Ass'ad Ashkar. RESPONDENT.

Evidence, corroboration, Evidence Ord., sec. 6, hearsay — Authority to sell — Joint agreement not signed by the two parties — What constitutes contradiction — Sale and agreement to sell — C. A. 140/43, estoppel — Position of occupant under Rent Restrictions Ordinance.

Appeal from the judgment of the Land Court of Haifa, dated 28th February, 1946, in Land Case No. 21/43, allowed:—

Sec. 6 of the Evidence Ordinance applies where the Defendant is disbelieved, in which case the Plaintiff's evidence requires corroboration. If the Plaintiff is disbelieved, the section need not be invoked and the Defendant succeeds.

(*A. M. A.*)

REFERRED TO: C. A. 140/43 (10, P. L. R. 421; 1943, A. L. R. 437).

ANNOTATIONS:

1. The judgment of the Land Court is reported in 1946, S. C. D. C., at p. 215.

2. For recent authorities on the effect of sec. 6 of the Evidence Ordinance in civil proceedings see C. A. 401/45 (1946, A. L. R. 323) and C. A. 27/46 (*ibid.*, p. 668) with cases cited in the notes thereto.

3. On contracts not signed by all the parties *cf.* note 3 to C. A. 254/45

(1946, A. L. R., at p. 156); *vide* also C. A. 56/46 (13, P. L. R. 380; 1946, A. L. R. 377).

4. On the *res judicata* point see C. A. 88/46 (13, P. L. R. 414; *ante*, p. 105) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANTS: Cattan.

FOR RESPONDENT: Asfour & T. E. Moghanam.

JUDGMENT.

Hubbard, J.: This is an appeal from the judgment dated 28.2.46, of the Land Court, Haifa, in Land Case No. 21/43.

The action concerns the title to a certain house property situated in Shefa 'Amr. The Appellants are a widow and her grown children who claim to be the lawful owners by way of inheritance from the late Elias Naser Jarrous, and they sought a declaration to that effect together with an order for recovery of possession from the Respondent. The Respondent contested the claim to ownership, and under a counter-claim based on an agreement for sale he set up an equitable title against the Appellants, claiming in the alternative the refund of LP. 600 alleged to have been paid under the agreement.

It is not disputed that the Appellants became entitled as owners to shares in the property, in accordance with a certificate of succession issued on 12.7.1926. On 12.2.33 the 2nd and 4th Appellants (to whom I shall now refer as Farid and Anis) with the consent of the other Appellants, leased the property to the Respondent for two years commencing on 1.3.33. At the end of that term Farid and Anis entered into an agreement with Respondent whereby he advanced to them the sum of LP. 100 without interest, in consideration of their leasing the house to him without rent, that is to say, the loan of the money was in consideration of the use of the house. That agreement was for a period of one year, and it was renewed from time to time with the knowledge and consent of the other Appellants, who throughout received from Farid and Anis what was due to them. These facts are all set out in the Statement of Claim, and they are not in issue.

On 14.11.41 Farid and Anis entered into a contract (Exhibit B) with the Respondent, whereby they agreed to sell the house to him in consideration of a sum of LP. 300, receipt of which they acknowledged. In clause 4 of that agreement they admitted that the Respondent had spent LP. 300 on repairs to the house. The case really turned on whether Farid and Anis had acted with the authority, express or implied, of the other Appellants when they entered into that contract. The Appellants also averred that the admission that

the Respondent had spent LP. 300.— on repairs was false, and that he had incurred no expenses whatsoever up to the date of the contract.

The question which raises a difficulty in my mind and which I can answer only in the negative is this: Is there sufficient evidence as required by Art. 6 of the Evidence Ordinance (as amended) that Farid and Anis were authorised by Appellants Nos. 5 and 6, Nadimeh and Aniseh, to sell the property? There is the evidence of the Defendant who said: "Anis and Farid were empowered by other heirs to sell. They showed me no paper". Then there follows in the record a reference to para. 5 of Ex. B., which is the paragraph in the agreement to sell which recites that the signatories were empowered to sell. This evidence, in its context, looks very much like mere hearsay. But taking it at its highest, it is both contradicted by Nadimeh and Aniseh and, in my view, uncorroborated. The statement in the contract by Anis and Farid that they were empowered to sell can obviously not bind Nadimeh and Aniseh. Any remarks made out of Court by Farideh and Hanneh which might be taken to constitute either consent or ratification by them personally can also not bind Nadimeh and Aniseh. The evidence as to a statement made out of Court by Farideh to the effect that the two signatories were empowered to sell is only evidence of an admission that she herself empowered them. As regards Nadimeh and Aniseh it is pure hearsay. If Farideh knows of her own knowledge that Nadimeh and Aniseh did in fact authorise the sale, then to make that evidence, she must have testified to it in Court. This she has not done.

The fact that the trial Judge thought the Appellants were lying is, in my view, immaterial. In fact, sec. 6 of the Evidence Ordinance has no application except where the Court does disbelieve a defendant. (The Plaintiffs in this case, for the purpose of the point under consideration, which arises on the counterclaim, were, of course, in the position of Defendants). Sec. 6 provides in effect that the Court, although it believes the evidence for the plaintiff and consequently disbelieves the evidence for the Defendant, must nevertheless not give judgment for the Plaintiff on the evidence of a single witness, if contradicted, unless it is corroborated. If in fact the Court thinks the defence witnesses are truthful, then obviously sec. 6 is irrelevant, because the Court will not in such case wish to give judgment for the Plaintiff. The fact that the trial Court makes use of invective and calls the Plaintiffs "brazen liars" cannot alter the legal position. Nadimeh and Aniseh have contradicted the Defendant's statement; this statement is, in my view, uncorroborated by any other evidence;

the result is that the trial Court was not entitled to find that Nadimeh and Aniseh consented to the agreement. The agreement being a joint one, it follows that, not having been signed by two of the parties to it, it is a nullity, and no equitable title can be based on it.

I add here that it may well be that if the evidence of the defence witnesses on the relevant point is extremely contradictory then it might be possible to say that there was no real contradiction of a sole witness for the Plaintiff. But in the present case the evidence of Nadimeh and Aniseh on the relevant point, *i. e.* whether or not they consented to the agreement, is quite categorical. It is only in connection with the sale to Kamal Jarrous that the learned Judge found the evidence of Appellants so very unsatisfactory.

Mr. Asfour, for the Respondent, contended in this Court that the other Appellants had held out Anis and Farid as their agents for the purpose of selling the property. The learned Judge did not base his judgment on this ground and I think it is in any case untenable. Permitting persons to act as agents to manage properties and collect their rents cannot, in my view, be deemed to be holding them out as agents to sell such properties.

Finally, on the question of sale or agreement to sell I am in agreement with the trial Judge that the contract was an agreement to sell and I am further in agreement with him that the judgment in C. A. 140/43 creates no estoppel in the present case. That judgment was given on an appeal from a judgment in a possessory action in the Magistrate's Court. The question of sale or agreement to sell was not really in issue in that case, that is to say, it did not fall to be conclusively determined. The question which did arise was whether, in view of the opposite contentions of the parties as to the proper construction of the contract, there was a genuine dispute as to an equitable right to the land. If there was such a dispute, then obviously the question whether the contract was an agreement for sale and gave an equitable right was a question for the Land Court. In my view, the statements in the judgment of the Court of Appeal are *"obiter dicta"* and the judgment is binding between the parties only as determining that there was a genuine dispute on which they should go to the Land Court.

For the reasons I have given I am of opinion that this appeal should be allowed, and that the declaration prayed should be granted. I do not however think it would be proper to make any order in this appeal as to possession, since it may be — I do not say it is so — but it may be that the Respondent's occupancy of the house is protected under

the Rent Restrictions Ordinance, and this matter was never dealt with by the trial Court nor on this appeal. The Appellants to have their costs on the lower scale to include a hearing fee of LP. 10 (ten pounds). The Appellants will also have their costs on the lower scale in the Court of trial together with a hearing fee of LP. 10.

Delivered this 3rd day of April, 1947.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 24/47.

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:—

Saleh Ibn Yousef Sabha Abu Fanneh. APPELLANT.

v.

The Attorney General. RESPONDENT.

Manslaughter — Self defence — Resistance to arrest — No evidence that deceased was a policeman — Confession to be taken as a whole.

Appeal from the judgment of the District Court of Nablus, dated 17.3.47 in Criminal Case No. 22/47, whereby the Appellant was convicted of manslaughter contrary to section 212 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, allowed:—

An accused charged with killing a policeman while resisting arrest is entitled to be discharged if there is no evidence that he knew the deceased to have been a policeman and no evidence to contradict his confession to the effect that the death was accidental.

(*A. M. A.*)

FOR APPELLANT: O. S. Bargouti.

FOR RESPONDENT: Crown Counsel — (Wicks).

JUDGMENT.

This is a regrettable case. A loyal Policeman lost his life in the performance of his duty, and the Accused was convicted of manslaughter in respect of this death, mainly on his own statements. These statements if accepted in their entirety were fully consistent with innocence. The learned Judge did not accept the Accused's version

in its entirety; he accepted a part and rejected a part. The Judge came to the conclusion, that the killing was not the direct result of the shooting by the Accused, but was a result of the Accused's resistence to hand over his shot-gun and himself.

We cannot see that the Crown adduced any evidence that there was a legal obligation on the Accused to hand over his shot-gun or himself, being given that he did not know that the victim was a Policeman, nor does it seem that there was evidence from which it could be reasonably deduced that the final act of shooting was other than as has been described by the Accused.

In the circumstances we feel that this conviction cannot be upheld. The conviction and sentence are quashed and the Appellant is discharged unless he is held on any other charge.

Delivered this 23rd day of April, 1947.

Chief Justice

CIVIL APPEAL No. 112/46.

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

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

IN THE APPEAL OF:—

Mustafa Mousa Abu Hijleh. APPELLANT.

v.

Abdallah Mohamed Rammaha. RESPONDENT.

Bankruptcy — Defective bankruptcy notice — Power of attorney as document under Art. 69, *Notary Public Law — Unauthenticated P/A — Affidavit under rr.* 66—7, *Form* 32 *— Act of bankruptcy, computation of three months.*

Appeal from the judgment of the District Court of Jaffa, dated 16.3.46 in Civil Case No. 71/44, dismissed:—

1. A power of attorney is not a final judgment or order for the purpose of sec. 3(2) of the Bankruptcy Ordinance.

2. A creditor is not entitled to present a petition unless the act of bankruptcy occurred within three months preceding the presentation of the petition.

(*A. M. A.*)

ANNOTATIONS:

1. Note, however, that "a notarial deed *in execution* has the force of a

judgment" — C. A. 139/42 (1942, S. C. J. 668; 12, Ct. L. R. 160 — italics supplied).

2. On setting aside of bankruptcy notices see Annotated Laws of Palestine, Vol. 2, pp. 255—6, and *ibid.*, pp. 440—1; *vide* also C. D. C. Jm. 129/44 (1945, S. C. D. C. 66).

3. *Cf.* also C. D. C. Jm. 12/46 (1946, S. C. D. C. 478).

(*H. K.*)

FOR APPELLANT: Germanus.

FOR RESPONDENT: Elia.

JUDGMENT.

This is an appeal from the judgment dated 16.3.46 of the District Court of Jaffa in Civil Case No. 71/44.

When the Appellant filed his request, dated 15.12.43, for the issue of a bankruptcy notice, he relied on an alleged fraudulent transfer of the property in suit to his wife, contrary to sec. 3(2)(a) of the Bankruptcy Ordinance, 1936, on 5.3.43. He also relied on the same transfer as being a fraudulent preference, contrary to sec. 3(2)(b).

When the bankruptcy notice was issued, however, it called upon the Respondent to pay, within seven days of service, the sum of LP. 700 with costs, advocate's fees, and interest at 6% from 14.4.42. This claim was made on the basis of a power of attorney, dated 14.4.42, signed in the presence of the Notary Public, Jaffa. The Appellant did not state in this notice that the amount which he was claiming was due under a final judgment or final order, but his advocate has relied on Article 69 of the law of Notary Public dated 28.10.1913, and his case is that the document dated 14.4.42 is a document of the type described in Article 69 and is equivalent to a judgment. He admits, however, that no notice was issued by the Notary Public. It is also evident that this document was not drawn up by the Notary Public himself, and it is by no means a simple acknowledgment of a debt. The LP. 700 was to be repaid only in certain circumstances.

The Respondent filed a statement of reply, dated 6.2.44, to this so-called bankruptcy notice, but he did not file an affidavit as required by Rule 66 of the Bankruptcy Rules, 1936. So there was no affidavit which could operate as an application to set aside the notice. It follows that it was not encumbent upon the Court to extend the time specified in the notice, as would have been the case if an affidavit had been filed.

After hearings on 28.2.44 and 8.3.44 the Court, on the latter date, dismissed the Respondent's application to set aside the notice. In

doing so the Court observed that Rules 66 and 67 had not been complied with, and that the application had not been submitted in accordance with Form No. 32. It is abundantly clear that the Court did not extend the time specified in the notice and as that notice had been served on the 3.2.44, the time had expired on 10.2.44.

A creditor's petition, dated 7.6.44, was filed by the Appellant, and his advocate submitted that it was in time since it was filed within three months of 8.3.44, that is to say, within three months of the Judge's dismissal of the so-called bankruptcy notice. The advocate for the Respondent, however, submits that, in order to be in time, it would have had to be filed within three months of 10.2.44.

In my judgment the latter submission must be supported, as the time stated in the notice had not been extended. It may be observed that in his petition dated 7.6.44, the Appellant states that the act of bankruptcy is non-compliance with a bankruptcy notice dated 18.1.44. He does not set out the date of service of that notice, nor does he allege that the time stated in the notice had been extended. Sec. 5(1)(c) provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is grounded has occurred within the three months preceding the presentation of the petition.

Assuming that the notice was a good notice the act of bankruptcy had occurred on 10.2.44 and the petition was, therefore, clearly out of time. It is also clear that if the Appellant was relying (which he was not) on the alleged fraudulent transfer and fraudulent preference which had taken place on 5.3.43 the petition was equally out of time.

The learned Judge further held that the power of attorney, dated 14.4.42, was not a final judgment or final order for the purposes of sec. 3(2)(g) of the Bankruptcy Ordinance, and I can see no reason for disagreeing with him.

In the result, therefore, I find that the lower Court properly dismissed the petition. The appeal must be dismissed with costs on the lower scale to include a hearing fee of LP. 10.

Delivered this 25th day of April, 1947.

British Puisne Judge.

CIVIL APPEAL No. 168/45.

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

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

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

The Keren Kayemeth Leisrael, Ltd. & 109 ors. RESPONDENTS.

Leave to appeal in L. S. — L. S. Ord., sec. 33(4) — C. A. 17/44, C. A. 2/46, C. A. 172/40, C. A. 99/41 — Conditional and unconditional leave granted by Chief Justice.

Appeal against the decision of the Land Settlement Officer, Safad Settlement Area, refusing to revise the schedule of rights; preliminary objection overruled:—

In granting leave to appeal in Land Settlement proceedings, the Chief Justice may make a conditional order, leaving it for the Court to decide whether an appeal lay, or grant unconditional leave, when it is not open to the Court to decide that an appeal does not lie.

(*A. M. A.*)

DISTINGUISHED: C. A. 172/40 (7, P. L. R. 547; 1940, S. C. J. 537; 8, Ct. L. R. 231); C. A. 99/41 (8, P. L. R. 269; 1941, S. C. J. 297; 10, Ct. L. R. 38); C. A. 17/44 (11, P. L. R. 254; 1944, A. L. R. 381); C. A. 2/46 (1946, A. L. R. 619).

ANNOTATIONS:

1. As the right of appeal is a statutory right it seems clear that the grant of leave to appeal by the Chief Justice cannot confer such right if it is not given by sec. 63 of the Land (S. of T.) Ordinance; *cf.* C. A. D. C. Ha. 57/45 (1945, S. C. D. C. 671) where a similar question is dealt with, and see the last paragraph of this ruling which stresses the same point.

2. On the restricted right of appeal in settlement cases see H. C. 48/35 (2, P. L. R. 341; 8, C. of J. 541), P. C. 19/35 (3, P. L. R. 135; 8, C. of J. 531) and C. A. 173/40 (7, P. L. R. 471; 1940, S. C. J. 311; 8, Ct. L. R. 74).

3. The appeal itself is reported *infra*.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Wicks).

FOR RESPONDENTS: No. 1 — Eliash.

Nos. 2—109 — H. Cattan & S. Khadra.

RULING.

Mr. Eliash has raised a preliminary objection to the hearing of this appeal on the ground that no appeal lies against the refusal of the Settlement Officer to exercise his discretion under section 33(4) of the Land Settlement Ordinance.

Mr. Wicks submitted in reply that leave to appeal had been granted by the Chief Justice and that Mr. Eliash could not appeal against the order granting leave.

Several cases have been cited to us.

C. A. 17/44, 11, P. L. R. 255 is not an authority which is of any help in the present instance because no leave was in fact obtained by the Appellants.

Mr. Eliash for the Respondent has drawn our attention to C. A. 2/46, A. L. R. 1946, p. 619 from which it appears that the Chief Justice granted leave to appeal in a settlement case leaving the Court of appeal "to decide the issue". It seems from this report, if correct, that the Chief Justice granted leave, leaving it to the Court of appeal to decide whether the appeal concerned a decision regarding rights to land, *i. e.* whether the matter was appealable. In that case, therefore, there was what we term conditional leave to appeal.

In our opinion where the Chief Justice grants unconditional leave to appeal the appeal must be heard.

C. A. 172/40, 7 P. L. R. 547 was also a Land Settlement Case. When application for leave to appeal was made it was objected that the appliation had been made too late. The question depended on the interpretation of section 63 of the Land Settlement Ordinance and leave was granted by the Chief Justice "without prejudice, however, to the objection". It seems to us that the learned Chief Justice thought it desirable that the Court of Appeal should interpret section 63 of the Land Settlement Ordinance and decide whether the word "refusal" in the said section meant "date of refusal" or "date of notification of refusal". In other words, what we term "conditional leave" was given whereas in the present case unconditional leave to appeal was granted.

Another case quoted to us is C. A. 99/41, 8, P. L. R. 269. In that case the point at issue was whether the Civil Procedure Rules, 1938, applied to succession matters. It was held that they did not apply and that under the Succession Ordinance there was no provision for appeals.

We are of opinion that in the present case, the preliminary objection must fail because leave to appeal was granted unconditionally.

This does not mean that after entering fully on the merits of the appeal we would be precluded from reaching the conclusion that we have no jurisdiction to entertain it.

Given this 17th day of March, 1947.

British Puisne Judge.

CIVIL APPEAL No. 168/45.

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

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

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

The Keren Kayemeth Leisrael Ltd. & 109 ors. RESPONDENTS.

Land Settlement — Refusal by L. S. Officer to revise schedule of rights — Whether an appeal lies — L. A. 92/34, C. A. 455/44 — Forest reserves, not necessarily on state lands, Forests Ord., secs. 3, 4, 12 — L. S. Ord., secs. 21, 24, 27, 29, 31—3, Rules, r. 2 — Failure to notify defendant Government of date of proceedings — Position of Government in L. S.

Appeal against the decision of the Land Settlement Officer, Safad Settlement Area, refusing to revise the Schedule of Rights, dismissed:—

1. Where the applicant for revision was a party to the proceedings prior to the posting of the Schedule of Rights, the Land Settlement Officer is justified, except in very exceptional circumstances, in refusing to revise the Schedule of Rights.
2. Where claims have been investigated prior to the publication of the Schedule of Rights, it is doubtful whether that Schedule may be amended at all, except for necessary adjustments.
3. An appeal may lie, by leave, from a refusal to revise the Schedule of Rights.
4. (*Per* Curry, A/J.) The correct procedure is to post the Schedule of Rights only in respect of undisputed claims.

(*A. M. A.*)

FOLLOWED: L. A. 92/34 (2, P. L. R. 471; 9, C. of J. 850); C. A. 455/44 (12, P. L. R. 388; 1945, A. L. R. 525).

ANNOTATIONS:

1. See the preliminary ruling in this case (*supra*) and the notes thereto.
2. On the proper procedure in land settlement generally see C. A. 185/43 (1943, A. L. R. 539) and cases therein cited, C. A. 229/45 (13, P. L. R. 175; 1946, A. L. R. 359) and C. A. 79/45 (*ibid.*, pp. 376 & 375).
3. See, as to Government's rights under sec. 29 of the Ordinance, C. A. 306, 311 & 318/44 (1946, A. L. R. 211) and C. A. 229/45 (13, P. L. R. 175; 1946, A. L. R. 359) with cases cited in the second sentence of note 2 thereto in A. L. R.
4. On secs. 26 & 33 of the Ordinance *cf.* C. A. 160/46 (*ante*, p. 57) and note thereto, and C. A. 79 & 133/45 (*ante*, p. 233).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Wicks).
FOR RESPONDENTS: No. 1 — Eliash, Scharf and Feiglin.
Others — Cattan and S. Khadra.

JUDGMENT.

De Comarmond, J.: This is an appeal by the Attorney General on behalf of the Government of Palestine against the refusal of the Land Settlement Officer, Safad Settlement Area, to revise his decision in the Schedule of Rights posted up on the 15.12.44 in respect of the settlement of rights to lands of Meirun village.

The history of the case is rather unusual. When settlement began in the Meirun area, claims were submitted by Government on the usual printed forms. These claims did not allege the existence of any registered rights, and merely indicated that the areas claimed were unassigned State domain and were shown on Forest plans which had been forwarded to the Settlement Officer. In short, the Government claims were based on the fact that the areas claimed were Forest Reserves and it is worth mentioning that Forest Reserves are not necessarily on State land (see sections 3, 4 and 12 of the Forests Ordinance, Cap. 61). There were other claimants besides Government, and it was the duty of the Settlement Officer to prepare a schedule of claims for each block as prescribed by section 21 of the Land (Settlement of Title) Ordinance, Cap. 80, to post it up (section 24) and then to investigate all claims publicly after due notice published in the village (section 27(1)). Section 27 also traces out what must be done when there are conflicting claims and it is provided by rule 2 of the Settlement of Title (Procedure) Rules, 1928, that rival claimants shall be notified of the date of hearing of conflicting claims. The Settlement Officer failed to notify the Government Officer who had signed the claims of the date fixed for the hearing of the disputed claims, although he had listed Government as being the Defendant. The Settlement Officer has explained this omission by pointing out that Settlement Officers had received instructions from the Commissioner of Lands and Surveys reminding them of the provisions of section 29 of the Ordinance and informing them not to expect a representative of the Attorney General to appear on behalf of Government in all settlement cases. The instructions were conveyed in two letters dated respectively 13.5.1938 and 5.11.1939, and Settlement Officers were also thereby asked to request the attendance of a Government representative whenever they considered his presence necessary.

It is not for me to question the wisdom of those communications,

but I am not surprised that they have brought about or at least greatly contributed to the difficulty in the present case.

The Settlement Officer pronounced his decision on the 12.10.43 and carefully explained why he decided to allot to Government part only of the Forest Reserves claimed by Government. He, however, allotted to Government two parcels in Block 13680 which had not even been claimed by Government.

Against that decision pronounced on the 12.10.43, Government sought to appeal. Government was undoubtedly entitled to apply for leave to appeal. The Settlement Officer refused to grant leave and gave the explanation that the Government claims amounted to no more than a reminder that the Settlement Officer should order registration in the name of Government, if the claims made by private persons failed. The Settlement Officer added that he had borne section 29 of the Ordinance in mind and that he saw no reason for granting leave to appeal. Application was then made to the Chief Justice under the provisions of section 63 of the Ordinance, but the application was made out of time and was therefore refused. Subsequently, the Settlement Officer published the Schedule of Rights and this gave rise to an application on behalf of the Attorney General for a revision of the decision set out in the Schedule. Mr. Wicks who appears for the Appellant has stressed the fact that this application made under section 33(4) of the Ordinance relates not only to parcels which had been mentioned in the application for leave to appeal but also several other parcels. The significance of this fact will appear later on.

The application under section 33(4) was refused by the Settlement Officer who gave his reasons for such refusal. The next step taken on behalf of Government was to apply for leave to appeal against this refusal. Again the Settlement Officer refused leave and the main reason given by him was that he did not consider that he had power to grant leave to appeal against the refusal to exercise the discretion vested in him by section 33(4) of the Ordinance. Leave to appeal was subsequently granted by the Chief Justice.

A preliminary objection was raised before us on behalf of some of the Respondents (represented by Mr. Eliash) to the effect that no appeal lies against a refusal by the Settlement Officer to exercise the discretion vested in him by section 33(4) to revise a Schedule of Rights. We ruled that leave to appeal having been granted we would hear the parties and would, if satisfied that the appeal did not lie, dismiss it on that ground.

Section 33(4) of the Ordinance reads as follows:—

> "During the period of thirty days in which the Schedule of Rights is posted, any person claiming a right to land may apply to the Settlement Officer, and thereupon the settlement officer may revise his decision in the schedule of rights if due notice is given to any person affected by the application for revision".

I confess that I have had, and still have, difficulty in interpreting that subsection as meaning that any person who holds himself out as being a claimant (although he had not made a claim within the prescribed time) may use section 33(4) to urge his alleged claim and presumably force a re-opening of the investigations and the holding of a fresh hearing. Were it not for decisions which I must respect, I would have understood section 33(4) to provide for final adjustments as between parties who had taken part in settlement proceedings. However, it was decided in Land Appeal 92/1934, 2 P. L. R. 471, that the operation of that subsection was not confined to persons who had previously claimed. The learned Judges who gave that decision mentioned that they appreciated the inconsistency between the subsection as interpreted by them and the provisions of the Ordinance (and I would add of the Rules) which regulate the addition of new claims prior to the settlement of rights; it is, therefore, impossible to avoid the conclusion that the point received full attention. I should perhaps call attention to the fact that at the time L. A. 92/1934 was decided the subsection provided for application to be made and revision effected (if at all) within fifteen days. Subsequently, Ordinance 48/39 enacted a new subsection (which is the present subsection (4) of section 33) providing for the application to be made within 30 days from the posting of the Schedule of Rights but not limiting the time for the carrying out of the revision. Land Appeal 92/34 was mentioned with approval in C. A. 455/44, 12 P. L. R. 388, and I therefore must accept that the principle of new claimants under section 33(4) is established. What constitutes a revision of the decision of the Settlement Officer in the Schedule, and how such revision should be carried out are points which, so far as I know, have not been definitely settled, but I consider myself entitled to hold that a Settlement Officer is justified in refusing to revise, except in very special circumstances, where the Applicant has been a party to the proceedings prior to the posting up of the Schedule of Rights. I will go further and say that section 33(4) is not intended to supply a means of appealing twice against a decision given by a Settlement Officer, and I will now proceed to examine this aspect of the matter. I would here mention that I have been at pains to try and understand sections 31, 32, 33(1) and 33(4) and have found them very confusing. Put shortly, my

difficulty on the question of appeal is whether the law (as it now stands, provides that the Schedule of Rights is to be published after the investigation of claims referred to in section 27(1) and should deal only with undisputed claims. If this were the correct view, the result would be that the decision in the case of disputed claims would be notified to the parties concerned and to the Registrar and would not appear on the Schedule of Rights. Originally, section 30 of Ordinance 9 of 1928 (now section 31 of Cap. 80) laid down that the Schedule of Rights was to be drawn up after all claims had been investigated and section 33 (formerly 32) provided only for the making of clerical corrections to the Schedule while it was posted up. Then Ordinance No. 28 of 1930 and 33 of 1932 introduced amendments which made it clear that the Settlement Officer has to draw up the Schedule of Rights after investigating such claims as were undisputed and that after the Schedule had been posted up and sent to the Registrar, the latter would be informed of the result of disputed claims. Furthermore, the amendment of the appeal section in 1930 fitted in with the then new scheme by providing for appeals from decisions in undisputed claims, *i. e.* decisions published in the Schedule of Rights. As matters then stood, therefore, and until 1939, it was clear that in a disputed claim the parties could only appeal against the decision notified to them in accordance with section 27(8) of the Ordinance. The amendments made to section 31 by Ordinance 48 of 1939 and 12 of 1942 have befogged the position, and I am not surprised to hear that Settlement Officers do not follow a uniform practice. Anyhow, my view is that in cases where a decision has been given in a disputed case and has been duly notified, the parties cannot seek revision of the Schedule of Rights when that Schedule happens to be published subsequently to the decision in the disputed case, except for the limited purpose of having final adjustments made where the necessity for adjustments appears on the face of the Schedule.

The view I have just expressed about the use of section 33(4) by a party to a disputed claim does not wholly dispose of this appeal. It remains to examine whether the fact that the application for revision embraced parcels not mentioned in the application made for leave to appeal justifies Mr. Wicks' contention that in so far as these additional parcels are concerned the Settlement Officer was not justified in refusing to revise. I must say that the argument does not alter the view I have already expressed because I do not see why it was impossible to appeal, or seek to appeal, against the decision as affecting all the parcels.

The conclusion I have arrived at, therefore, is that the Settlement Officer was justified in refusing to revise.

When leave to appeal from refusal to revise was made, the Settlement Officer stated that in cases of refusal to exercise his discretion under section 33(4) there is no appeal even with leave. With that view I disagree.

The appeal is dismissed. The Respondents other than No. 1 and No. 76 sided with the Appellant and I will not allow them any costs. Respondents 1 and 76 will each have costs on the lower scale and LP. 20 (twenty) advocate's attendance fee for each advocate (*i. e.* Mr. Eliash and Feiglin).

Delivered this 3rd day of April, 1947.

British Puisne Judge.

Curry, A/J.: I agree with the judgment of my learned brother, but desire to make one or two further comments. It is true that as a result of numerous amendments the Ordinance is now confused and complicated and it requires to be redrafted by the legislator, but from my interpretation of Section 31 of the Ordinance, it is not possible for section 33(4) to apply to disputed claims. According to section 31 the Settlement Officer investigates all the rights and settles those which are undisputed. He then makes out his Schedule of Rights, stating in all the undisputed cases who is entitled to the land, and in the disputed cases making an entry "disputed". That Schedule of Rights is posted in the village and a copy sent to the Registrar of Lands. Subsequently, under sub-section (2) he notifies the Registrar of his decision in respect of the disputed claims, but it is to be noted there is no further posting of the schedule in respect of these decisions. It follows, therefore, that as no schedule of rights is posted after the Settlement Officer's decision in respect of disputed claims, it is not possible for section 33(4) to apply to such cases.

It would appear that some Settlement Officers do not adopt the correct practice, as I interpret it. Some of them apparently do not post the schedule of rights until after they have made their decisions on the disputed claims, and in fact that is the case here. Had the Settlement Officer in this case posted his schedule of rights after dealing with the undisputed claims, and then merely notified the Registrar of his decision in this matter, Government could not of course have made this application under section 33(4). In my opinion, however, the fact that the wrong procedure has been adopted by the Settlement Officer does not enlarge the rights of any party.

Coming now to the question whether in the event of the Government having the right to apply under section 33(4), the Settlement Officer exercised his discretion wrongly in refusing to revise his decision: — In the first place, I would remark that this section must be distinguished from a general appeal section. In my opinion, revision should only be exercised by a Settlement Officer in comparatively rare cases. A revision does not mean a re-hearing of the whole case. I consider that it is little more than a request to reconsider his decision in the light of all the evidence already before him — with the possible exception that a party who had not previously claimed, might be allowed to adduce evidence. I certainly do not think it permits claimants who were parties in the Settlement proceedings to adduce further evidence and in fact have a re-trial.

For the foregoing reasons I agree that the appeal must be dismissed and costs allowed, as in the judgment of my learned brother.

A/British Puisne Judge.

HIGH COURT No. 42/47.

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

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

IN THE PETITION OF:—

Eliezer Zylberberg. PETITIONER.

v.

The Chairman of the Billeting and Accommodation Committee for the Lydda District & 2 ors. RESPONDENTS.

Requisition by requisitioning authority of a room in favour of L. — Subsequent cancellation of Requisition Notice — L. who got possession by virtue of Requisition Notice refusing to vacate — Ineffectiveness of eviction order issued by Billeting Officer.

Return to an order *nisi*, dated the 8th of April, 1947, directed to the 1st and 2nd Respondents, calling upon them to show cause why they and each of them should not refrain from executing the decision given by the 1st Respondent on the 31st day of March, 1947, in Billeting File No. 55 of Tel Aviv; and why the said order of the 1st Respondent should not be set aside and/or withdrawn. Order *nisi* discharged:—

While a person holding by virtue of a Billeting Notice which has been cancelled must return that notice when demanded and, if failing to comply, is liable to penalties, he is not under obligation to give up possession to Billeting Authority, and latter has no power to issue an order of eviction.

(*M. L.*)

ANNOTATIONS: Although the judgment speaks of a "requisitioning authority", "requisitioning" and "requisition notice" it deals as may be seen only with the interpretation to be given to Regulation 72A of the Defence Regulations which mentions only "a competent authority", "billeting notice" and "requires to furnish accommodation".

Quaere: Whether same considerations apply also to a requisition made under Regulation 48 of the Defence Regulations or under Regulation 114 of the Defence (Emergency) Regulations.

(*A. G.*)

FOR PETITIONER: Waldman.

FOR RESPONDENTS: Nos. 1 & 2 — Crown Counsel — (Wicks).
No. 3 — Michaeli.

ORDER.

We emphasize that the order we are about to deliver is based on the consideration of one point and one point alone. It is the question of the powers given under section 72A of the Defence Regulations. The facts are that under the Regulations a room in Tel Aviv was requisitioned by the proper requisitioning authority. There is no doubt that the authority was perfectly entitled to requisition the room. Later, for reasons which seemed good to the requisitioning authority, he decided to cancel the requisition. Here again we think he was perfectly entitled so to do. But having cancelled the requisition notice he purported to issue a further order, which was Exhibit "B" to the petition. We would mention here that under the requisition notice, the Petitioner managed to get possession of the room, which he refused to leave when the billeting notice was cancelled. He gave as a reason, the fact that, apart from this requisition notice altogether, he had a legal right to remain in this room, a right which in fact he contested in the proper Court, and which is now the subject matter of appeal.

Exhibit "B" interpreted briefly, was an order issued by the Chairman of the Billeting Committee to the police to evacuate the Petitioner from the room, if necessary by the use of force. We cannot find in the regulations any authority for the issue of such an order. Under sub-regulation 7 of Regulation 72A the person who is holding by virtue of a Billeting Notice which has been cancelled, is under a legal obligation to return that Billeting Notice when demanded. If he fails to comply with that obligation he is liable to the penalties provided in

sub-section 8. We would remark that the regulation makes no mention of an obligation on the person who is in possession by virtue of a billeting notice, to render up vacant possession to the Billeting Officer; the only obligation upon him is to deliver the Billeting Notice. If he chooses to remain on after the Billeting Notice has been cancelled, he is presumably a trespasser unless he has got some other legal right to remain on the premises. If he has got no such legal right, there is available legal procedure by which he can be ousted from the premises, but the Chairman of the Billeting Committee is not authorised by the Regulations to issue a notice of eviction such as that embodied in Exhibit "B". The order of the Court therefore is that this notice be cancelled.

Given this 7th day of May, 1947.

Chief Justice.

CIVIL APPEAL No. 362/45

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

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

IN THE APPEAL OF:—

Muhammad Karzoun. — APPELLANT.

v.

Adma Dallal & 2 ors. — RESPONDENTS.

Pleadings — Alteration of cause of action — Interest, whether payable from date of contract or action.

Appeal and cross-appeal from the judgment of the District Court of Jaffa, dated 22.10.45, in Civil Case No. 173/43; appeal and cross-appeal dismissed subject to an amendment as regards interest:—

When interest is payable in virtue of a contract, it may be claimed only for the period covered by the contract.

(*A. M. A.*)

ANNOTATIONS:

1. The facts underlying this case are as follows: In 1930 Appellant entered into a partnership agreement with Respondents whereby he acquired a half share in certain machinery and undertook to pay therefor the sum of LP. 692.—, payable over a three years' period with interest at 5% *p. a.*; Respondents contended that Appellant had not fulfilled his obligations and filed an action for (1) the said sum of LP. 692.— with interest at 5% from 1930, and (2) an account

in respect of the income out of the said machinery received by the Appellant. The District Court gave judgment (1) for LP. 692.— with interest from the date of the filing of the action only, and (2) refusing the prayer for an account. Hence this appeal.

2. An appellant is bound by the grounds set out in his notice of appeal: C. A. 361 & 370/45 (1945, A. L. R. 790) and note 1.

(*H. K.*)

FOR APPELLANT: F. Ghussein.

FOR RESPONDENTS: B. Azar.

JUDGMENT.

These are an appeal and a cross-appeal from the judgment dated 22.10.45 of the District Court, Jaffa, in C. C. 173/43.

The Appellant (original Defendant) is satisfied with the finding of the Court below that there was a partnership between him and the Respondents, and the ground upon which he is appealing is stated in the following terms:—

> "The Court did not hear any evidence to try the issue of payment of the price of the plant by the Appellant and it was wrong for the Court to say that the Appellant did not prove his allegations."

When Fawzi Eff. Ghussein argued this appeal before us he relied on clause 3 of the agreement (Exhibit M/1) which provides as follows:—

> "The first party has stipulated, and the second party agreed, that the payment of the said value together with the interest should be out of the revenue of the said motor accruing to the second party, after the deduction of the fees and costs accruing to his said share."

Fawzi Eff. submitted that by virtue of this clause the question whether the Appellant has paid the whole or part of the price (LP. 692) of the plant is one which can only be considered in the winding-up proceedings, and that the Court below ought not to have dealt with it.

On referring to the statement of defence, however, it appears — see clause 3(b) — that the Appellant did not then rely on clause 3 of the agreement, but pleaded that promissory notes had been made out to the order of the Respondents to cover the agreed price of the plant, and that those promissory notes had been met at maturity.

When he gave evidence the Appellant told a different story, and said that he had purchased half of the mill and the press for LP. 650, on account of which he paid LP. 350 when the contract was made, that he had given three promissory notes of LP. 100 each for the balance, and that he had redeemed the promissory notes.

The trial Court did not believe the Appellant's evidence on this point.

So the position is this — that the Appellant having contradicted

his pleading when he gave evidence, and having been disbelieved by the Court, and having put forward the ground of appeal as set out above, has argued quite a different point. This he is not entitled to do.

We find, therefore, that the appeal fails and must be dismissed with costs on the lower scale to include an advocate's fee of LP. 10 for attendance at the hearing.

We now come to the cross-appeal. The first submission is that the trial Court ought to have allowed interest at 5% as from the date of the contract (11.7.30) and not only from the date of action. The contract — Exhibit M/1 — provided that the sum of LP. 692 should carry interest at 5%. This interest, arising as it does from the contract, must be limited to the contractual period which is three years from the date of the contract. He being a successful Plaintiff is also entitled to the usual interest from the date of taking action. That is to say, the cross-Appellants must have interest at 5% on the sum of LP. 692 for three years, in addition to interest on that sum at 6% as from the date of the action until payment.

The second ground of appeal is a prayer for the setting aside of the trial Court's finding that there was a partnership, and for the remission of the case to the trial Court for decisions to be given in respect of other prayers.

The trial Court in its judgment stated:—

> "There are strong and satisfactory proofs that both parties are partners, each has half of a share, in the subject matter of this case, and that the Defendant was running the flour-mill and olive oil-press, in his capacity as a partner during all this period *i. e.* as from the date of the agreement until the date of lodging this action *viz.* 1943, and he was not a usurper as alleged by the Plaintiffs in their action.

This is a finding of fact, and having perused the record we are not prepared to say that there was no evidence to support the finding that there is a partnership.

There is an alternative prayer that the case should be remitted with a direction to the trial Court that an order of dissolution is unnecessary, and that the other prayers should be dealt with.

The trial Court having held that there is a partnership we consider that the remaining issues between the parties could most satisfactorily be dealt with in winding-up proceedings.

The cross-appeal must therefore be dismissed except for the amendment regarding interest. We order no costs on the cross-appeal.

Delivered this 25th day of November, 1946.

PRIVY COUNCIL LEAVE APPLICATION No. 6/47.

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

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

IN THE APPLICATION OF:—

Keren Kayemeth Leisrael Ltd., Jerusalem. APPLICANTS.

v.

Saleh Said el Nahawi of Safad. RESPONDENT.

Application for leave to appeal to Privy Council — Stay of execution pending appeal.

Ruling in an application for leave to appeal to the Privy Council, from the judgment of the Supreme Court, sitting as a Court of Appeal deted 10.2.47 in C. A. 220/46.

1. Where application for stay of execution is made to the Supreme Court in course of hearing of application for leave to appeal to Privy Council, notice of an intended application to move for stay need not be given.

2. Supreme Court may act under Art. 7, Palestine (Appeal to Privy Council) Order-in-Council, as to carrying judgment into execution or suspension of execution, without being asked by either party.

(*M. L.*)

FOR APPLICANTS: Eliash.

FOR RESPONDENT: Cattan.

RULING.

We are of opinion that notice of an intended application to move for stay of execution need not be given where the application for stay is made to the Supreme Court in the course of the hearing of the application for leave to appeal. In the present instance, for example, both parties are represented before us and are well aware of the powers vested in the Court by Article 7 of the Palestine (Appeal to Privy Council) Order-in-Council; this Court may act under Article 7 without being asked by either party, and it would be illogical to hold that one of the parties cannot without notice move the Court to exercise its powers under the said article.

Given this 25th day of April, 1947, in the presence of Mr. Scharf for Applicants and of G. Elia, by delegation, for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 140/46.

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

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

IN THE APPEAL OF :—

Dr. A. M. Buxbaum. APPELLANT.

v.

Abraham Setton. RESPONDENT.

Landlord claiming tenant's flat for his own use — Magistrate finding landlord's claim capricious though the alternative accommodation offered to tenant adequate — Court of Appeal reversing Magistrate's findings confirmed on appeal by District Court.

Appeal from the judgment of the District Court, Jerusalem, in Civil Appeal No. 1/46, dated 4th April, 1946, dismissing Appellant's appeal from the judgment of the Magistrate's Court in Civil Case No. 71/45, dated 21st December, 1945, allowed:—

1. Court of Appeal may, on the evidence on record, find that contrary to the conclusion arrived at by the Magistrate and confirmed on appeal, the landlord seeking eviction has proved a genuine present need for the flat he claims.

2. Where one of the flats in landlord's house was at a certain time vacant and landlord claims tenant's flat as being more spacious than his own, argument that landlord could have satisfied his need, if any, of better accommodation by joining together his own flat with the one that became vacant should not influence Court's decision as to genuineness or otherwise of the requirement.

3. Fact alone that two months before demanding the flat for himself and refusing to accept rent landlord requested tenant to sign lease and pay rent is not sufficient for holding that landlord was capricious and that his requirement of the house was not reasonable.

4. Queston of balance of inconvenience does not arise in cases where landlord shows a genuine present need for tenant's flat and flat offered to tenant constitutes adequate alternative accommodation.

(*M. L.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 372.

2. On point 1 see C. A. 13/46 (1947, A. L. R. 135) and annotations.

3. It is submitted that although the question of inconvenience should not in accordance with this decision be taken into consideration when dealing with the question of alternative accommodation it still has to be taken into consideration by the Court when deciding whether it is reasonable to order eviction.

4. On question of non interference of Appellate Court with Magistrate's find-

ing with regard to alternative accommodation see C. A. 411/44 (1945, A. L. R. 373); C. A. 466/44 (1945, A. L. R. 423; 12, P. L. R. 187); C. A. 59/45 (1945, A. L. R. 624; 12, P. L. R. 459); C. A. 71/45 (1945, A. L. R. 705; 12, P. L. R. 363) and annotations in A. L. R. but see also C. A. 398/44 (1945, A. L. R. 269; 12, P. L. R. 55).

5. On point whether an appellate Court may interfere with finding of Court of trial that premises are reasonably required by landlord see C. A. 13/46 (1947, A. L. R. 135) and annotations.

6. On balance of conveniences see Blundell's Rent Restrictions Cases No. 82, 97, 106, 126, 150, 300, 308, 337, 431 and 458.

(*A. G.*)

FOR APPELLANT: Goitein and Buxbaum.

FOR RESPONDENT: Eisenberg and Perlmutter.

JUDGMENT.

Curry, A/J.: The Appellant, a landlord, brought an action to recover possession of the flat he had leased to the Respondent on the ground that it was reasonably required by him. The Magistrate dismissed the action, and that judgment was upheld by the District Court on appeal.

The flat in question is a top flat consisting of six rooms, and the underneath flat, at present occupied by the Appellant, consists of five rooms. Some of the rooms of the top flat are larger than those of the underneath flat.

The Appellant's family at the time of the institution of the action consisted of seven persons — Appellant, his wife and five children, aged 17, 14, 10, 2 and 1 year. Evidence, which was not challenged, was given on behalf of the Appellant that he needed a children's maid to sleep in and look after the two babies, — in fact they always had a maid prior to the birth of the two babies. Evidence which was not contradicted was also given that his wife held meetings in respect of certain societies for the assistance of the poor and of expectant mothers, which meetings had to be conducted in a certain amount of privacy. Finally, there was evidence that Appellant had a library in the house where he did a certain amount of office work.

Now the first question to be asked and answered is, not whether Respondent would in the event of the change over suffer as much or greater inconvenience than the Appellant suffers at present, but whether in the light of those uncontradicted facts the Appellant has shown that he has a genuine present need of the top flat for his own occupation. The flat is used as follows: one room as a sitting-room; a passage room as a dining-room; one bed-room for two girls, one

bedroom for one girl and young boy, and the third bed-room for the parents of the baby. I think on those facts alone the only reasonable answer is that the Appellant has shown that he has a genuine need of the extra room, and when one considers his very reasonable desire to have a nurse maid to help with the babies, there can be no possible doubt, to my mind, that he has proved a genuine present need for the top flat.

The Magistrate came to the conclusion that the requirement was a capricious one, and it is clear that he has come to the decision as a result of two facts which emerged from the evidence.

Originally the house consisted of the top flat as it is, and a bottom flat of four rooms. In 1941 the Appellant built additional rooms adjoining his own. As a result of that extra building he got one extra room, and another flat of two rooms, bath-room and kitchen was formed. In August, 1944, the flat became vacant, and the Magistrate argues that the Appellant could have taken in, this other flat to have formed one with his own, as there was a connecting door.

This line of reasoning is, in my opinion, quite erroneous. In the first place it must be clearly appreciated that the Rent Restrictions Ordinance was enacted merely to restrict the increase of rents and the eviction of tenants in view of the shortage of accommodation, and there was no intention to deprive landlords of lawful enjoyment of their property. There is no reason why a landlord of several houses or flats should not live as he wishes to live, so long as he acts reasonably. The Ordinance certainly does not entitle a tenant of one flat to say to his landlord — "if you have insufficient accommodation you must joint together the two flats you own and live in those rather than claim mine". The Magistrate seems to have overlooked the fact that by joining the two flats the Appellant would have had two bath-rooms and two kitchens which were not necessary, and of course he would have lost unnecessarily rent for that other flat. The situation might well have been different had the landlord, when building the other flat, taken some of the rooms, but he actually got a net gain of one room. The Magistrate was wrong in allowing this fact to influence him in his decision on the matter before him.

The second fact from which it appears the Magistrate came to the conclusion that Appellant's request was capricious was that on the 17th October Appellant sent Respondent a letter requesting the latter to sign the lease and pay the rent for the coming year. The Respondent altered the date of the beginning of the rental year to 17.12.44 instead of the date of signature, and then returned the lease about the end of October. The Appellant apparently kept the forms and said nothing

further until Respondent sent the rent on the 15th December; Appellant then refused to accept the rent and demanded the flat for himself. On those facts the Magistrate seems to have come to the conclusion that the Appellant was capricious; but to change one's mind is not being capricious. It must be a change of mind without reason. The mere fact that the size of Appellant's family had not changed between October and December does not of necessity mean that the change of mind was capricious. One can well imagine that some sleepless nights, owing to the baby being troublesome, may well have caused Appellant's wife, with good reason, to say that it was impossible for her to carry on any longer without a nurse maid. In her evidence she says, "I am the principal sufferer from this state of affairs" — "I felt very nervous during these last months" — "I had no rest for lack of space". One must also not forget the important fact that it had always been their intention to occupy the top flat, and that as far back as 1940 Appellant informed Respondent that he needed the flat for himself. This was no last minute trumped-up excuse, but clearly a state of affairs finally brought to a head as the result of the extra strain resulting from the 7-months-old baby. Quite rightly, the learned Judge on appeal agreed that to describe the Appellant's condcut as "capricious" was somewhat wide of the mark (as he expressed it). Having found that Appellant's conduct was not capricious, however, the learned Judge decided that the Magistrate's finding that Appellant's requirement of the house was not reasonable could be supported. How the Judge came to that conclusion I am quite unable to conceive. Clearly the whole basis of the Magistrate's finding against Appellant was his capricious conduct, and if the Magistrate is wrong in that finding, as he is, then equally clearly the evidence supports Appellant's claim that he has a genuine present need of the flat.

Having answered that question, it merely remains to consider whether the alternative accommodation was suitable for the Respondent. The Magistrate in his judgment found that the Plaintiff's flat would have indeed constituted adequate alternative accommodation according to law. That finding undoubtedly is a correct finding. Whilst it is true the number of persons in the two families is the same, more accommodation is undoubtedly required when one has young children, and there was also the nurse to be accommodated. Having found that the alternative accommodation was adequate, however, the Magistrate goes on to say that he was satisfied that by residing with his family in the Plaintiff's flat the Defendant would have suffered an inconvenience not less than that of the Plaintiff and his family. Here again the Magistrate is considering irrelevant facts, for that is beside the point.

The question as to the balance of inconveniences does not arise in these cases, and should not be considered by Magistrate. There seems to be some prejudice by Magistrates against landlords as a class, as though they were living on immoral earnings. It is no more immoral to build or buy houses and live on the rents, than to buy goods and resell, living on the profits, or even to buy and sell stocks and shares and live on the profits and dividends — in fact it might well be argued that a man who employs his money in building houses is a benefactor to the community. If Magistrates would only keep their minds free from any of these considerations, and merely consider the following question, they would find these cases much easier to determine correctly.

The first question for a Magistrate to put to himself is, "On the facts before me, has the Plaintiff establishhed a genuine present need for the accommodation he claims?" If he has, the second question then arises, "Is the alternative accommodation offered, adequate?" and thereafter consider whether in all the circumstances of the case it is reasonable to give the judgment prayed for.

In this case there can be no doubt that the Appellant has proved a genuine present need of the top flat. He has also shown that there is suitable alternative accommodation for the Respondent, and that no circumstance exists which makes it unreasonable to give such a judgment.

In the result, therefore, the judgments of the Magistrate's Court and the District Court are set aside, and the costs reversed. Judgment to be entered for Plaintiff-Appellant as prayed, with costs of the appeal to include an advocate's hearing attendance fee of LP. 15.

Delivered this 30th day of April, 1947, in the presence of Dr. Buxbaum for the Appellant and Dr. Perlmutter for the Respondent.

A/British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

HIGH COURT No. 22/47.

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

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

IN THE PETITION OF:—

Boulus Hanna Boulus. PETITIONER.

v.

The Chairman and members of the District Motor Regulatory Board, Galilee District, Nazareth. RESPONDENTS.

Unsuccessful application for establishhment of an omnibus service on a certain route — Status of Motor Regulatory Boards — Non-interference of High Court.

Return to an order *nisi* issued on 3rd of March, 1947, directed to the Respondents, calling upon them to show cause why their decision, dated the 22nd of January, 1947, refusing Petitioner's application should not be set aside and why they should not be ordered to recommend the establishment of an omnibus service on the Bi'neh — Deir El Asad — Acre—Haifa route and the issue of a permit to the Petitioner to operate such service on the said route; order *nisi* discharged:—

1. Motor Regulatory Boards are not governed by any statutory provision and have no obligation to carry out certain duties in any specified way, they are only advisory bodies, free to conduct their activities in any manner they like.

2. High Court will not make an order to the effect that a person or a body must exercise his or its discretion in a certain manner.

(*M. L.*)

REFERRED TO: H. C. 78/39 (7, Ct. L. R. 45; 1940, S. C. J. 25; 7, P. L. R. 35).

ANNOTATIONS: On point 2 see case referred to. See also H. C. 26/47 (*ante*, p. 178) and annotations.

(*A. G.*)

FOR PETITIONER: Goitein and Rutberg.

FOR RESPONDENTS: L. Weston — (Legal Assistant).

JUDGMENT.

This is a return to an order *nisi* directed to the Respondents, calling upon them to show cause why their decision dated the 22nd of January, 1947, refusing Petitioner's application should not be set aside and why they should not be ordered to recommend the establishment of an omnibus service on a certain route and the issue of a permit to the Petitioner to operate such service.

An affidavit sworn by Mr. Thorne Thorne, has been filed on behalf of the Respondents, and the deponent was cross-examined. Mr. Thorne Thorne is Deputy District Commissioner, Galilee District, (at present acting District Commissioner). He is the District Commissioner's representative on the District Motor Regulatory Board of Galilee District and as such is the chairman thereof.

The decision referred to in the petition and in the order *nisi* was to the effect that the aforementioned Board rejected on the 22nd of January, 1947, the application made by advocate Kaiserman on behalf of the Petitioner for a permit to operate a new bus service. I might explain that the Board had been approached on several occasions by

the Petitioner to the same effect and, that the matter had received due attention according to Mr. Thorne Thorne's evidence.

Mr. Weston who appeared for the Respondent Board submitted that the application was misconceived in law because the Board is purely advisory and has no statutory duties.

Mr. Weston traced out the history of Motor Regulatory Boards and referred us to the recommendations made by a Board of Inquiry appointed in 1931 to inquire into the motor transport industry in Palestine. It appears from this report which was published in the Official *Gazette* of 1931 page 871 that a recommendation was made for the creation of Motor Regulatory Boards which would *inter alia* fix the maximum number of omnibuses plying between municipal areas and outlying settlements or between municipal areas. At page 900 of the Official *Gazette* for the same year the Government published a statement to the effect that the Government agreed in principle with the recommendation concerning Regulatory Boards. Regulatory Boards have in fact been appointed but no mention of such Boards was ever made in any Ordinance or Regulations dealing with road transport. Mr. Weston is, therefore, fully justified in submitting that these Boards have no statutory recognition and no statutory duties.

Mr. Goitein, for the Petitioner, has submitted that Regulatory Boards perform a public duty and that, in fact, no new bus route is included in the Schedules to the Road Transport (Routes and Tariffs) Regulations, 1934, and no permit to operate a bus service is issued by the licensing Authority except on a recommendation made by the Regulatory Board. Mr. Goitein also relied on H. C. 78/39, 7 P. L. R. 35 in which it was stated that the jurisdiction of the High Court of Palestine is "broadly in the nature of *mandamus* and prohibition" and that "in such matters this Court will exercise a wider jurisdiction, conferred upon it by law, than that of the Supreme Court in England".

In H. C. 78/39 the Court took into consideration Article 43 of the Palestine Order-in-Council, 1922, and section 6 of the Courts Ordinance and mentioned the types of cases in which the High Court had intervened. There is nothing in that decision to support the view that the High Court would make an order in a case like the present one where the Respondents have no statutory duties or no public legal duties. It is, however, clearly laid down in the said decision that the High Court will not be inclined to intervene where a discretion is vested in a public officer unless he has misdirected himself in law and has failed to direct his mind to the question of discretion. That decision also contains the statement that the Court will not make an order which cannot be effective.

Without venturing to lay down an exhaustive test as to the limits of the jurisdiction exercisable by the Supreme Court sitting as a High Court of Justice, I would say that in the present case the orders sought by the Petitioner cannot be made for the following reasons. A Motor Regulatory Board is a body which is not governed by any statutory provision and which has no obligation to carry out certain duties in any specified way. Although these Boards are consulted by Government and by licensing authorities, their advice is not at all required for the carrying out of the provisions of the Motor Transport laws. Also, this Court will not make an order to the effect that a person or a body must exercise his or its discretion in a certain manner, the more so as, in the present case, there is and cannot be any satisfactory proof that the attitude adopted by the Board is not justified.

Put shortly, the position is that Regulatory Boards are free to conduct their activities in any manner they like, there is no line of conduct traced out, and, what is more, they have no legal responsibility or duty.

For the foregoing reasons, the order *nisi* is discharged.

I wish to add that the facts of the present case tend to show that persons interested in the operation of bus services would feel more satisfied if they were given an opportunity to ascertain that the material points have been taken in consideration. Thus in the present case it is alleged that villages situate at about five kilometres from a main road are not properly served by the existing services and that villagers are overcharged and find difficulty in securing seats in the omnibuses. The Petitioner is obviously not convinced that proper information on these points has been made available to the Board. He may be wrong, but it cannot be denied that his feelings are not wholly unreasonable. Whether or not the law should be improved is a matter for the legislature, but, as things now stand, I venture to express the hope that the Respondent Board will make quite certain that there is no necessity for improving the transport facilities available to the villagers concerned.

The Petitioner will pay LP. 10 inclusive costs to the Respondents jointly.

Delivered this 30th day of April, 1947, in the presence of Petitioner, and L. Weston for Respondents.

British Puisne Judge.

INCOME TAX APPEAL No. 7/46.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Shaw, J.

IN THE APPEAL OF:—

"Necit" Near East Commercial Investment Trust Ltd. — APPELLANTS.

v.

Assessing Officer, Tel-Aviv. — RESPONDENT.

Income Tax — Company investing in shares and selling them at a profit — Capital increment — Sec. 5 — Objects of the Company.

Appeal from the decision of the Assessing Officer, Tel-Aviv, refusing to vary assessment No. Ltd. 256/6162, dated 12.2.46, allowed:—

A company investing in shares which are later sold at a profit, the transaction not being within the objects of the company, is not liable to tax on the profits so made.

(*A. M. A.*)

ANNOTATIONS: *Vide* I. T. A. 9/42 (10, P. L. R. 255; 1943, A. L. R. 278), C. A. 345/43 (10, P. L. R. 678; 1944, A. L. R. 50) and I. T. A. 3/44 (11, P. L. R. 462; 1944, A. L. R. 490) and authorities quoted in these cases.

(*H. K.*)

FOR APPELLANTS: Elhanani.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

This is an appeal from the decision of the Assessing Officer, Tel-Aviv, who refused to vary assessment No. Ltd. 256/6162 dated 12.2.46. By that assessment the Appellants were required to pay income tax in the sum of LP. 257.250.

Mr. Elhanani has appeared for the Appellants and Mr. Wittkowski for the Respondent. The appeal has been argued with great thoroughness on both sides, and a number of cases have been referred to. As Mr. Wittkowski rightly said the question to be decided is ultimately one of fact, and although the cases referred to are a guide to the principles to be applied, none of them can be said to be on all fours with the present case. What I have to decide here is a question of fact.

The Appellants were registered in Palestine as a company in 1935,

and their principal object was to finance instalment contracts, that is to say contracts for the sale of vehicles and other goods on the instalment system. The Appellants used to advance money on the bills which the purchasers gave to the distributors. The paid-up capital of the Company was LP. 12,500, and the volume of the advances used to be between twenty and twenty-five thousand pounds in normal years. In respect of the larger part of that sum the Company held bills, but there were also commercial transactions where the Company advanced money without taking bills. At the beginning of the war the Company restricted advances, and at the end of 1940 the volume of such business fell to about LP. 10,000.

Owing to the contraction of its normal business those who controlled the affairs of the Company naturally cast about for other methods of increasing their diminishing incomes obtained by way of interest on investments, and in 1942 they subscribed for 50 ordinary shares "B" out of 100 ordinary shares "B" at LP. 0.030 each (*i. e.* LP. 1.500) in the capital of Ramet Ltd.

In November, 1942, the Appellants subscribed for 200 Bearer Bonds (first issue) of LP. 10 each (*i. e.* LP. 2000).

On 24.9.44 the Appellants sold their holding in Ramet Ltd. for LP. 3750 making a profit of LP. 1254.500.

On 26.12.44 they sold 50 of the Bearer Bonds at LP. 10.975 each, and on 31.12.44 they sold 50 more at LP. 11 each, making a profit of LP. 98.750.

On 6.12.44, one bond out of the remaining 100 Bonds was drawn with a prize of LP. 10.

The Assessing Officer determined the Appellants' income as follows:—

Loss returned	LP. 271.
Less profit on sale of investments	LP. 1363.
	LP. 1092.
Less Company Profit Tax	LP. 63.
Chargeable income	LP. 1029.

Mr. Wittkowski has agreed that no tax is chargeable on the profit of LP. 10 on the Bond which was drawn, and the case for the Appellants is that the profits on the sale of the investments are capital profits and not trade profits, and are therefore not assessable to income tax. The submission is that in the year of assessment (1945/46) the Appellants, having suffered a loss, were not liable for any tax.

Section 5 of the Income Tax Ordinance, 1941, provides that income tax shall be payable upon income in respect of "gains or profits from any trade, business, profession or vocation, for whatever period of time

such trade, business, profession or vocation may have been carried on or exercised".

So the point for determination in this case is whether the profits on the shares of Ramet Ltd., and on the Bearer Bonds, were gains or profits from any trade or business.

Mr. Klaus Hermann, who was the manager of the Company from its inception in 1935 till 1941, has stated, and his evidence on the point has not been questioned, that during his term of office the Company never bought shares or promoted companies. Nor did it buy Bearer Bonds or other securities.

Mr. Max Mainz, who became manager in 1941, has stated that when he took over, the business activities of the Company had already dropped, and the liquidity of the Company's assets increased every month. The Company's chief investment (bills discounted) dropped from LP. 8000 at the beginning of 1941 to LP. 2400 at the end of that year. In 1941 the Company subscribed, in equal parts on its own behalf and on behalf of Ellern's Bank, for 498 ordinary shares of 500 mils each and 500 preference shares of LP. 5 each in Razilly & Co. In 1942 the Company transferred the shares owned by Ellern's Bank to that Bank. The Company still holds its own shares in Razilly & Co. The transfer to Ellern's Bank of their shares resulted in a profit of LP. 13 odd which the Assessing Officer accepted as being a capital profit. In 1942 the Appellants subscribed for 333 shares of LP. 1 each out of 1000 shares in the capital of Len Ltd. In 1943 the Appellants sold these shares making a profit of LP. 380 odd which the Assessing Officer accepted as being a capital profit.

Mr. Mainz has stated that the Company's investments in the Len, Ramet and Razilly firms were all intended to be permanent investments. That is to say, they were not made with a view to selling out at a profit. He states that the Appellants were compelled to sell the Len and Ramet investments. In the case of Len Ltd. they received no dividends. Another reason for selling was that their partners in the foundation of that Company wished to withdraw, and it was not within the capacity of the Appellants to continue alone in that line of business. In the case of Ramet Ltd. the Appellants were compelled to sell partly because they received no dividends, and partly because the activities of Ramet Ltd. increased to such an extent that the Appellant Company would have had to invest more and more money in its shares if they wished to retain control. Mr. Mainz has stated that the appellant Company was not willing to take shares in Companies which it could not control, and that if the Company had had

to invest large sums in Ramet Ltd. it would not have been able to re-establish its normal business. Mr. Mainz stated that Ramet Ltd. took building contracts which entailed risks amounting to one to two hundred thousand pounds, and that he told the appellant Company that he would retire if the Company did not sell its Ramet shares, as he was unwilling to share the responsibility for such extensive dealings.

Mr. Mainz has stated that the Bearer Bonds were subscribed for as an investment, and with no intention of selling them. He stated that he never thought that these bonds would appreciate in value in the way they did.

The Memorandum of Association (Exh. A) of the appellant Company has been exhibited by Mr. Wittkowski, and Mr. Elhanani has very candidly said that he thinks that within the terms of this Memorandum the appellant Company could even engage in speculative transactions. If there had been an express provision in the Memorandum of Association for the Company to buy shares or bonds with a view to selling them at a profit there would have been an almost irrebuttable presumption that the transactions with which I am dealing were entered into with a view to profit on re-sale. But there is no such express provision, and it is well known that Memoranda of Association are quite usually drawn in wide terms. The fact that it was possible for the Company to enter into a speculative transaction does not prove that the Company was formed with a view to investing money in such transactions, and the whole course of the Company's dealings prior to 1941 gives no indication of any such intention.

I was impressed with the evidence of Mr. Hermann and Mr. Mainz, and I see no reason for disbelieving Mr. Mainz when he says that the shares and the Bearer Bonds were bought primarily as an investment, and not with a view to making a profit on selling.

I do not think it is necessary for me to deal with the various cases which have been referred to as I am satisfied, and find as a fact, that these were intended to be genuine investments and in no way speculative dealings, and that the profits on sale are capital profits and therefore not liable for income tax.

The appeal is allowed, with fixed costs in the sum of LP. 25.

Delivered this 28th day of November, 1946.

British Puisne Judge.

PRIVY COUNCIL APPEAL No. 43/45.

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

BEFORE: Lord Uthwatt, Sir Madhavan Nair and Sir John Beaumont.

IN THE APPEAL OF:—

The Attorney General of Palestine. APPELLANT.

v.

Fakhry Ayyas. RESPONDENT.

Forfeiture of goods under Licensing of Exports Order, 1940, made under Export and Customs Powers (Defence) Ordinance, 1939 — Scope and Interpretation of relevant sections of the Ordinance — Sec. 26, Interpretation Ord.

1. Where a section in an enactment is not clear in its intendment, resort may legitimately be made to ancillary provisions related to that section in order to determine its proper meaning and to resolve any ambiguity; but not where the language of the section is clear and unambiguous.

2. Nothing in sec. 3(1), Export and Customs Powers (Defence) Ordinance suggests any limitation on the extent of the power to prohibit importation or exportation; exportation by any means is within ambit of sec. 3(1); throughout the Ordinance "export", unless controlled by context, includes export by land carriage.

3. Meaning of "place" in phrase "if any goods are brought to any quay or other place for the purpose of being exported" in sec. 3(5)(1)(b) is not limited by reference by "quay" and phrase affords no context for limiting the meaning of "exported" to sea carriage alone.

4. On meaning of "exported" see *op. cit.* p. 672.

(*M. L.*)

ANNOTATIONS:

1. The judgment of the Court of Appeal (C. A. 290/44) is reported in 1945, A. L. R. 285; 11, P. L. R. 602.

2. On the 1st point see Maxwell on the Interpretation of Statutes, 8th Edition, pp. 18, 19, 20, 26 and 27.

3. On meaning of place see Stroud's Judicial Dictionary, 2nd Edition, pp. 1483 & *seq.*

(*A. G.*)

JUDGMENT.

Lord Uthwatt: This is an appeal from a judgment of the Supreme Court of Palestine setting aside a judgment of the District Court of Haifa which had dismissed the Respondent's claim for the return of certain goods or payment of their value.

The goods in question were claimed by the Government of Palestine (represented in the proceedings by the Appellant the Attorney General for Palestine) to have become forfeited goods under the Export and Customs Powers (Defence) Ordinance, 1939. The facts are not in dispute; the only questions for decision relate to the proper construction of the Ordinance.

The Respondent in September, 1942, bought certain goods in Palestine for export to Syria. He made no effort to obtain a licence for export. On the 18th September, 1942, the goods were loaded into two lorries which left Jaffa at 2 *a. m.* After by-passing Samakh, where there was a customs post, the lorries were stopped by the police about 200 yards from the Syrian border and were then taken to Samakh where the goods were seized. The District Judge who tried the case had no difficulty in drawing the inference of fact that the goods were being carried for purpose of export.

The more directly material provisions of the Ordinance as it stood amended at the date of the seizure of the goods are as follows:—

> "3.—(1) The High Commissioner may by order make such provisions as he thinks expedient for prohibiting or regulating, in all cases or any specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the importation into, or exportation from, Palestine or any specified part thereof, or the carriage coastwise or the shipment as ships' stores, of all goods or goods of any specified description.
>
> (4) For the avoidance of doubt it is hereby declared that, without prejudice to the provisions of the enactments relating to customs with respect to ships and aircraft, the taking into or out of Palestine of ships or aircraft may be prohibited or regulated by an order under this section as an importation or exportation of goods, notwithstanding that the ships or aircraft are conveying goods or passengers, and whether or not they are moving under their own power.
>
> (5) (1) If any goods:
>
> (*a*) are imported, exported, carried coastwise or shipped as ships' stores in contravention either of an order under this Ordinance or of the law relating to trading with the enemy; or
>
> (*b*) are brought to any quay or other place, or waterborne, for the purpose of being exported or of being so carried or shipped in contravention either of an order under this Ordinance or of the law relating to trading with the enemy,
>
> those goods shall be deemed to be prohibited goods and shall be forfeited; and the exporter or importer of the goods or his agent or the shipper of the goods shall be liable, in addition to any other penalty under the Ordinance relating to Customs, to a penalty of two years' imprisonment or a fine of five hundred pounds or both.
>
> (2) If any such order as aforesaid prohibits the exportation of any goods unless consigned to a particular place or person and such

goods so consigned are delivered otherwise than to that place or person, as the case may be, the vessel in which the goods were exported shall be deemed to have been used in the conveyance of prohibited goods.

(3) If any goods are imported, exported, carried coastwise or shipped as ships' stores, or are brought to any quay or other place, or waterborne, for the purpose of being exported or of being so carried or shipped, a customs officer may require any person possessing or having control of the goods to furnish proof that the importation, exportation or carriage coastwise, as the case may be, is not unlawful by virtue either of an order under this Ordinance or of the law relating to trading with the enemy; and if such proof is not furnished to the satisfaction of the Director, the goods shall be deemed to be prohibited goods unless the contrary is proved.

7.—(1) For the purpose of securing compliance with the provisions of this Ordinance or any order made under section 3 of this Ordinance or with any other Ordinance relating to the importation or exportation of goods or with the law relating to trading with the enemy:—

(*a*) a customs officer may at any time refuse clearance to any ship;...

8.—(1) Where a person about to export goods from Palestine, in the course of making entry thereof before shipment, makes a declaration as to the ultimate destination thereof, and the Director has reason to suspect that the declaration is untrue in any material particular, the goods may be detained until the Director is satisfied as to the truth of the declaration, and, if he is not satisfied, the goods shall be forfeited.

(2) Any exporter or shipper of goods which have been exported from Palestine shall, if so required by the Director, satisfy him that those goods have not reached any enemy or any enemy territory, and if he fails so to do, he shall incur a penalty of treble the value of the goods or one hundred pounds at the election of the Director, unless he proves that he did not consent to or connive at the goods reaching an enemy or enemy territory, and that he took all reasonable steps to secure that the ultimate destination of the goods was not other than that specified in the documents shown or furnished to the customs officers in connection with the exportation of the goods".

Purporting to act under the powers conferred by sec. 3 of the Ordinance the High Commissioner by the Licensing of Exports Order, 1940, prohibited the export of all goods from Palestine.

There is one provision of the Interpretation Ordinance which is relevant. That provision runs as follows:—

"26. Where the words 'or' 'other' and 'otherwise' are used they shall unless a contrary intention appears be construed disjunctively, and not as implying similarity, unless the word 'similar' or some other word of like meaning is added."

In these circumstances two main questions of construction were

debated: first, whether or not the Ordinance when construed as a whole empowered the High Commissioner to prohibit export otherwise than by water; and second, whether assuming it did, head (*b*) of sec. 5 applied where export involving only carriage by land was in contemplation. A further point was raised by the Respondent that the goods in question were not brought to a "place".

The District Judge took the view that the Ordinance regulated the import and export of goods into and out of the country whether it be by sea, land or air and that to restrict the meaning of "other place" to places *ejusdem generis* with "quay" would not be giving effect to the obvious intention of the legislature as gathered from a general survey of the Ordinance.

The Supreme Court did not express any opinion upon the general effect of the Ordinance but was content to rest its decision on a conclusion that "other place" must refer to some place near or close to or part of a waterside.

For the reasons which they will now state, their Lordships have come to the conclusion that the views expressed by the District Judge are correct.

The first matter to be determined is the general scope of the Ordinance. The Respondent contended that as a matter of construction, the powers of the High Commissioner under sec. 3(1), as regards exportation, extended only to making orders prohibiting or regulating exportation by sea. It was argued that a consideration of this Ordinance as a whole and in particular the terms of head (*b*) of sec. 5(1) of 5(2), and secs. 7 and 8, showed that export by sea alone was under consideration, and that sec. 3(1) should accordingly receive a limited construction.

For the purposes of considering this argument, their Lordships are content to assume that head (*b*) of sec. 5(1) applies only to export by sea. As regards sec. 5(2) it is clear that read strictly it proceeds on the footing that where goods are exported, a vessel is concerned. The provision of sec. 7(1) do not aid the Respondent's argument, for the existence of a particular provision relating to ships, carries the point no further. Sec. 8(1) is of more assistance to the Respondent by reason that it assumes that an entry before shipment will be made whenever goods are about to be exported from Palestine. Their Lordships express no opinion as to the effect of sec. 8(2) but again are content to assume in favour of the Respondent that it applies only to goods shipped by sea.

The conclusion of the Respondent was that on giving due weight to the language and substance of these provisions, the proper inference

was that as regards exportation export by sea alone fell within the contemplation of sec. 3. That section should as a matter of construction be limited accordingly. The Ordinance would in light of Palestine's land frontiers be somewhat whimsical in character but that, it was argued, was no reason for attributing to the Ordinance a construction repelled by its terms.

In their Lordships' view the argument proceeds upon a false basis. The substantive provision is contained in sec. 3. All the provisions on which the Respondent relies (other than sec. 8) are provisions which are ancillary either to sec. 3 or to some other enactment. Sec. 8 is an independent provision. Their Lordships do not doubt that if sec. 3(1) was not clear in its intendment, resort might legitimately be made to ancillary provisions related to sec. 3(1) in order to determine its proper meaning and to resolve any ambiguity. But the language of sec. 3(1) is clear, unambiguous and sweeping. There is nothing in it to suggest that there is any limitation on the extent of the power to prohibit importation or exportation. There is indeed nothing in it to suggest that methods of export are being considered or dealt with at all. These circumstances taken alone are sufficient to preclude a gloss limiting the power to prohibit export to a power to prohibit export by sea carriage. The matter does not however rest there. First, a gloss cannot be put upon exportation without putting the same gloss on importation, for the two matters are in the section dealt with together and there is nothing in any part of the Ordinance to suggest that importation by sea alone is in view. Second, under the Act exportation from or importation into or from a part of Palestine may be prohibited. A land-locked part of Palestine might be selected as an area subject to restrictions on importation and exportation, and obviously sea carriage would then be out of the question. And lastly sub-sec. (4) "for the avoidance of doubt" declares that an order under sec. 3(1) may prohibit the taking out of aircraft moving under their own power. The inclusion of any means of export is therefore clear. The result is not that the ancillary provisions suggest a qualification on the terms of sec. 3 but that some of the ancillary provisions come under the stigma of ineptitude or of incompleteness.

Their Lordships are therefore of opinion that exportation by any means is within the ambit of sec. 3(1) and that therefore throughout the Ordinance "export", unless controlled by the context, includes export by land carriage.

The next question is the proper construction of head (*b*) of sec. 5(1). The contention of the Respondent is that head (*b*) is confined to "the bringing of goods to a quay or other like place for the purpose

of being exported by sea". This contention has to be examined on the footing that the word "exported", unless controlled by the context, is quite general in its signification.

It is beyond question that in head (*a*) of sec. 5(1) the word "exported" is not confined in its application to export by sea. No reason can be assigned for putting a limitation on its general scope. Head (*b*) on its general intendment, picks up the references to export, carriage coastwise and shipping as ships' stores contained in head (*a*), with the result that the phrase "If any goods are brought to any quay or other place for the purpose of being exported" — and it is the phrase that has to be construed, not particular words contained in it — has to be looked at in light of the general signification of the word "exported". Once the question is stated, the answer is apparent, when the provision of the Interpretation Ordinance quoted above is borne in mind. The meaning of "place" is not limited by the reference to "quay" and the suggestion that sea carriage alone is under contemplation is not inherent in the phrase "quay or other place". The words "quay or other place" afford therefore no context for limiting the meaning of "exported". In their Lordships' view therefore head 5(1)(*b*) applies where goods are brought to a place for the purpose of export by land.

The remaining question is whether "place" is confined in its application to a spot which possesses some characteristic other than locality. Their Lordships see no reason for accepting any such limitation.

In the result therefore the goods were, in their Lordships' view, duly forfeited according to law.

Their Lordships will humbly advise His Majesty that the appeal be allowed. The respondent will bear the cost of this appeal and of the proceedings in the Supreme Court.

Delivered this 15th day of April, 1947.

CIVIL APPEAL No. 29/47.

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

BEFORE: FitzGerald, C. J., Shaw, J. and Hubbard, A/J.

IN THE APPEAL OF :—

The London Society for promoting Christianity among the Jews & 2 ors. — APPELLANTS.

v.

Lionel Alexander William Orr & 2 ors. — RESPONDENTS.

Torts — Negligence in torts and in contract — Applicability of the English law of torts in Palestine — And of English law of contract — P. O. in C. Art. 46 — Effect of proviso, C. A. 113/40; C. A. 129/42; P. C. 30/39 — Local circumstances of inhabitants — Arts. 64, 109 O. C. C. P. — Notarial notice — Evidence of negligence, Evans v. Kerr — Vicarious liability — Measure of damage, Owen v. Sykes.

Appeal from the judgment of the District Court of Jerusalem, dated 2nd January, 1947, in Civil Case No. 147/45, dismissed:—

1. The English Common Law conception of tortious liability for the negligent performance of an act by a person holding himself out as competent, may be introduced into Palestine law under Art. 46 of the Palestine Order-in-Council.

2. Damages for mental suffering may not be awarded under Art. 109 of the Ottoman Code of Civil Procedure, but the article may be invoked in claims for future maintenance.

(*A. M. A.*)

NOT FOLLOWED: C. A. 113/40 (7, P. L. R. 363; 1940, S. C. J. 192; 8, Ct. L. R. 17).

REFERRED TO: C. A. 129/42 (9, P. L. R. 707; 1942, S. C. J. 753); P. C. 30/39 (8, P. L. R. 116; 1941, S. C. J. 279); Evans & an. *v.* Kerr (Gloucester Assizes, 30.5.1945); Owen *v.* Sykes, 1936, 1 K. B. 192, 105 L. J. (K. B.) 32, 154 L. T. 82.

ANNOTATIONS:

1. The judgment of the District Court is reported in 1947, S. C. D. C. 3; see *ibid.*, note 1 on p. 4 for previous proceedings in this matter.

2. The relevant authorities are fully set out in the judgment under appeal (*supra*) and in note 3 thereto.

3. For the latest English authority on the liability of hospitals, *etc.*, see Collins *v.* Hertfordshire C. C. & an., 1947, 1 All E. R. 633.

4. *Quaere* as to the effect of introducing the principles of torts in Palestine, as a result of this decision, such as the full doctrine of common employment (*cf.*, as to the unpopularity of this doctrine, the Editorial Note to Lancaster *v.* L. P. T. B. in 1946, 2 All E. R. 612) and the rule that no relief is granted in case of contributory negligence (the rule having now been abolished in England by the Law Reform (Contributory Negligence) Act, 1945 — but this Act cannot be applied in this country).

(*H. K.*)

FOR APPELLANTS: Asfour, Sahyoun and Bustany.
FOR RESPONDENTS: A. Levin and N. Solomon.

JUDGMENT.

This is an appeal against a judgment of the District Court of Jerusalem, whereby the three Appellants were adjudged jointly and severally to pay damages for negligence in the sum of LP. 14,910. The negligence

complained of was held both to give rise to liability in tort and to be a breach of contract. The same sum was awarded in respect of both causes of action.

The action arose out of serious and permanent physical injuries suffered by the infant third Respondent when, as a new-born baby, she was under the care of the first Appellant Society exercised through its nursing sister, Miss Rendle, the second Appellant, and its probationer, the third Appellant. The injuries were caused by a leaking hot-water bottle.

The relevant facts are as follows. At the time of the confinement of the second Respondent, Mrs. Orr, the first Appellants (to whom we shall now refer as the Society) were conducting the maternity section of its hospital in Jerusalem with one nursing sister, Miss Rendle, and with two probationers, one by day and one by night. The third Appellant was the night probationer. Apart from Mrs. Orr, there were another lady and her twins, eight days old, in the maternity section.

At about 6 *p. m.* on 14th April, when Miss Rendle was about to take Mrs. Orr to the labour ward, she noticed in her bed a wet patch on the under sheet near the mouth of the bottle. Being busy with Mrs. Orr, she did not examine the bottle but placed it on a window-sill. She did, however, think that since the wet patch was near the mouth of the bottle the leakage must have been caused by looseness of the stopper. This same bottle found its way into the cot in which the new-born child was subsequently placed. Miss Rendle says the bottle must have been in the cot by 7 o'clock that evening. Between the birth of the baby at 8.10 *p. m.* and 10 *p. m.*, when the routine weighing and washing of the baby was completed, Miss Rendle twice handled the hot-water bottle in the course of taking the baby out of the cot and putting her back again, but she saw nothing to arouse her suspicions. She knew it was the same bottle which had leaked before, but she was satisfied with the explanation of a loose stopper.

The water in the bottle was not changed again until 4 *a. m.* on the next morning, *i. e.* 15th April, when it was changed by the probationer. She noticed no leakage when she took the bottle out of the bed, and when she had filled it she tested it as she had been taught to do. She did not, however, squeeze the bottle after filling which, according to the Plaintiffs' witness, Dr. Eli Davis, Deputy Director of Medicine at the Hadassah Hospital, is a necessary part of the routine of testing a bottle for soundness. The probationer replaced the filled bottle about 4.10 *a. m.* and stayed in the same room until 4.30 *a. m.*

There were two blankets between the bottle and the baby, and the

baby was wearing a long sleeved vest, a coatee and long bootees. At 4.30 *a. m.* the probationer went into the next ward to see the mother of the twins. After a few minutes she heard the baby cry, ran to her and found that her colour had changed, and at once called Miss Rendle, who was with the baby by 4.40. The baby was in a state of collapse, and Miss Rendle gave her an injection of coramine. Dr. MacLean, the doctor in charge of the hospital, was then called, and arrived at 5 *a. m.*

On these facts the learned trial Judge found against all three Appellants in tort: against Miss Rendle and the probationer, for negligence in nursing the baby and in testing the bottle, and against the Society, as being responsible for the torts of its servants. He also found against the Society in contract, on the ground of its failure to provide the adequate nursing and safe equipment it had undertaken to provide.

Two important questions of law arise in this appeal: (1) whether the English law of tort as regards negligent acts and ommissions causing damage to the person applies in Palestine; and (2) whether the English law of contract applies, or whether the Court must be guided only by the relevant provisions of the Ottoman Code of Civil Procedure.

On the question whether the English law of liabilities for tort applies wholly or in part to Palestine, Article 46 of the Palestine Order-in-Council is relevant. The Article is as follows:—

> "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman laws as have been or may be declared to be in force by public notice, and such orders-in-council, ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date."

Now the English Law of Torts, except to the limited extent that it has been codified in statutes, is part of the Common Law. Article 46 therefore applies it to Palestine, subject to the two limitations imposed by the Article. Those limitations are:—

> "Save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions."

And the proviso:—

> "Provided always that the said common law and doctrines of equity

> shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

There is no statutory law of torts in Palestine, so that the first limitation is not applicable.

We have now to consider the effect of the proviso. In Civil Appeal 113/40 (7, P. L. R. 1940, p. 363) the Court by a majority decision were of the opinion that it would be a grave injustice to force on Palestine the common law of England which Mr. Justice Copland, who presided in that case, designated as a customary law founded on totally different customs and habits of a totally different race.

The general principles embodied in this decision would appear to have been questioned in a later case (C. A. 129/42, 9, P. L. R.). Moreover, since Civil Appeal 113/40 was decided the Privy Council delivered judgment in Appeal No. 30 of 1939 (8, P. L. R. 1941, p. 116) which confirms our opinion that Article 46 imported into Palestine far more of the Common Law of England than the Court who decided Civil Appeal 113/40 supposed.

It seems to us that a perusal of the relevant cases discloses a sufficient conflict of judicial opinion on the issue to justify us in refusing to be bound by the previous decision of this Court in Civil Appeal 113/1940. We have come to this conclusion with less hesitation, as it might well be argued that at the time when Civil Appeal 113/40 was decided conditions in Palestine were such that it could reasonably be said that local circumstances did not render the application of this particular part of the Common Law necessary. We are satisfied, however, that those circumstances, if they ever did exist since the advent of the British Administration, do not exist today. There is now in Palestine a population of 600,000 Jews with Western ideas of culture and Western ideas of commerce. There is a progressive Arab population of one and a half million, also with strong cultural and commercial ties with Europe. It may be that some specific form of tortuous liability which has its origin in conditions peculiar to the English way of life might be considered out of place in Palestine. But the conception of a person being liable for the negligent performance of an act which he holds himself out by reason of his professional qualifications, or the business he carries on, as peculiarly qualified to perform efficiently, is far too universal to justify us in holding that there is anything in the circumstances of Palestine and its inhabitants which would preclude us from importing (under the provisions of Article 46 of the Order-in-Council) the English law as to tortuous liability.

As regards the law of contract, under Article 64 of the Ottoman Code of Civil Procedure parties may make what contracts they please, subject to considerations of public policy; and any kind of contract which is not expressly provided for in the laws of Palestine must, in our view, be taken to be made under the provisions of this Article. It follows, therefore, that the question of damages in the present case, in which the contract is of such a nature that its breach cannot be remedied, and no notarial notice was therefore necessary to found a claim in damages, and in which no bad faith is alleged, must be governed by Article 109.

Mr. Asfour has submitted that the learned trial Judge went against the weight of the evidence. It appears to us that there is no substance in this submission. As regards the finding that the nursing was inadequate, which, as far as we understand it, refers mainly to the number of nurses, there was the evidence of Dr. Davis which the Court was entitled to rely on. In any case, the injury which occurred does not seem to have been due to an inadequate nursing staff, nor did the learned Judge so find. The whole question of negligence centres around the leaking bottle, and we are unable to say that the trial Judge was not justified in finding negligence on the part of Miss Rendle. It seems to us that the Judge was not insisting on too rigorous a standard, especially in the case of a new-born baby, when he concluded that Miss Rendle should not have been satisfied with her first speculation that the stopper was loose. She herself said in evidence, "I would normally presume that the stopper was not screwed in properly. Normally it is tested in the usual way to see if there is any other cause of leakage. One has to be on one's guard against perforations". And the defence witness, Miss Morris said, "If I find a leaking hot-water bottle in a patient's bed I would put it aside with the intention of examining it later. I hope I'd carry my intention out. If I'd had no time to do this, but I saw it had been placed in another patient's bed and I saw it was dry, I'd not remove it, as I would think the leakage was from the stopper. I'd come to this conclusion if I saw no wetness when removing the cover or making any other test. Old bottles are very apt to give round the neck". In the case of Evans *v.* Kerr (Gloucester Assizes, 30th May, 1945) the patch of discolouration appearing in the rubber of the bottle was a certain sign of weakness in the rubber; the patch could mean only one thing. In the present case the dampness in the bed might have meant either of two things: either a faulty screwing in of the stopper, or a defect in the bottle. It was Miss Rendle's duty to ascertain by an effective test whether

there was not some perforation through which the water could have escaped.

For this negligence, if it was the cause of the damage, Miss Rendle is liable in tort, and the Society as her employer; and the Society is also liable in contract for failure to provide safe equipment, the provision of which must, in our view, be considered to have been an implied term in the contract.

But though there was negligence, did the injury to the baby result from that negligence? That is to say, did the perforation in the bottle come into existence before it was placed in the cot by the probationer, so that with proper testing it could have been discovered. We think it is quite clear from the last sentence of the learned Judge's fourteenth paragraph, that he found that it was certainly in existence prior to its being placed in the cot at about 4.10 *a. m.* on 15th April. That sentence reads as follows: "In parenthesis, it may be noted that none of the Defendants relied on or pleaded the possible defence that the leak in the bottle was due to a latent defect which could not have been discovered by the exercise of reasonable care. Even had they done so, however, it would in my opinion be impossible to come to any conclusion but that there was a hole in the bottle which would have been discovered if ordinary care had been used". Now if ordinary care could have prevented the injury, then the hole must have existed before the refilling at 4.10 *a. m.*

Since, however, the learned Judge found against Miss Rendle, we think it must be taken that he also found as a fact that the hole was in existence when the bottle leaked into Mrs. Orr's bed, and we do not think that this is a finding with which this Court should interfere. It is, of course, obviously within the limits of possibility that the perforation occurred after 4 *a. m.* on the 15th. But a Judge is not bound to give heed to every remote possibility. The fact of the smallness of the hole, described as a "pin hole", the short period within which the damage was done, the position of the patch of dampness in Mrs. Orr's bed near the neck of the bottle, and other details, all go to lend a high degree of probability to the proposition that the bottle leaked into Mrs. Orr's bed from the same hole from which it leaked into the baby's cot, which is further strengthened by the fact that the bottle itself was never produced to the Court by the Appellants, nor any evidence led to establish their defence of inevitable accident. In fact, in our view, the circumstances of this case are such that the maxim *"res ipsa loquitur"* applies, and in the absence of any reasonable explanation by the Appellants, the Court was entitled to hold that the injury to the child was due to want of care. It is on

this ground that we think the Court was justified in finding against the probationer in tort.

There remains only the question of the damages awarded. These were awarded by the Court below as follows: special damages (a) in respect of sums actually expended, LP. 910.546, (b) in respect of future treatment, LP. 6000; general damages LP. 8000. The position of an Appeal Court in regard to the question whether it ought to interfere with the Judge's judgment as to the amount of damages, was considered in the case of Owen *v.* Sykes, Law Reports, King Bench Division, Vol. I, 1936. Applying these principles to this case we do not consider that the trial Judge took an erroneous view of the evidence as to the damage suffered by the child, or made any mistake in giving weight to evidence that ought not to have affected his mind, or in keeping out of consideration something that ought to have affected his mind.

There is no dispute as to the amount of the first head of special damages. Under the second head, the Respondents originally claimed LP. 8000. In respect of this claim the trial Judge allowed LP. 6000. In the light of the figures produced by the Respondents, we cannot say that this was an unreasonable estimate of the cost of future treatment. Finally, the sum of LP. 8000 for general damages; although it might be argued that it was on the generous side, is not such as would justify a revision by a Court of Appeal.

What we have just said concerning damages applies to damages as for a tort. With regard to the breach of contract, we think the Appellants are clearly liable to pay the surgical expenses to date, and the future estimated expenses. Two questions, however, arise under Article 109 of the Ottoman Code of Civil Procedure: (1) whether damages for merely mental suffering can be awarded on a breach of contract; and (2) whether the expense which will be incurred owing to the infant Respondent's inability to maintain herself when she grows up should be considered as a direct loss, or as a profit of which she will be deprived. These matters were not dealt with in argument before us. In our view, on a proper construction of Article 109, damages cannot be awarded for mental suffering; that Article contemplates purely financial items. As regards the second question, we are of opinion that the bare cost of a suitable maintenance is a direct loss caused by the negligence. If such an injury had happened to a dancer, say, we think the Defendant could obviously not be made responsible under Article 109 for the loss of those profits which she might have made in the future by the practice of her art. On the other hand, if by the injury she was rendered incapable of earning her

living, we think the Defendant would be liable to secure to her a proper and reasonable maintenance. In the present case the sum of LP. 8000 awarded by the trial Judge does not seem excessive if considered from this point of view.

For all the above reasons this appeal must be dismissed, with costs on the lower scale to include a hearing fee of LP. 30.

Delivered this 13th day of May, 1947.

Chief Justice.

CIVIL APPEAL No. 271/46.

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

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

IN THE APPEAL OF :—

Solomon Agasee. APPELLANT.

v

David Shmuel Agasee & 2 ors. RESPONDENTS.

Imbecility, Mejelle Art. 945 — Transfer by father of all his property to one child — "Imbecile" — Evidence of mental defectiveness — Lunacy and imbecility — L. A. 7/32.

Appeal from the judgment of the District Court of Haifa, dated the 28th of June, 1946, in Civil Case No. 54/45, dismissed:—

1. In order to avoid the legal consequences of his actions, it must be shown, under Art. 945 of the *Mejelle*, that the person was in such a state of mind as not properly to understand what he was doing, or fully to appreciate the consequences of his act.

2. Lunacy tests should not be applied in determining a person's competence under Art. 945.

(*A. M. A.*)

REFERRED TO: L. A. 7/32 (3, C. of J. 1010).

ANNOTATIONS: *Cf.* L. C. Ha. 38/45 (1946, S. C. D. C. 383) and cases cited in the note thereto, C. D. C. Ha. 132/44 (*ibid.*, p. 476), C. A. D. C. Jm. 34/46 (*ibid.*, p. 812 on p. 815) and *vide* also H. C. 83/46 (*ante*, p. 71).

(*H. K.*)

FOR APPELLANT: B. Joseph and Caspi.

FOR RESPONDENTS: No. 1 — Eliash.
No. 2 — Weinshall.
No. 3 — Absent — served.

JUDGMENT.

This is an appeal from the refusal of the District Court of Haifa to make an order declaring a person to come within the provisions of Article 945 of the *Mejelle*. The question, as Dr. Joseph for the Applicant emphasized, was mainly one of fact. It was therefore primarily an issue for the trial Court to decide after it had heard all the evidence.

Dr. Joseph argues that the trial Court went wrong both in fact and in law. He says that the Judge drew wrong conclusions from the evidence. The transaction that gave rise to this action was the transfer by a father of all his property to one child, to the detriment, it is alleged, of the interests of his other children. That of course he was quite entitled to do, and if the Court could come to the conclusion that there had been no undue influence, or that he did not fall within the ambit of Article 945, it was bound to give effect to his wishes. The father himself gave evidence, and an important fact to bear in mind is that he gave this evidence before the trial Judge. He was in the witness box some five hours, which afforded the Judge the opportunity of gauging his reactions. Medical experts were called on both sides. Those called for the Appellant were able to say that the father, who was 80 years old, suffered from certain defects, such as loss of memory.

Now in regard to Article 945, we would observe that the *Mejelle* was not compiled in the English language, and it does not lend itself easily to translation. In interpreting the term "imbecile" in Article 945 it becomes necessary, therefore, to guard against rushing to the conclusion that every person who might be considered an imbecile from the point of view of the English appreciation of the term, is an imbecile within the meaning of the Article. In our opinion what the Article intended to convey was that in order to avoid the legal consequences of his actions, a man must have been in such a state of mind as not properly to understand what he was doing, or fully to appreciate the consequences of his act.

Dr. Joseph's main complaint is that the evidence of Dr. Herman was not properly appreciated by the trial Judge. Dr. Herman is a specialist in mental and nervous diseases, and as to his professional competence or the authority of his opinion there can be no doubt. His evidence as to mental defectiveness was as follows:—

> "From my observations of what I saw yesterday, limited observation, I gathered the impression that his mentality was somewhat below average of a normal man of his age. Appears to have weak spots in his memory. Failure to recognise his children would support the view that he was not mentally in order. If he made a

> mistake in the name of the street where he lived for six months would also support this view. He understood mostly what was said to him. He did not seem to understand that he was in Court. Had some difficulty in following the procedure."

The Judge took this evidence in the old man's own house, and we cannot see that there is anything exceptional in the fact that he did not appreciate that a judge sitting in this informal manner did not differ from a Court with all its paraphernalia. Even by itself we do not think that this evidence was such as would lead inevitably to the conclusion that the man was an imbecile within the meaning of the Article. But balanced against other evidence which was given, and in the light of the observations which the trial Judge himself was able to make, we think that he was justified in coming to the conclusion that as a pure question of fact this man was not an imbecile within the meaning of Article 945.

The second point made by Dr. Joseph was that the trial Judge applied the test of lunacy, instead of imbecility. We quite agree with Dr. Joseph that the two tests are entirely separate. A man might well be an imbecile within the meaning of Article 945, and still fall far short of a state of lunacy. But we cannot see that the trial Judge made any such error. On the contrary, it seems to us that he fully realised the distinction. He stated specifically in his judgment that the law to be applied was contained in Article 945 of the *Mejelle*, and he added that that Article had been exemplified and expanded by a decision of the Supreme Court in Land Appeal No. 7/32. It is clear to us that the object of the Judge in referring to the case was to stress the fact that he fully appreciated the distinction between lunacy and imbecility. His judgment goes on to say:—

> "Now applying this definition to the evidence before me I find that it cannot be said that this old gentleman's mind is so deranged that his understanding is small; there was no evidence of confusion of speech, but only of some impediment in articulation."

These are the words used in Article 945. It seems to us, therefore, that the test which the trial Judge did apply was the test of imbecility within the meaning of Article 945 and not the test of lunacy.

For these reasons we are of opinion that this appeal must be dismissed, with costs on the lower scale to include LP. 15 advocate's attendance fee.

Delivered this 29th day of April, 1947.

Chief Justice.

CIVIL APPEAL No. 329/46.

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

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

IN THE APPEAL OF :—

Z. Agronowitz & H. Ben-Ari. APPELLANTS.

v.

Rayah Orlinski. RESPONDENT.

Arbitration — Award bad on the face of it — Allegation of prejudice — Dispute between client and advocate submitted to arbitration by Panel of Jewish Bar Association — Leaning in favour of validity of award.

Appeal from the judgment of the District Court of Tel-Aviv in its appellate capacity dated 18.7.46 in Civil Appeal No. 86/46 whereby the appeal of Appellants from the judgment of the Magistrate's Court of Tel-Aviv, dated 31.3.46 in Civil Case No. 635/46, was dismissed; appeal allowed:—

The fact that a dispute between a layman and an advocate is submitted to members of a panel of advocates is not, in itself, evidence of prejudice which can invalidate an award.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, *"Hamishpat"*, p. 158 (*in Hebrew*) and the application for leave to appeal *ibid.*, p. 238.

2. On arbitration by members of the Jewish Bar Association *cf.* C. D. C. Jm. 60/44 (1946, S. C. D. C. 139) and note 1.

3. See, on awards being bad on the face of them, C. A. 135/45 (12, P. L. R. 525; 1945, A. L. R. 826), C. D. C. T. A. 33/44 (1945, S. C. D. C. 528), C. D. C. T. A. 407/45 (1946, S. C. D. C. 184) and notes to these cases.

4. As regards the presumption in favour of the validity of an award see C. A. 4/45 (1945, A. L. R. 445) and note 2.

(*H. K.*)

FOR APPELLANTS: Goitein and Ben-Ari.

FOR RESPONDENT: Absent — served.

JUDGMENT.

This is an appeal from the District Court, Tel-Aviv, which in its appellate capacity upheld the decision of the Magistrate to refuse confirmation of an arbitration award.

Once again we emphasize that the Courts will always lean towards upholding an award of arbitration. Mere technical objections, unless they go to the root of the matter, are not in themselves sufficient for upsetting the decision of an arbitrator. Both the learned Magistrate and the learned Judge of the Court of Appeal set this award aside

because they came to the conclusion that it was bad on the face of it. Now for an award to be bad on the face of it, it must disclose some patent error of law. The facts of this case are that the dispute was submitted by each party to the arbitration of two named lawyers. The deed of submission further made provision for the appointment of an umpire by the Jewish Bar Association of Tel-Aviv, in case of disagreement. The two lawyers whom both parties accepted as arbitrators, happened to be members of the Jewish Bar Association and members of the Panel of Arbitrators appointed by the Association for the purpose of adjudicating all disputes between lawyers and the general public.

Now we should have thought that the mere fact that the umpire was to be appointed by the Jewish Bar Association of Tel-Aviv, would have led to the not unreasonable inference that when the parties agreed to these two gentlemen, they agreed because they were members of the Jewish Bar Association and because they were peculiarly qualified to carry out this arbitration. But it is this membership which the Respondent has successfully objected to in both the lower Courts. The substance of the objection was that this fact might have prejudiced the arbitrators against the Respondent and favoured the lawyer who was Appellant. It seems to us that the onus was on the Respondent affirmatively to prove the existence of this prejudice. We fail to appreciate how it could be inferred from the mere fact that the arbitrators were members of the Panel of the Jewish Bar Association or from the reference to that fact which appeared in the award.

In any case it could not in our opinion be held that this factor would label the arbitration award as bad on the face of it.

The appeal must therefore be allowed with costs in the Courts below and costs in this Court on the lower scale to include advocate's attendance fee of LP. 15.—.

Delivered this 28th day of April, 1947.

Chief Justice.

INCOME TAX APPEAL No. 13/46.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Curry, A/J.

IN THE APPEAL OF:—

Sa'eed Ibrahim Elias Radi. APPELLANT.

v.

The Assessing Officer Samaria District, Nablus. RESPONDENT.

Income Tax — Effect of repeal of sec. 12 — Interpretation of statutes — Claim for deduction of Rural Property Tax.

Appeal from the assessment of the Assessing Officer, Samaria District, Nablus, in File No. J/79, whereby Income Tax for the year ending 31.3.45 was assessed at an amount of LP. 2, dismissed:—

A claim for deduction of Rural Property Tax paid before 1.4.45 (date of the repeal of sec. 12) cannot be entertained.

(*A. M. A.*)

ANNOTATIONS: *Cf.* I. T. A. 7/45 (12, P. L. R. 536; 1945, A. L. R. 797) and local authorities therein cited.

(*H. K.*)

FOR APPELLANT: B. Odeh.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

The point in this case is as follows. The Appellant in respect of the year of assessment 1945/46 claims that he should be allowed a deduction in respect of the Rural Property Tax to be paid during the year of income, *i. e.* the year preceding the year of assessment.

The Ordinance contained a section — section 12 — allowing this deduction until its repeal, on 1.4.45, so that in the year of assessment to which this claim refers an income tax payer had no longer the right to make the deduction, although it concerned income for the previous year.

The appeal must accordingly be dismissed, with costs fixed at LP. 1.

Delivered this 12th day of May, 1947.

A/British Puisne Judge.

HIGH COURT No. 12/47.

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

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

IN THE PETITION OF:—

Shmuel Nahum & 3 ors. PETITIONERS.

v.

A. Zauber & an. RESPONDENTS.

Petition to High Court accompanied by lawyer's affidavit — Limits of relaxation of Rule 3, High Court Rules.

Return to an order *nisi*, dated 17.2.47, directed to Respondents, calling upon them to show cause why they should not be punished under section 4 of the Contempt of Courts Ordinance for publishing a certain article in the "Iton Meyuhad" on the 18th *Tevet* 5707 (Jewish Calendar years) corresponding to 10.1.47, order *nisi* discharged:—

> High Court will not entertain a petition supported by an affidavit signed by Petitioner's advocate unless good reason is shown why Petitioner himself did not depose to the facts stated in the petition.
>
> (*M. L.*)

REFERRED TO: H. C. 87/46 (*ante*, p. 304).

ANNOTATIONS: See case referred to and annotations.

(*A. G.*)

FOR PETITIONERS: Buchhalter.

FOR RESPONDENTS: Hake.

ORDER

A preliminary objection has been raised that the Petitioners cannot be heard because they have not complied with the Rules of Court made under the Courts Ordinance. Rule 3 specifically commands that the petition shall be supported by affidavits of the Petitioner. In this case the petition is supported by an affidavit of a lawyer.

The issue raised in this preliminary objection was considered exhaustively quite recently in High Court Case No. 87/46. It was there pointed out that in certain circumstances the Court had in the past enlarged this rule so as to permit advocates to sign the affidavit, but it emphasised that those cases were rare, and were always confined to execution cases where the matters to be dealt with would be peculiarly within the knowledge of the advocate himself. The presiding Judge said: "I think, however, this case does not permit an indefinite enlargement of the rule, and the Petitioner is the person who must depose to the facts, save in exceptional circumstances, which exist for instance in execution matters where the advocate is in a better position so to do than his client".

With respect we agree with this appreciation of the law. We are forced to the conclusion that no good reason has been shown in this case why the Petitioners themselves did not depose to the facts stated in the petition and following the decision in High Court 87/46 the order *nisi* must be discharged. Inclusive costs of LP. 10.

Given this 29th day of April, 1947.

Chief Justice.

CIVIL APPEAL No. 104/46.

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

BEFORE: Curry, A/J.

IN THE APPLICATION OF:—

Keren Kayemeth Leisrael Ltd. APPLICANT.

v.

Ali Tewfik Bey el Khalil & 4 ors. RESPONDENTS.

Joinder on appeal — Persons in whose favour renunciation made in L. C. applying to be joined on appeal to awlawiyeh action — When application should be granted — Prima facie interest — Collusion — C. P. R. 313(b).

Application for joining the above Applicant in the above appeal, allowed:—

A person having a *prima facie* interest in the subject matter of an appeal may be joined under C. P. R. 313(*b*).

(*A. M. A.*)

ANNOTATIONS:

1. For other proceedings in this appeal see 13, P. L. R. 424; *ante*, p. 117.

2. *Cf.* C. A. 79/45 (13, P. L. R. 376; 1946, A. L. R. 375) — penultimate paragraph.

(*H. K.*)

FOR APPLICANT: Scharf.

FOR RESPONDENTS: No. 1 — E. Koussa.
Rest — Absent — served.

ORDER.

The Petitioners have applied to this Court under Rules 226 and 313 of the Civil Procedure Rules to be added as Respondents or that notice of the appeal be served upon them in Civil Appeal 104/46.

The Husseins filed an action for *awlawiyeh* against Ali Khalil. In view of settlement proceedings a motion was filed to have that action dismissed. It was dismissed. The Husseins have appealed against that decision (C. A. 104/46), Ali Khalil being the Respondent.

It is alleged by the Petitioners that Ali Bey Khalil contracted to transfer the land to them and in Land Settlement he renounced his rights in their favour. However, owing to the land being in Zone A., no effect could be given thereto. The Petitioners have instituted proceedings to obtain a declaratory judgment that they are the equitable owners of the land and that case is pending.

It seems to me that from these facts alone the Petitioners have shewn that they have a *prima facie* interest in these proceedings entitling them to be served with notice of the appeal. In my opinion, so long as the petition is not frivolous or vexatious the petition should be granted.

One might well ask why Ali Bey Khalil should object to the Petitioners being joined as an additional Respondent with him — as far as I can see he can have nothing to lose thereby. It is to be noted that the Appellant is not objecting to the joinder of the Petitioners. I think the answer can be found in the fact that apparently the Appellant and Respondent to the appeal have come to terms, as they asked the Appeal Court to enter an agreed judgment, which the Court refused. This not unreasonably makes the Petitioners nervous that their interests which they claim through the Respondent may be adversely affected by collusive action between the Appellant and Respondent.

It having been shown to me that this is not a frivolous or vexatious petition, and that the Petitioners *prima facie* have a claim to the land by virtue of a contract entered into with the Respondent, the petition is granted and it is hereby ordered that notice be served upon Petitioners in respect of Civil Appeal 104/46 in accordance with Civil Procedure Rule 313(b). Petitioners are entitled to LP. 5 costs from the Respondent, Ali Bey Khalil.

Given this 28th day of May, 1947.

A/British Puisne Judge.

CIVIL APPEAL No. 139/46.

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

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPEAL OF:—

Pinhas Moshe Vanna. APPELLANT.

v.

Moshe Yihia Vanna & 2 ors. RESPONDENTS.

Defect in form of appeal, C. P. R. 333 — Non-essential parties should be cited as respondents even if not served, C. P. R. 313.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 29th day of March, 1946, in Land Case No. 15/42, dismissed:—

A party who need not be served with the notice of appeal under C. P. R. 313 must still be cited as respondent to the appeal.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* C. A. 325/45 (1946, A. L. R. 202) and C. A. 104/46 (*ante*, p. 379).

2. Generally, on r. 333 of the C. P. R. as amended, see C. A. D. C. T. A. 195/45 (1946, S. C. D. C. 507) and cases cited in the note on p. 508; see also C. A. D. C. Ha. 65/46 (*ibid.*, p. 563) and C. A. D. C. Jm. 68/45 (*ibid.*, p. 787).

(*H. K.*)

FOR APPELLANT: Kehaty (by delegation from Henigman).

FOR RESPONDENTS: Needer.

JUDGMENT.

This appeal was filed on 26.4.46.

In March, 1947, the advocate for Respondents 1 and 2 gave notice of certain objections which he intended to raise under the provisions of Rule 333 of the Civil Procedure Rules.

It is agreed that in the amended Notice of Appeal, which was filed on 27.3.47, the defects were remedied with one exception to which we shall refer later.

The first defect to which exception was taken is that the Notice of Appeal did not contain the name and address of the General Mortgage Bank of Palestine Ltd. as Respondent. That Bank was the second Defendant in the action, and the judgment ordered the payment to it of its costs together with the sum of LP. 5.—. In the original notice of appeal the Appellant prayed for the quashing of the judgment, and it is clear that if this Court had quashed the judgment the Bank would have been affected because it would have lost its costs and the sum of LP. 5.—. If the Bank would be affected by the appeal it ought to have been not only named as a respondent but also served.

We would like to take this opportunity of expressing our views in regard to Rule 313. In our opinion although by virtue of this Rule it is not necessary to serve parties who are not affected by the appeal those parties should nevertheless be named as Respondents to the appeal. We are fortified in this view by Rule 313(b) which says that parties who are not affected need not be served. It does not say that they need not be named, and we think it is desirable that they should be named so that the fact that they were parties to the original action may not be overlooked, and so that the Court may, if it thinks fit, direct notice to be served upon them under Rule 313(b).

The amended notice of appeal repeats one of the defects of the first notice in that it again prays for the quashing of the judgment of the

Court below. Mr. Kehaty first submitted that the order for costs which the lower Court made in favour of the Bank was made against the 1st and 2nd Respondents, but he later agreed that it was made against his client and he said that in any event he would remain liable for those costs.

We would have great hesitation in holding that the failure to cite as Respondent a party who is affected by the appeal is a defect in form of the type contemplated in Rule 333. We would hesitate still more before we held that it was a defect which could be remedied by the Appellant, without any order of the Court, and after expiry of the period fixed by law for the filing of the appeal. But in the present case the Appellant, in spite of the notice, and although he has had over a year's time within which he might have taken steps with a view to remedying the defect, has repeated it in the amended Notice of Appeal. It may also be observed that Mr. Kehaty agrees that he did not supply copies of documents (other than the Notice of Appeal) for service upon the Bank. In the circumstances we uphold the objection which Mr. Needer has put forward, and direct the dismissal of the appeal with inclusive costs in the sum of LP. 15.—. We do not consider it to be necessary to deal with the other objection raised by Mr. Needer.

Delivered this 23rd day of May, 1947.

British Puisne Judge.

CRIMINAL APPEAL No. 142/46.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ragheb Fallah Isaili. APPELLANT.

v.

The Attorney General. RESPONDENT.

Evidence — Hiatus in connecting link — Refreshing a witness's memory — Reopening prosecution case — Remittal or acquittal.

Appeal from the judgment of the District Court of Jerusalem, dated the 18th November, 1946, in Felony No. 80/46, whereby the Appellant was convicted on a charge of uttering a note purporting to be a bank note, knowing same to

be forged, contrary to section 349(1) of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment; appeal allowed:—

> In a charge of knowingly issuing forged notes, the accused is entitled to be acquitted if there is a *hiatus* in the evidence connecting the notes exhibited at the trial with those allegedly uttered.
>
> (*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 107/44 (11, P. L. R. 527; 1944, A. L. R. 717).
(*H. K.*)

FOR APPELLANT: Levitsky.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

Ragheb Isaili was convicted under section 349(1) of the Criminal Code Ordinance on a charge of uttering forged notes knowing the same to be forged. The case against him rests on the uncorroborated evidence of the witness Azizeh, to whom he is alleged to have given the notes. The allegation is that he passed the notes on two occasions when he bought oil from Azizeh. The principal ground of appeal is that there was no case before the trial Court that the notes which the Appellant gave to Azizeh were the notes exhibited at the trial.

Mr. Hooton, Crown Counsel, has with his usual fairness agreed that there is a *hiatus* in the evidence. Azizeh did not identify the Police Officer to whom she handed the notes, and the witness Sgt. Shafic Eff. Asfour did not initial the notes when he received them from Azizeh and he was not, when shown the notes in Court, able to say whether they were in fact the actual notes which he had received. It appears that an attempt was made to allow the witness Shafic to refresh his memory by looking at the statement which Azizeh gave to him. Assuming that that was the first record which the witness Shafic made of the numbers of the notes, we think that the trial Court erred in preventing him from using that statement for the purpose of refreshing his memory in regard to the numbers on the notes. On the other hand, if the first record which he made was that in the Station Diary he should have brought that diary to Court with him, and he should have been allowed to refresh his memory by looking at it. However, it is quite clear that there is this missing link in the chain, and for that reason alone we find that this appeal must be allowed.

Another ground of appeal was that after the prosecution had closed its case the officer conducting the prosecution was allowed to call one further witness — Mr. John Freeman. It appears from the record at page six that the officer conducting the prosecution realised, immediately after he had said that he closed his case, that he had omitted

to call this witness. We think that in these circumstances the Court ought to have allowed the witness to be called. At page 190 of Stone's Justices' Manual, 1942, there is the following passage:—

> "There is no rule of practice against re-opening a case, if objection is made at the close of the case for the prosecution that some formal proof has not been given. Cave, J., expressed himself strongly that where admissible evidence is tendered it should be received."

It has been submitted that the learned trial Judge did not expressly record a finding that the Accused had the intent to deceive. It is true that there is no express finding to that effect but, assuming that these notes were handed to Azizeh in the manner stated by her, there can be no doubt at all of the Accused's intention to defraud. The Accused himself when giving evidence said that the notes were obvious forgeries.

We have now to consider whether we should merely quash the conviction and order acquittal, or remit the case for a fresh trial.

Having considered Azizeh's evidence we do not feel satisfied that she could not possibly have made a mistake, and even if the witness Shafic was allowed to refresh his memory there would still be no absolute proof that these notes were the same, since it is obvious that other forged notes may have been prepared from the same genuine note, and in that case they would bear the same numbers. Shafic did not initial the notes at the time when he received them.

For these reasons we find that the conviction must be quashed, and that no fresh trial should be ordered. The Accused if not detained on any other charge will be set at liberty.

Delivered this 13th day of February, 1947.

British Puisne Judge.

CIVIL APPEAL No. 35/47.

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

BEFORE: Shaw and Hubbard, JJ.

IN THE APPEAL OF:—

David Moyal. APPELLANT.

v.

The Official Receiver & an. RESPONDENTS.

Bankruptcy appeals, C. P. R. 333 — Failure to comply with Bankruptcy Rules, rr. 60, 61 — Re Muscovitch, re Vitoria — Ordinance and English Act compared — B. R. r. 282 — Costs.

Appeal from the order of the District Court of Tel-Aviv, in Civil Case No. 271/39 dated 17th January, 1947, ordering Respondent No. 1 to remit to the estate of the bankrupt Issa Beidas, Respondent No. 2, the two sums of LP. 114.328 mils and LP. 40, or a total of LP. 154.328 mils; preliminary objections overruled:—

An omission to comply with r. 61 of the Bankruptcy Rules may, if the Court thinks fit, be ignored or remedied.

(*A. M. A.*)

DISTINGUISHED: Vitoria, *re, ex parte* Spanish Corporation, Ltd., 1894, 1 Q. B. 259, 63 L. J. (Q. B.) 161, 70 L. T. 141, 10 T. L. R. 165; Muscovitch, *re, ex parte* Muscovitch, 1939, Ch. 694, (1939) 1 All E. R. 135, 160 L. T. 184, 55 T. L. R. 364.

ANNOTATIONS:

1. For other proceedings in this bankruptcy see C. A. 278/45 (13, P. L. R. 65; 1946, A. L. R. 53).

2. *Vide* Annotated Laws of Palestine, Vol. 2, pp. 438—9 and C. A. D. C. T. A. 215/44 (1946, S. C. D. C. 97).

(*H. K.*)

FOR APPELLANT: Yifrach.

FOR RESPONDENTS: No. 1 — J. Gavison.
No. 2 — G. Berouti.

ORDER.

Hubbard, J.: Mr. Berouti, for the second Respondent, has raised two preliminary objections to the hearing of this appeal from an order of the District Court of Tel-Aviv made on 17th January, 1947, in Civil Case No. 271/39. The order was one made under the Bankruptcy Ordinance, 1936. Mr. Berouti does not admit that the Civil Procedure Rules apply in the case of appeals brought under that Ordinance, but he has nevertheless, *"ex abundanti cautela"*, given the Appellant notice under Rule 333 of his objections.

The objections are: (1) that the Appellant failed to lodge in this Court the sum of twenty pounds at or before the time of filing the appeal, as required by Rule 60 of the Bankruptcy Rules, 1936; and (2) that the Appellant, on entering this appeal, failed to send forthwith a copy of the notice of appeal to the Registrar of the Court appealed from, as required by Rule 61.

The facts as regards the two objections are: that the order appealed against was made on 17th January, 1947; that the appeal was filed in time on 5th February; that the sum of LP. 28 was lodged in this

Court on 25th February pursuant to a notice from the Chief Registrar, the Appellant having applied under Rule 327 of the Civil Procedure Rules; that the Appellant sent a copy of the notice of appeal to the Registrar of the District Court, Tel-Aviv, on 3rd April.

As regards the first objection, Mr. Berouti was unable to furnish us with any authorities, but he dealt at length with the second objection and cited the case of *re* Muscovitch and Muscovitch (1939, 1 A. E. L. R. 135) as authority for saying that this Court could relieve against a failure to comply with Rule 61 of the Bankruptcy Rules, if at all, only if there were "special circumstances and for good cause shown" as laid down in Rule 283.

The *re* Muscovitch and Muscovitch case was decided on the basis of *re* Vitoria, *ex-parte* Spanish Corporation Ltd. (1894, 1 Q. B. D. 259). It is, I think, clear on a careful consideration of this latter case, that the learned Judges of the Court of Appeal laid great emphasis on the fact that the Bankruptcy Act, 1883, contained a clause providing that "no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal" (sec. 104(1)(d)). These words are repeated in section 108(2)(c) of the Bankruptcy Act, 1914, under which *re* Moscovitch and Moscovitch was decided. Both Lord Halsbury, L. C., and Kay, L. J., insist on the mandatory character of those words. The Court of Appeal therefore held that since an appeal could only be entertained if the rules were complied with, a failure to comply with Rule 132 of the Bankruptcy Rules, 1886 & 1890 (corresponding to our Rule 61) was not a mere irregularity and could not be cured under section 143 of the Bankruptcy Act, 1883, (see *re* Muscovitch and Muscovitch, at page 139, *per* Wilfred Greene, M. R.) and that the time limited for compliance with the rule could be extended only if there were special circumstances, as required by Rule 351.

In the Palestine Bankruptcy Ordinance there is no section corresponding to section 108(2)(c) of the Bankruptcy Act, 1914. The result, to my mind, is that the overriding force which the rules had in the minds of the Judges in *re* Vitoria need not influence this Court. I would add here, *en passant*, that under section 132(2) of the Act of 1914, all general rules have effect as if enacted in the Act. We have no similar provision in our Ordinance. An appeal under the Bankruptcy Ordinance, therefore, can be treated exactly like any other appeal, and its form and substance judged by those rules which are applicable to it, either specially under the Bankruptcy Ordinance and Rules, or generally under the Civil Procedure Rules. It is obvious, I think, that in view of the scanty rules on matters of appeal in the

Bankruptcy Rules, the Civil Procedure Rules must be relied on for many matters. But where both sets of rules deal with the same subject-matter, then the Bankruptcy Rules should be followed in bankruptcy matters unless there is strong reason to presume that a repeal was intended. The English 1915 Bankruptcy Rules provide that, subject to their own provisions, appeals shall be regulated by the Rules of the Supreme Court (Rule 134). It appears to me that even in the absence of such a provision in Palestine, we should follow a similar principle.

In my view, in the present case it is unnecessary to have recourse to the Civil Procedure Rules. I am of opinion that it is covered by Rule 282 of the Bankruptcy Rules, 1936, the relevant part of which reads as follows:—

> "Non-compliance with any of these rules ..... shall not render any proceedings void unless the Court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit."

It is quite plain that what happened in this case was that the Appellants mistakenly applied under Rule 327 of the Civil Procedure Rules instead of lodging a deposit under Rule 60 of the Bankruptcy Rules, and forgot altogether about sending a copy of the notice of appeal to the Registrar until reminded to do so by the second Respondent's notice. At the present moment a sum of more than LP. 20 has been deposited and the notice has been served. There is no affidavit before us as to any prejudice suffered by the second Respondent, nor as to any delay in the hearing of this appeal. In my view, the two omissions by the Appellant were in the nature of irregularities, and there is no reason why this Court should declare the appeal to be void.

I am strengthened in this view by a consideration of the grounds on which the Divisional Court in *re* Vitoria had overruled the preliminary objection, based on Rule 132 of the Bankruptcy Rules, 1886 & 1890, that no copy of the notice of appeal had been sent to the Registrar of the County Court, for in that case no copy at all was sent. At the hearing before the Divisional Court the argument for the preliminary objection was based on certain cases decided under the Bankruptcy Rules of 1870, where a similar objection had been held fatal. The Divisional Court, however, made this distinction, that while under the Bankruptcy Rules of 1870, the sending of the copy of the appeal notice to the Registrar of the Court appealed from was the only step prescribed to be taken at the time when the appeal was

entered for bringing to the notice of the Respondent the fact that an appeal had been entered under the Rules of 1886 & 1890, which were those in force at the date of the hearing, the procedure as to appeals was regulated by the provisions of Order LVIII of the Rules of the Supreme Court, which required that the notice of appeal should be served directly upon all the parties to the appeal. The only object, therefore, of sending a copy of the notice of appeal under the Rules of 1886 & 1890, was to ensure the Registrar's having the file of the proceedings in Court. The Divisional Court held that the omission to send the notice was a mere irregularity, which could be cured (1894, 1 Q. B. D. at p. 260).

It is true that this decision of the Divisional Court was overruled, but as I have pointed out, it was overruled mainly on the ground of section 104(1)(d) of the Act of 1883, and Lord Halsbury, L. C., said in the course of his judgment: "With the greatest possible respect for the opinion of the Judges of the Court below, I cannot agree with the view which they seem to have taken on this point, and *I cannot help thinking that section* 104(*d*)*of the Bankruptcy Act,* 1883, *was not called* to their attention" (*ibid.*, at p. 264).

In my view, therefore, we are at liberty to give the words of our Rule 282 their plain meaning, which is that non-compliance with any of the Bankruptcy Rules does not necessarlly avoid any proceedings in which the non-compliance occurs — it depends upon the discretion of the Court.

Each case must be treated on its own merits. The Appellant has in the breach of one rule been careless, and in the breach of the other misadvised in law. But it does not appear that the Respondents have been prejudiced, and the irregularities have been cured. Both objections are therefore overruled.

On the question of costs, however, it appears to me that as these objections were caused by the Appellant's failure to obey the rules, and that as one defect was cured only after his receipt of the second Respondent's notice, the latter is entitled to his costs, which I fix at an inclusive sum of LP. 5.

Given this 30th day of May, 1947.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 106/46.

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

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

IN THE APPEAL OF:—

Anton Hazboun. APPELLANT.

v.

The Society for Education and Culture "Maaleh" & 2 ors. RESPONDENTS.

Premises let "for day-school only" — Tenant subletting part of premises for tutorial evening classes for adults — Interpretation of contract — Tenant refusing to pay landlord Municipal Taxes without production by latter of a receipt from Municipality.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated 12th July, 1945, in C. A. 89/44, setting aside the judgment of the Magistrate's Court, Jerusalem, in Civil Case No. 2049/43, dated 22.10.43, dismissed:—

1. Where a clause in a contract shows a certain amount of ambiguity, Court of trial and/or appellate Court are entitled to examine the contract as a whole to ascertain what was in parties' minds.

2. Where contract of lease provides that tenant shall pay the Municipal Taxes, tenant entitled to request from landlord (who alleges having paid them for him) to produce a proper receipt; failure to pay amount demanded by landlord on account of Taxes without such receipt does not constitute breach of contract.

(*M. L.*)

ANNOTATIONS:

1. On interpretation of contracts see C. A. 211/46 (1946, A. L. R. 629) and annotations.

2. On change of user see C. A. 359/45 (*ante*, p. 45) and annotations.

(*A. G.*)

FOR APPELLANT: Elia and Malak.

FOR RESPONDENTS: Nos. 1 & 2 — Levanon.
No. 3 — In person.

JUDGMENT.

This is an appeal from the District Court of Jerusalem which, sitting in its appellate capacity, reversed an order of the Magistrate granting eviction to the Appellants against Respondents. It was a case of holding on to leased premises by virtue of the Rent Restrictions Ordinance.

The question in issue was the interpretation of certain clauses of the contract, and whether in fact there was a breach of those clauses. The difficulty was mainly due to the fact that the contract was drawn up in English, which was not the mother tongue of the parties, and in consequence it discloses a certain amount of ambiguity. Taking one of those ambiguous clauses by itself and interpreting it strictly, the contract might have been held to be in conformity with the interpretation given to it by the learned Magistrate. The President of the District Court was of opinion that the contract, being ambiguous, he was entitled to read it as a whole to ascertain what was in the minds of the parties. In this we think he was right.

We come now to examine those clauses of the contract which, it is alleged, were ambiguous and which led to the difficulty. There is a preamble in the agreement which says in general terms that the purpose for which the premises were leased was for a day-school only. It was admitted that not only were the premises used as a day-school but they were sub-let (the Respondents being entitled to sub-let) in part to another person who held tutorial classes for adults in the evening.

It is alleged by the Appellants that this is a breach of the very specific term that the object was for use as a day-school only. Now apart from this preamble, there were terms which purported to govern this contract drawn up in much more precise language. Among those terms was (F), which reads as follows:—

> "To see that the school shall be held only in the day-time. After sunset he is not entitled to the use of the premises as a school for children, or to do anything else which is likely to disturb the tranquility of neighbouring tenants and inhabitants."

This clause we consider does indeed provide a clue to what was in the minds of the parties when they made the lease. From it we infer that the main objection was to provide that a nuisance would not be caused to the neighbours by holding a children's school at night. It must be conceded by all parties that the holding of these tutorial classes could not have caused a nuisance to the other inhabitants, in the sense that holding a children's school after sunset would cause a nuisance. We therefore think that the object of the contracting parties was not to exclude all types of schools after sunset, but only that type of school which would cause a nuisance. We are reinforced in this opinion by the facts which were adduced in the evidence, that the Appellant himself had visited the premises on various occasions when the tutorial classes were being held, and he does not appear to have protested against them. We think therefore that the President was entitled to examine the contract as a whole, and having done so, we agree with the conclusion at which he arrived.

There was one other point raised in the appeal: it concerned the provision that the Respondents should pay the municipal taxes. The Respondents said they were ready at all times to pay these municipal taxes, and that fact can be conceded in their favour, but they said they were not prepared to pay them until the Appellant had given them a receipt showing that he had in fact discharged them. We consider that this was a reasonable precaution on the part of the Respondents, otherwise they would have had no guarantee that the Appellant had in fact paid the taxes to the Municipality. We agree with the learned President that failure to meet this liability without first being furnished with the receipt they demanded was not a breach of the condition of the contract.

For these reasons the appeal must be dismissed, with inclusive costs of LP. 10 to the first Respondent.

Delivered this 31st day of March, 1947.

Chief Justice.

CIVIL APPEAL No. 141/46.

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

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

IN THE APPEAL OF:—

Eliezer Miller. APPELLANT.

v.

Manya (Miriam) Pines, née Shita. RESPONDENT.

Jointly owned flats and shops partly let by co-owner, partly occupied by himself — Action in Magistrate's Court by other co-owner for proportionate share in rent in respect of one year — Rights and liabilities of co-owner in matter of rent under Mejelle as regards flats and as regards shops.

Appeal from the judgment of the District Court of Tel Aviv in its appellate capacity in Civil Appeal No. 213/44, dated 12th February, 1946, dismissing the judgment of the Magistrate's Court of Tel Aviv in Civil Case No. 1995/43, dated 3rd November, 1944, dismissed:

1. While a co-owner seeking to recover his share in rent payable to him by other co-owner may bring in District Court an action for account, nothing prevents him from taking another course, *i. e.* claiming in Magistrate's

Court (within limits of its jurisdiction, *viz.* LP. 250) a specific sum in respect of one year.

2. If A occupies a flat (or room) in a house jointly owned by him and B, he is not liable to pay proportionate rent in accordance with a valuation in respect of B's share.

3. If A occupies a shop in a home jointly owned by him and B, he is liable to pay proportionate rent in accordance with a valuation in respect of B's share.

4. If A leased to a tenant a flat or shop in a house jointly owned by him and B, he is liable to pay B a proportionate part of the rent in respect of B's share.

(*M. L.*)

ANNOTATIONS:

1. The judgment of the P. D. C. is reported in full in S. C. D. C. 1946, p. 129—135. The relevant portions of it are also reported in Gorali's Law of Landlord & Tenant pp. 92 and 93 Nos. 80 and 83.

2. The relevant passages of the judgment in connection with headnotes 2—4 are set out below:—

(2) "As regards the flat occupied as a dwelling by the Appellant, I find that the position is governed by Articles 597, 1075 and 1083 of the *Mejelle*. That effect of these Articles, both independently and con-jointly, is that in the case of a dwelling-house which is jointly owned, if one of the joint owners lives in the house for a certain period he cannot be called upon by the other joint owner to pay rent corresponding to the latter's share. I accordingly hold that the Respondent could not claim in respect of the flat occupied by the Appellant as a dwelling for himself."

(3) "But if one co-owner derives profit from the shop premises by using them himself, to the exclusion of his co-owner, it seems to me that he ought equally to account to his co-owner for the latter's proportionate share in so much of that profit as is directly attributable to the use of the premises (in other words, a rent valuation), as distinct from profit resulting from the occupier's own efforts in running the business. The co-owner ought not to be put in a worse position by the fact that the occupier has chosen not to let the premises to a third party but to benefit himself equally by using them for his own business purposes."

(4) "I now pass to the flat and part of the shops let by the Appellant to a tenant. Here the legal position is in my view far simpler, the position being covered by Article 1077 of the *Mejelle*, which provides that if one of two joint owners of property lets such property on hire and receives the rent therefor, he is obliged to pay the other his share thereof. This Article directly covers the letting of the flat and part of the shops, and I agree with the learned Magistrate that the Appellant is liable to the Respondent in respect of these."

3. On point 2 see C. A. 115/29 (1, P. L. R. 606; 3, C. of J. 1161, Gorali's Landlord & Tenant p. 93, No. 81), C. A. 198/37 (4, P. L. R. 364; 1937, S. C. J. (NS) 361; Gorali's Landlord & Tenant, p. 93, No. 82); C. A. D. C. Jm. 45/43 (Gorali's Landlord & Tenant, p. 94, No. 84).

4. On point 3 *cf.* C. A. D. C. Jm. 131/42 (Gorali's Landlord & Tenant, p. 94, No. 85).

(*A. G.*)

FOR APPELLANT: Hake.

FOR RESPONDENT: Olshan and Kadury.

JUDGMENT.

This is an appeal from a decision of the District Court of Tel Aviv sitting in its appellate capacity.

The parties are co-owners of a certain property consisting of two flats and two shops. The present Appellant has been in occupation of one flat and one shop and has leased the other flat and the other shop to a third party. Present Respondent claimed before the Magistrate's Court what he considered to be his share of the estimated rent for one year. The learned Magistrate gave judgment in favour of the present Respondent in the sum of LP. 81.750. On appeal to the District Court, the learned President upheld the Magistrate's judgment except as to the Appellant's liability to pay rent in respect of the flat occupied by himself.

The first point taken by the Appellant was that the Magistrate had no jurisdiction and that Plaintiff should have brought an action for an account before the District Court. We are in agreement with the learned President that, although an action for an account might have been more suitable, yet in the circumstances of this case there was nothing to preclude the claim from being entertained being given that it was for a specific sum in respect of one year only.

As to the liability for the payment by the Appellant in respect of the flat leased to a tenant and of the two shops we again entirely agree with the Courts below and we find nothing useful to add to the reasons given.

Respondent has cross-appealed in respect of the flat occupied by the Appellant claiming his share of rent in respect thereof. The learned President has given full attention to this point and we agree with his interpretation.

In conclusion, the appeal and the cross-appeal are hereby dismissed. We grant costs on the lower scale and LP. 10 advocate's attendance fee to the Respondent.

Delivered this 16th day of May, 1947.

British Puisne Judge.

CIVIL APPEAL No. 189/46.

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

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

IN THE APPEALS OF :—

Muhammad Hussein Hamdan. APPELLANT.

v.

Abdel Hamid Jaber Husein Afaneh & 4 ors. RESPONDENTS.

Magistrate dismissing claim for recovery of possession upon finding that Plaintiff failed to prove previous possession — District Court giving judgment for Plaintiff under sec. 3(c), Magistrates' Law — Finding made by Magistrate contrary to evidence.

Appeal from the judgment of the District Court of Jaffa sitting as a Court of Appeal, dated 13th January, 1946, in Civil Appeal No. 99/44, whereby judgment of the Magistrate's Court of Majdal, dated 27th May, 1944, in Civil Case No. 228/43, was set aside, dismissed :—

> Where it appears not only from the evidence of Plaintiff's witnesses, with which the Magistrate says he was not satisfied, but also from that of Defendant's witnesses that Settlement authorities fixed iron pegs on the boundaries and handed over the land in question to Plaintiff, Magistrate's finding that Plaintiff failed to prove possession cannot stand.
>
> (*M. L.*)

FOR APPELLANT: G. Elia.

FOR RESPONDENTS: S. Salameh.

JUDGMENT.

Curry, A/J.: The Respondents brought an action for recovery of possession in the Magistrate's Court, and in his final address their advocate appears to have relied on Article 24 of the Magistrates' Law. The Magistrate dismissed the action because he found that the Respondents had failed to prove possession as required by section 24(1).

On appeal to the District Court the learned trial Judge expressed his doubt whether the Magistrate was justified in making that finding, but he proceeds to give judgment for the Respondents under section 3(c) of the Magistrates' Law.

We have no doubt that on the evidence before him the Magistrate was not justified in finding that the Respondents had not been in possession.

The circumstances are briefly as follows. The Respondents had entered into an agreement to sell Plot A. to the Appellant, who entered into possession thereof but in the Land Settlement the Respondents were awarded Plot B. in lieu of Plot A.

The first witness for the Respondents stated that when the settlement Officer gave them land B, they placed iron pegs therein on the order of the Settlement Officer, and cleaned it from grass, and worked thereon for seventy days.

The next witness gave evidence of taking the land at Settlement and fixing iron pegs on the boundaries, and of the removal of the grass.

The third witness for the Respondents stated that at the time of delivery by the Settlement Officer the Defendant was not present, and

that they fixed the iron pegs when the plot was allotted to them.

It is true that the Magistrate says he was not satisfied with their evidence, and he held that they had not entered into possession. However, when we turn to the evidence of the Appellant and his witness we read as follows: The first witness states that the Respondents took as their share an area in the same parcel of El 'Urush, because all the owners of the land were present. "The settlement authorities fixed iron pegs on the boundaries of the lands". "The Respondents told me to take the four *dunums* from the west. I did take the four *dunums* and left the remainder for them. . . .". "I asked the vendors to register the land in my name at settlement but they refused". "I did not make a claim at settlement". The next witness for the Appellant alleges that Respondent allowed them to take possession of the land after the iron pegs were fixed.

On the evidence of the witnesses of the Appellant it is clear that this land was handed over by the Settlement Officer to the Respondents, and therefore they had possession in the first place and registration. It is alleged by Appellants that they took over the land from the Respondents with the latter's consent, but this was not proved.

In the result therefore this appeal must be dismissed, with costs on the lower scale and an advocate's hearing fee of LP. 10.—.

Delivered this 10th day of June, 1947, in the presence of Marto for Appellant, and Hamouda for Respondents.

A/British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

HIGH COURT No. 62/46.

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

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

IN THE PETITION OF:—

Luna Levi. — PETITIONER.

v.

Assistant Chief Execution Officer, District Court, Tel-Aviv & an. — RESPONDENTS.

Petition to High Court to set aside its previous decision — Proof in

High Court that Respondent is a member of Jewish Community — Submission of foreigner to jurisdiction of Rabbinical Court.

Return to an order *nisi*, directed to the Respondents calling upon them to show cause why the order of the High Court of Justice, dated 29th May, 1946, in High Court Case No. 35/46 and/or the order of the first Respondent, dated 4th of March, 1946, should not be set aside and why the first Respondent should not execute the judgment of the Chief Rabbinate of Jaffa—Tel-Aviv District, given on the 14th of January, 1946, against the second Respondent, filed for execution in Execution File No. 478/43 of the Execution Office, Tel-Aviv; the order *nisi* is made absolute:—

1. Petitioner to High Court who was taken by surprise and could not adduce additional evidence regarding Respondent's membership in Jewish Community may, again apply to High Court and on proving Respondent's membership obtain an order superseding previous order not to execute the judgment of the Rabbinical Court.

2. Husband (or wife) of foreign nationality cannot oppose judgment of Rabbinical Court on ground of non-submission to its jurisdiction if application for marriage to Chief Rabbinate embodied agreement of both parties that all matters of personal status that might arise hereafter and in respect of which the Rabbinate had exclusive or concurrent jurisdiction should be submitted to the Rabbinate.

(*M. L.*)

ANNOTATIONS:

1. The previous proceedings in this case (H. C. 35/46) are reported in 1946 A. L. R. 743 and 13 P. L. R. 328.

2. On question of successive applications to High Court see H. C. 105/44 (1944, A. L. R. 556; 11, P. L. R. 478); H. C. 11/45 (1945, A. L. R. 502; 12, P. L. R. 220) and H. C. 115/45 (a) (1946. A. L. R. 519).

3. On question of consent to jurisdiction see H. C. 72/45 (1945, A. L. R. 734; 12, P. L. R. 357) and annotations in A. L. R. see also H .C. 50/46 (1946, A. L. R. 594) and H. C. 46/46 (1946, A. L. R. 708; 13, P. L. R. 390).

(*A. G.*)

FOR PETITIONER: Hochman.

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

ORDER.

The Petitioner obtained a judgment from the Chief Rabbinate, Jaffa—Tel-Aviv District, on the 14th January, 1946, whereby the Petitioner's husband — the second Respondent — was ordered to pay Petitioner LP. 10 per month maintenance.

The first Respondent refused to execute that judgment, and the Petitioner applied to the High Court in High Court Case No. 35/46. In that case the second Respondent, in his reply, averred for the first time that he was not a member of the Jewish Religious Community. The Petitioner was taken by surprise and could not adduce additional

evidence at that stage of the proceedings to prove the contrary. This Court then discharged the order *nisi*, as it entertained some doubt as to whether Respondent 2 was a member of the Jewish Community.

The Petitioner now again comes before this Court, as she is entitled to do, asking us to set aside the order of this Court in High Court 35/46, and also the order of first Respondent dated 4.3.46.

The second Respondent is a foreigner, and two questions arise for the decision of this Court, *viz.*, is he a member of the Jewish Community, and did he give his consent to the jurisdiction of the Rabbinical Court.

The Petitioner in her affidavit swore that she had seen a register of the members of the Jewish Community of Palestine wherein she saw the name of second Respondent under No. 11034. She further filed a letter from the General Council (*Vaad Leumi*) of the Jewish Community of Palestine, dated 27th May, 1946, which states that Zecharia Levy, whose father's name is Yehuda, is registered as a member of the Jewish Community of Tel-Aviv for the year 5704 under No. 11034. The second Respondent's reply to this is that in a register entitled "Book of the Adults of the Jewish Community in Tel-Aviv—Jaffa, 704" (1944) which he saw at the Municipality at Tel-Aviv, his name did not appear, although the names of his father and mother were there, but that he found a name identical with his in the register entitled "Book of Adults of the age 18—19 of the Jewish Community in Tel-Aviv and Jaffa for the year 1944 (704)". The argument of the second Respondent is that he cannot be this person because in 1944 he was 22 years of age. It is to be noted that the address given was the address at which his parents have lived for many years, and in fact the Respondent is now living with them at that address. In our opinion the Petitioner has proved that Respondent 2 is registered as a member of the Jewish Community.

As regards the second Respondent submitting to the jurisdiction of the Rabbinical Court, of that there can be no doubt. In their application for marriage to the Chief Rabbinate both Petitioner and Respondent 2 declared that they had agreed that all matters of personal status, alimony, maintenance, *Ketuba, etc.*, that might arise hereafter, and in respect of which the Rabbinate had exclusive or concurrent jurisdiction, should be submitted to the exclusive jurisdiction of the Rabbis.

For the foregoing reasons the Order *nisi* is made absolute and it follows that this order supersedes the order of the Court of 29th May, 1946, in High Court 35/46, and the first Respondent is ordered to execute the judgment of the Rabbinical Court of Jaffa—Tel-Aviv District, given on the 14th January, 1946, against second Respondent

and filed for execution in file No. 478/43, of the Execution Office, Tel-Aviv.

Petitioner is entitled to her costs and an advocate's hearing fee of LP. 15.

Given this 5th day of June, 1947, in the presence of Mr. M. Hochman for Petitioner, and Mr. Z. Kleinzeller for Respondents.

A/British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

HIGH COURT No. 121/46.

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

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

IN THE PETITION OF:—

Ahmad Mohammad Mahfouz Dris & 2 ors. PETITIONERS.

v.

Deputy Chief Execution Officer, Haifa & 3 ors. RESPONDENTS.

Affidavit sworn by advocate — Land settlement conducted and terminated without occupiers making any move to safeguard their interests — Action by co-owner for partition — Sale of the land by public auction — Chief Execution Officer ordering eviction and delivery of land in question to purchaser — Chief Execution Officer's powers under Art. 9. Law of Partition.

Return to an order *nisi*, dated 2nd January, 1947, directed to the first Respondent, calling upon him to show cause, if any, why his order, dated 11h December, 1946, in Execution File No. 629/46, should not be set aside; order *nisi* discharged:—

1. Where no claim at settlement is made by alleged possessors of the land, they cannot, after land has been entered in new register in some other person's name, come forward and rely on long possession for any period prior to new registration.

2. Art. 9, Law of Partition read together with other provisions regarding sale by public auction, empower Chief Execution Officer to order eviction so as to deliver land to purchaser at auction, and latter need not go to Court for an order of eviction.

REFERRED TO AND DISTINGUISHED: H. C. 36/40 (7, P. L. R. 296;

7, Ct. L. R. 195; 1940, S. C. J. 410); H. C. 86/43 (11, P. L. R. 46; 1944, A. L. R. 148); H. C. 95/44 (1944, A. L .R. 698); H. C. 41/43 (1943, A. L. R. 196); H. C. 81/45 (1946, A. L. R. 118; 12, P. L. R. 564).

(*M. L.*)

ANNOTATIONS:

1. On the 1st point see C. A. 9/44 (1944, A. L. R. 328) and annotations in A. L. R.

2. On point 2 see cases referred to and annotations in A. L. R.

(*A. G.*)

FOR PETITIONERS: F. Nazzal and M. Yahya.

FOR RESPONDENTS: Nos. 2—4 — A. Levin and Solomon.

ORDER.

The three Petitioners in this case seek to set aside an order given on the 11th December, 1946, by the Deputy Chief Execution Officer, Haifa. The said order was to the effect that the Deputy Execution Officer refused to alter a previous order given by him in the same matter regarding the eviction of the Petitioners from a certain plot of land.

This Court issued an order *nisi* directed to the aforementioned Execution Officer (1st Respondent) and three other Respondents, two of whom are not in fact interested in the matter.

An affidavit in reply has been sworn by Mr. Jacob Salomon, who is the attorney of the second and third Respondents in the present proceedings and who was the attorney of Respondents 2, 3 and 4 in the partition proceedings which have given rise to the present application.

The following facts will be sufficient to bring out clearly the question which falls to be decided. In 1939, proceedings under the Land (Settlement of Title) Ordinance, Cap. 80, began in respect of certain lands situate between Haifa and Acre. The land with which we are here concerned is parcel 8 of block 10875/Haifa. The settlement proceedings were concluded in 1942, and parcel 8 together with other parcels were entered in the new register. It is of importance to note that all through the course of the settlement proceedings the present Petitioners made no move and put in no claim. I need hardly point out that settlement proceedings are conducted in such a way that the persons residing on or near the land to be settled cannot avoid knowing what is going on. I might at this stage refer to section 51 and 52 of the Land (Settlement of Title) Ordinance, which enable persons in possession of land to be registered as owners if their possession has been long enough, or as holders of a possessory title if their possession is less than the statutory period but the registered owner cannot be traced.

I am of opinion that where no claim at settlement is made by alleged possessors of the land, they cannot, after the land has been entered in the new register under some other person's name, come forward and rely on long possession for any period prior to the new registration.

To revert to the facts of this case. The aforementioned parcel 8, together with parcels 30 and 44, were registered in 1942 in the new register in the name of a number of co-owners, one of whom in 1945 took steps to have a partition carried out between him and his co-owners. The law governing partition is the Ottoman Law published on the 14th *Muharram* 1332 by an Imperial *Iradeh*. In pursuance of that law the parcels were inspected, and it was found impossible to divide them in kind amongst the co-owners. It is recorded in the report of inspection that the first Petitioner was seen on the land and that he stated having lived there for twenty years on three *dunums* which he had bought from a certain Abul Leil. The other two Petitioners were also found on the land, and they stated that they had come on the land, had built huts thereon, had never paid rent, and did not claim ownership. The inspection took place on 8.1.46, and all the persons found on the land were told about the partition proceedings and were advised by the Chief Clerk of the Magistrate's Court that if they had any claims to any part of the land they should take steps to safeguard their interests.

The partition proceedings then proceeded as traced out in Article 8 and 9 of the Law of Partition, and finally the parcels were put up to auction and were adjudicated as follows: parcel 8 to Shemen, Ltd. (second Respondent) and the other two parcels to Respondents 3 and 4. (Shemen Ltd. subsequently acquired the last mentioned parcels).

For the purposes of the present application we are concerned only with parcel 8.

On 2.4.46 parcel 8 was registered in the name of Shemen Ltd. by order of the Magistrate who had dealt with the partition case, and on 28.5.46 Shemen Ltd. applied to the Execution Office, Haifa, and asked to be put in possession thereof. The Deputy Execution Officer dealt with the case: he summoned Petitioners to appear before him and heard their advocate's submissions, which were to the effect that the Execution Officer could not evict them and that the purchasers had to obtain an eviction order from a competent Court. At that stage the allegation was that the Petitioners had been on the land for thirty years; subsequently the period was alleged to be forty years.

I find it unnecessary to relate minutely the numerous incidents of the proceedings before the first Respondent. It is sufficient to say that the first Respondent held that he was entitled to order the eviction

so as to deliver the land to Shemen Ltd., the matter was adjourned several times in order to afford the present Petitioners time to apply to the High Court. On 12.11.46 the first Respondent ordered execution to proceed. On 15.11.46 he ordered that force be used if necessary. On 15.11.46 the eviction could not be carried out, although four policemen were present. Subsequently new attempts were made to convince the first Respondent that he should not order eviction, and this led to further hearings which culminated on 11.12.46 by the Execution Officer re-affirming his decision but granting a stay of execution for two weeks. The Petitioners then petitioned the High Court.

The crux of the matter is whether Article 9 of the Law of Partition empowers the Execution Officer to evict. For the present purposes I need only mention that Article 9 (see Tute's Ottoman Land Laws, p. 173) provides for sale by auction in accordance with the law concerning the sale of immovable property which is hypothecated, and also provides for the transfer of the property to the highest bidder and for the division of the proceeds amongst the co-owners. The last three lines in Tute should, as held in High Court 36/40 (7, P. L. R., p. 269, in the case of Miller *v.* Registrar of Lands, Jaffa) read as follows:—

> "The delivery and evacuation of the property sold to the purchaser shall, if necessary, be effected by the Execution Officer."

In the same case the Court remarked that the Execution Officer is only concerned in a case such as the present one, "if the purchaser cannot obtain possession of the property purchased by him. ....." I would add that Article 10 of the Provisional Law for the Mortgage of Immovable Property to which reference is made in Article 9 of the Law of Partition, provides that after the sale by auction to the highest bidder the Execution Officer, if necessary, will cause the property to be vacated and will deliver it to the purchaser. There is also Article 17 of the Provisional Law Regulating the Right to Dispose of Immovable Property, of the 5th Jumad-il-Awwal, 1331, (Tute, p. 171) which reads as follows:—

> "Actions claiming the ownership of immovable property, sold through the *Tapou* Office by public auction in accordance with special laws, must be brought before the sale is completed ..... The Courts are forbidden to hear cases where the claim is brought after the sale has been completed unless the delay was due to a lawful excuse."

A somewhat similar provision is also to be found in Article 115 of the Execution Law of 28h *Nissan*, 1330.

It seems to me difficult, in presence of the aforementioned texts, to accept the view that in a case like the present one the Petitioners

cannot be evicted by order of the Execution Officer. To put it bluntly, they have taken no steps whatsoever throughout the settlement proceedings, the partition proceedings, and the public auction proceedings, and now they brazenly expect to remain on the land while the purchaser is put to the trouble of taking the matter to a Magistrate's Court with the prospect of being met by various objections and pleas, causing more delay. The question is whether there is any valid ground for such an attitude. The learned advocate for the Petitioners has relied on several cases, which I will now consider.

There is High Court 86/43, 11 P. L. R. 46, which however was not a case of partition ending up with a sale by auction. In other words, it was a case where the property was divisible, and in such a case the Law of Partition makes no mention of delivery of the lots by the Execution Officer.

Another case is High Court 95/44 (1944, A. L. R. 698) but the gist of that case was that the identity of the land sold in execution was in dispute, and this explains why the High Court directed a stay of proceedings for one month in order to enable either part to apply to the appropriate Court to establish their claims. That case is completely foreign to the issue in the present case.

In High Court 41/43 (1943, A. L. R., p. 196) the High Court refused to intervene in a case where the Execution Officer had considered that the occupier of land which had been sold by auction had reasonable grounds to aver that he had been unaware of the auction proceedings and had thus not been in a position to protect his rights prior to the sale. Needless to say, the facts in our case are completely different, and at any rate High Court 41/43 is one of those cases where the High Court found no sufficient reasons for exercising its powers, and pointed out that it was not a Court of Appeal.

Finally there is High Court 81/45 (1946, A. L. R., p. 118) which is a case where the Petitioners wanted the Execution Officer to mention in the notice of sale by auction that he could not guarantee vacant possession. Obviously the Petitioners had taken up the matter in time and desired to make it clear that they were going to rely on their alleged long possession of the land intended to be sold. The High Court considered that the Execution Officer should have accepted to mention the matter in the notice of sale. In the present instance, as already mentioned, no move has been made by the Petitioners until long after the auction proceedings had been terminated.

I have given full consideration to this case because it is obviously an outstanding example of the attitude taken up by mere squatters who seem to be under the impression that they have in all cases more

rights than registered owners. In the present case the main fact against the Petitioners is that whatever possibility there was for them prior to 1942 to rely on long possession, they lost such rights after the conclusion of the Land Settlement proceedings, so that they cannot now rely on ten years' possession. In addition they did not avail themselves of the opportunity of attempting to make out a case when partition proceedings were carried out and culminated in a sale by auction.

I therefore consider that they have not the slightest justification in contending that in the circumstances of this case the purchasers at auction should have to go to Court to get an order of eviction. I am satisfied that Article 9 of the Law of Partition, read together with the other provisions I have already reviewed, do entitle the Execution Officer to order their eviction so as to deliver the land to the purchasers.

The order *nisi* is therefore discharged, with LP. 15 inclusive costs.

Given this 25th day of April, 1947, in the presence of Mr. I. Carmi for the Petitioners, and Mr. Levin for the Respondents.

British Puisne Judge.

Hubbard, A/J.: I concur.

A/British Puisne Judge.

HIGH COURT No. 29/47.

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

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

IN THE APPLICATION OF :—

Abdallah Ali Shamir. PETITIONER.

v.

The Chief Execution Officer & 2 ors. RESPONDENTS.

Attachment of Judgment Debtor's property with 3rd party — Sale of attached property by receiver — Order of attachment against 3rd party — Scope of Art. 77, Law of Execution.

Return to an order *nisi*, directed to the Respondents, calling upon them to show cause why the orders of the first Respondent, dated 5th of October, 1946, and 13th February, 1947, in Execution File No. 71/46 of the District Court of Jaffa, should not be set aside; and why the attachment levied on the goods of Petitioner on 30th April, 1946, should not be released; order *nisi* made absolute:—

1. Attaching officer when attaching goods in third party's possession and leaving them with him as custodian has to make a valuation of the goods attached.

2. Before making an order under Art. 77 Law of Execution, for attachment of goods belonging to 3rd party, Chief Execution Officer must call for evidence as to the value of judgment debtor's property of which the 3rd party had undertaken to be custodian.

3. Order under Art. 77 Law of Execution, by Chief Execution Officer against 3rd party for "attachment of his movable property" without placing a limit of any kind is bad, unless the property is of an indivisible nature.

4. Art. 77, Law of Execution is inapplicable where a third party undertakes duties of custodian of the goods in his possession belonging to judgment debtor.

5. Where a question of law has not been argued and decided in a previous case and there is not evidence of a long and well established practice, High Court may make a contrary decision to previous decisions.

(*M. L.*)

REFERRED TO: H. C. 31/36 (4, P. L. R. 49; 1937, S. C. J. (N. S.) 293); H. C. 39/38 (4, Ct. L. R. 3; 1938, 1, S. C. J. 378); H. C. 76/43 (10, P. L. R. 482; 1943, A. L. R. 626); H. C. 112/43 (10, P. L. R. 637; 1944, A. L. R. 19).

ANNOTATIONS:

1. On interpretation of Art. 77 of the Ottoman Law of Execution see cases referred to.

2. On point 5 see C. A. 70/46 (*ante*, p. 91) and annotations.

(*A. G.*)

FOR PETITIONER: G. Beirouti.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — J. Dajani.
No. 3 — Absent — served.

ORDER.

Shaw, J.: This is a return to an order *nisi* dated 28th March, 1947, calling upon the Respondents to show cause why the orders given by the first Respondent on 5.10.46 and 13.2.47 in Execution File No. 17/46 of the District Court of Jaffa should not be set aside, and why the attachment which was placed on the property of Petitioner on 30.4.46 should not be released.

In 1943 the second Respondent brought an action (C. C. 152/43) against the 3rd Respondent in the District Court of Jaffa, and at the same time he applied to the Registrar for the attachment of the goods of the third Respondent. A provisional attachment was issued and a clerk of the District Court went on 25.10.43 to the orange grove of the Petitioner (from whom the third Respondent leased part of the grove and certain rooms) and there attached certain goods which were alleged to belong to third Respondent.

As is usual in such cases the clerk did not want to remove the goods, and the Petitioner undertook to act as custodian of them. The report (Exh. A/1) of the attaching officer states, with reference to this under-

taking by the Petitioner, that — "The latter undertook to keep in his custody and take care of these articles, and not allow anybody to take any part thereof, and to deliver the same to the Court or to any Execution Office when so demanded, and that if he fails to do so, he will be held responsible criminally and in civil law".

Subsequently to this attachment the Petitioner himself obtained judgment against the 3rd Respondent in two cases in the Magistrates' Court at Jaffa:—

(a) for LP. 60 and costs, in C. C. 1245/45, filed for execution in File No. 1057/45, and

(b) For LP. 30 with interest and costs, in Civil Case 257/46, filed for execution in File No. 279/46.

On 17.1.1946 the Petitioner obtained from the Chief Execution Officer of the Magistrate's Court of Jaffa, in Execution File No. 1057/45 referred to above, an order of attachment of the goods of the third Respondent.

On 28.1.46, in Motion No. 54/46 of the District Court of Tel-Aviv (Exh. B), Mr. Marc Mani was appointed to be an *interim* receiver for the purpose of carrying into execution an agreement between a certain Mr. Abraham Zvi Safrai (Shulman) and the third Respondent, which had been confirmed by an arbitrator on 17.1.46.

On the same day (28.1.46) the receiver went to the grove and Mr. Berouti, who appears for the Petitioner, has informed us that the receiver took actual possession of the goods of the 3rd Respondent (which were already under attachment in C. C. 152/43 of the District Court of Jaffa), locked them up with his own locks in the rooms of the 3rd Respondent, and sealed up the rooms. Mr. Berouti has further informed us that a clerk from the Execution Office of Jaffa (who had come to the grove in order to attach the same goods in pursuance of the attachment dated 17.1.46 in Execution File No. 1057/45 in which the Petitioner himself was the judgment-creditor) actually arrived at the grove on 28.1.46 before the receiver came there, but that the clerk did not make any attachment on the Petitioner's behalf.

Mr. Berouti states that although the goods were left at the grove they were in fact taken over by the receiver. But no report was submitted to the District Court of Jaffa by his client.

On 4.3.46 the District Court of Jaffa gave judgment in C. C. 152/43 and confirmed the provisional attachment, but Mr. Berouti says that his client was not informed of these facts.

On 9.4.46 the receiver sold the goods, and the sale was confirmed on 10.4.46 by the District Court of Tel-Aviv.

On the same date (9.4.46) a notice was served by the Execution

Office of the District Court of Jaffa calling upon the Petitioner to bring the attached goods to the Jaffa Town Clock Square on 20.4.46 for sale by public auction.

On 20.4.46, however, nothing happened as the Execution Office was not functioning owing to the strike, and on 20.4.46 the Execution Officer fixed 4.5.46 for sale of the goods.

On 25.4.46 the Receiver objected to the sale on the ground that he had been appointed receiver and had in fact already sold the goods.

On 29.4.46, the second Respondent, after being served with the aforesaid application of the receiver, applied to the first Respondent for the attachment of the movable property of the Petitioner under Article 77 of the Ottoman Law of Execution, and on 30.4.46 the Assistant Chief Execution Officer of Jaffa made an order of attachment accordingly and certain property was attached.

The first observation that I would make is that the attaching officer had not made any valuation of the goods attached. He ought to have done this. In the absence of such a valuation it was not possible for the Assistant Chief Execution Officer, when he made the order dated 30.4.46, to limit the value of the property to be attached. If the Assistant Chief Execution Officer was at all empowered to make an order under Article 77 of the Ottoman Law of Execution he should first have called for evidence as to the value of the property of which the Petitioner had undertaken to be custodian. It would clearly be unjust to attach property which was worth a great deal more, unless the Petitioner's property happened to be of an indivisible nature. The Assistant Chief Execution Officer gave an order for the "attachment of the movable property" without placing a limit of any kind. For this reason alone I consider that the order was bad. Article 77 authorises the attachment of such property or other property *"equivalent to it"*.

But a further question arises and that is whether Article 77 is at all applicable to a person who undertakes the duties of a custodian in circumstances such as these. Article 77 is in Cap. 2 and that chapter is headed — "Attachment of Property in the Hands of a Third Party". Article 74, which is the first article in that chapter, provides that:—

> "Property in the hands of a third party may be seized by an order of attachment served on him, directing him not to hand such property to the judgment creditor ....."

It is, in my judgment, perfectly clear from this Article, and from Articles 75 to 77, that they provide for a kind of garnishee proceeding. I am quite unable to see how they can be held to apply to a person who takes charge of property as custodian in the circumstances of the present case. If the Petitioner had had property of the 3rd Respondent

in his hands then that property could undoubtedly have been seized "by an order of attachment served on him", that is to say by an order of attachment served on the Petitioner. But that is not what happened in the present case.

We have been referred to H. C. 31/36, 4 P. L. R. 49; H. C. 39/38, 4 C. L. R. 3; H. C. 76/43, 10 P. L. R. 482; and H. C. 112/43, 10 P. L. R. 637; and it must be admitted that Article 77 has in the past been used against a custodian in cases similar to this. But in none of those four cases does it appear that any objection was taken as to the applicability of the Article. In H. C. 76/43 Copland, J., said: "It is true that the Article is not one that is commonly employed because trustees of property placed in their care by an Execution Officer usually take precautions to see that that property does not disappear . . .".

If this question had been argued and decided in a previous case, or if there were evidence of a long and well established practice, I would have had the greatest hesitation in giving a contrary decision, but in the absence of both such circumstances I feel bound to hold that Article 77 has been misapplied in the present case.

The order *nisi* is therefore made absolute. The orders of the 1st Respondent dated 5.10.46 and 13.2.47 in Execution File No. 71/46 of the District Court of Jaffa are set aside, and the attachment levied on the goods of Petitioner on 30.4.46 must be raised. I do not consider that the second Respondent is to blame for having adopted this wrong procedure in this instance and I would therefore order no costs.

Given this 3rd day of June, 1947.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 369/46.

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

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

IN THE APPEAL OF :—

Selim Adib Salem & 4 ors. APPELLANTS.

v.

1. Yousef Fahoum & 6 ors.,
8. Nazif Mustapha Khairy District Officer. RESPONDENTS.

Elections — Petition under sec. 36, Municipal Corporations Ord. — Municipal Election Petitions Rules, rr. 2, 7 — Security to be fixed by Court — "Court", Art. 40, P. O.-in-C. — Everett v. Griffiths — When deposit must be made — Amount thereof, Kingston-upon-Hull Election Petition.

Appeal from the order of the District Court of Haifa, sitting at Nazareth, dated 18.11.46 in Civil Case No. 196/46, allowed and case remitted:—

1. The amount of the security to be deposited in an election petition must be determined by the Court and not by the Registrar.

2. The Court competent to hear the petition is the District Court constituted in special manner.

(*A. M. A.*)

DISTINGUISHED: Everett *v.* Griffiths (No. 2), 1923, 1 K. B. 130, 92 L. J. (K. B.) 293, 128 L. T. 350, 87 J. P. 49.

REFERRED TO: Kingston-upon-Hull Election Petition, 19 T. L. R. 648.

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 834.

2. For authorities on election petitions see note 1 to the judgment under appeal; *vide* also Mo. D. C. Jm. 197—8/46 (1946, S. C. D. C. 853).

(*H. K.*)

FOR APPELLANTS: A. Atallah.

FOR RESPONDENTS: Nos. 1, 2, 5, 6 and 7 — W. Salah.
No. 4 — Asfour.
No. 8 — Crown Counsel — (Heenan).
No. 3 — Absent — served.

JUDGMENT.

This is an appeal from the Order dated 18th November, 1946, of His Honour Judge Weldon sitting in the District Court, Haifa, in Civil Case No. 196/46. This was an election petition which purported to have been brought under section 36 of the Municipal Corporations Ordinance No. 1/1934.

The trial Court held that the procedure in regard to security had not been properly complied with. That procedure is to be found in Rule 2 of the Municipal Election Petitions Rules, 1935, (Supplement No. 2, 1935, p. 651) which reads as follows:—

> "2. (1) The presentation of an election petition shall be made by lodging it in the office of the District Court with a bond securing the payment by the Petitioner of all such costs, charges and expenses relating to the petition as the Court may order the Petitioner to pay any person summoned as a witness on the Petitioner's behalf or to any respondent.

(2) Such security shall be to such amount not being less than LP. 50 or exceeding LP. 150 as the Court may on summons direct, and may be given either by recognizances to be entered into by not more than four sureties or by deposit of money or partly in one way and partly in the other.

(3) In addition to the petition and bond so lodged there shall be lodged in the said office as many copies of the petition and bond as there are Respondents named in the petition."

Mr. Anton Atallah for the Appellants has told us that his clients were ready to deposit the sum of LP. 150 which he submits is the maximum sum which the Court could order to be deposited, but that the Registrar accepted a deposit of LP. 25 only, which was later raised to LP. 75. Mr. Atallah submits that his clients should not be prejudiced by the failure of the Registrar to comply with the Rules. He has referred us to Maxwell on the Interpretation of Statutes in which the following passage appears, at page 328 of the seventh edition:—

"So, if the Appellant was entitled to appeal, subject to the condition of giving security for costs within a certain time, he would be held to have complied with the condition if he offered and was ready to complete the security within the limited time, though it was, owing to the act of the Court, or of the Respondent, not completed till long after."

The drafting of Rule 2 leaves much to be desired, but there appears to be no doubt that the Court and not the Registrar must fix the amount of the security. At the same time we do not agree with the submission made by Walid Eff. Salah that the Court as constituted under the provisions of section 37 is not a District Court. We find that it is a District Court although constituted in a particular way. We are supported in this view by section 36 which provides that an election petition shall be presented "to a District Court". It does not say to a special tribunal. We are also supported by Article 40 of the Palestine Order-in-Council, 1922 (Vol. 3, Laws of Palestine, page 2579) which provides that a District Court shall exercise jurisdiction as a Court of first instance in all civil matters not within the jurisdiction of the Magistrates' Courts in and for that district. An election petition must be regarded as a civil matter. The learned trial Judge referred to the *dictum* in Everett *v.* Griffiths (1923, 1 K. B. p. 136). But the tribunal in England is presided over by a barrister, and so there can be no real comparison between the position in this country and the position in England.

Section 36 of the Ordinance allows fifteen days' time for the presentation of an appeal and, in our judgment, the Rules cannot cut down that period. We do not agree that it is the duty of the Petitioner to give a security or deposit, in the minimum sum laid down in Rule 2,

at the time when he files his petition. All that he must do is to file his petition within the time fixed in section 36(b) of the Ordinance. Thereafter a summons should issue to the Respondents calling upon them to appear before the Court in order that the amount of the security may be determined. The Petitioner must thereafter, and within the time fixed by the Court, file the necessary bond together with copies for service upon the Respondents as required by Rule 2(3).

Rule 7 of the above mentioned Rules provides that:—

> "Two or more candidates may be made Respondents to the same petition and their case may, for the sake of convenience, be tried at the same time but such a petition shall be deemed to be a separate petition against each Respondent."

The question has been raised whether, in a case in which there are more than one Respondent, the Petitioners should be required to give security of not less than LP. 25 and not more than LP. 150 in respect of *each* Respondent. Mr. Atallah has referred us to the Kingston-upon-Hull Election Petition, (L. T. R. Vol. 19, p. 648), and relying on that case we find that where, under Rule 7, there is only one trial, the security to be deposited should only be one security in the sum of not less than LP. 25 and not more than LP. 150.

Mr. Atallah has submitted that at the date of the judgment (18.11.46) the amendment to section 37 of the Municipal Corporations Ordinance, brought about by Ordinance No. 59/46 (at page 236 of Supplement No. 1 of 1946), was not in force, and that the President of the District Court had no power to dismiss the petition on a preliminary point. We are unable to agree, and we hold that under that section as it then stood the President was empowered to dismiss, without hearing it, a petition which had been improperly brought before the Court.

In the result we find that this appeal must be allowed, and the matter remitted to the President of the District Court, Haifa, in order that it may be dealt with in the light of this judgment. At the hearing Crown Counsel will be at liberty, if he so wishes, to raise again the objections which the trial Judge did not consider it necessary to deal with in view of his decision to strike out the petition. The Appellants will have their costs on the lower scale, to include a hearing fee of LP. 10 (ten pounds).

Delivered this 22nd day of April, 1947.

Chief Justice.

CRIMINAL APPEAL No. 48/47.

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

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

IN THE APPEAL OF:—

Bar-Kochva Danoch. APPELLANT.

v.

The Attorney General. RESPONDENT.

Oath — Witness testifying without taking the oath — Age or religious belief, T. U. I. Ord., sec. 34 — Corroboration — C. C. O. 216(d) preparation — Provocation.

Appeal from the judgment of the Court of Criminal Assize, sitting at Tel-Aviv, in Criminal Assize Case No. 11/47, dated the 12th day of May, 1947, whereby the Appellant was convicted of murder *contra* section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death; appeal dismissed:—

Where the unsworn evidence of a witness is accepted under sec. 34(1) of the T. U. I. Ord., that evidence does not require corroboration.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* C. A. D. C. T. A. 154/44 (1945, S. C. D. C. 142) with cases therein cited and the note thereto.

2. On the question of provocation see CR. A. 95/46 (13, P. L. R. 437; 1946, A. L. R. 559) and note 3 in A. L. R.; *vide* also CR. A. 52/46 (*ibid.*, pp. 249 & 647).

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: Crown Counsel — (Wicks).

JUDGMENT.

In this appeal two main contentions were advanced by Mr. Goitein, they were indeed the only two points that could arise.

The first turned on the admission of the evidence of the boy Mizrahi. He was affirmed instead of being sworn. The law on the question of the affirmation or swearing of a witness is contained in section 34 of the Criminal Procedure (Trial Upon Information) Ordinance. Generally speaking, the section visualises two cases where a witness can be affirmed instead of being sworn. The first exception is contained in section 34(1) and it is in the case where the taking of an oath is contrary to the religious belief of the witness or where he has

no religious belief. The second is the case of a child too young to understand the nature of an oath. Now it is true, as Mr. Goitein has argued, that a certain confusion of thought is undoubtedly endangered by a comparison of page 4 of the record with page 2 of the judgment. It might be argued (it must be argued Mr. Goitein submits) from page 4 of the record, that the reason for allowing an affirmation was the reason authorised in section 34(2) that is that the witness was a child. But turning to the judgment at page 2, it is in our opinion, quite clear that the reason why the Court affirmed instead of administering an oath was because they were of opinion that the case fell within section 34(1). The second paragraph of page 2 of the judgment states categorically that this course, that is the course of affirming instead of administering an oath, was not adopted because the boy was too young to understand the nature of an oath. It is also clear from this paragraph that the Court were alive to the necessity of making an enquiry as to the nature of the witness's religious beliefs. The same paragraph indicates that the result of their enquiry was that the witness did not have religious belief within the meaning of section 34(1). That conclusion is based, as they state, on two grounds; one because the witness in fact did not appear to be aware of any religious sanction in taking an oath, and the second ground was that he declared that he had a very half-hearted belief in the *Thora*. Now it seems to us that the inference which the Court drew that the witness had no religious beliefs insofar as religion touched the question of an oath, was a justifiable conclusion. It follows in our opinion that they were entitled to affirm this witness in accordance with the provisions of section 34(1). This being so, the evidence given by this witness did not in law require corroboration.

The next ground advanced by Mr. Goitein arose out of the question of the interpretation of section 216(d) of the Criminal Code Ordinance. He says that there was no preparation. Now in regard to preparation it may of course cover a very long period of time, or it may be effected in minutes. There are cases where this Court of Criminal Appeal has held that the mere drawing of a dagger, which the person was carrying, was itself a preparation. Undoubtedly in favour of the Accused in this case is the fact that he was by trade a butcher, and that he usually carried his butcher's knife with him. But the evidence of Mizrahi was to the effect that the first attack made on the deceased was from behind. His evidence was that the Accused pulled the deceased over and stabbed him in the chest or the abdomen. To do this he must have made some preparation to get the knife ready, because it cannot be alleged that he carried a knife in a position ready for an aggressive

attack at any moment. There was evidence from which it could be inferred that the knife was encased in either a sheath or a belt by his waist. In the circumstances we consider that the Court was justified in coming to the conclusion that there had been preparation.

The other point raised was the question of provocation. Two sources of provocation were alleged by the Accused. One, which was admitted, was the fact that some months previously the Accused himself had been the unfortunate victim of a murderous attack by the deceased and his family. In regard to this attack there is no ground for disbelieving the allegation of his counsel that it crippled him for life. The second source of provocation was the allegation of certain insulting and provocative words used by the deceased. Now in regard to this the trial Court has recorded as a definite finding the fact, that they did not believe the Accused, and we see no reason for interfering with this finding. In regard to the attack which crippled the Accused, undoubtedly it was provocation, and at the time when it was made it must have been very serious provocation. But in so far as the killing which led to the charge on which the Accused was convicted is concerned, this act of provocation was in our opinion far too remote to enable it to be advanced successfully as a defence.

For this reason the appeal must be dismissed.

Delivered this 4th day of June, 1947.

Chief Justice.

CRIMINAL APPEAL No. 110/47.

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

BEFORE: FitzGerald, C. J., Hubbard, A/J. and Frumkin, J.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Ahmad Nimer Taha Ismail. RESPONDENT.

Criminal appeal — Object of rules of procedure — No injustice to accused — Appeal filed in Registry of Supreme Court instead of District Court — T. U. I. Ord., sec. 66 as amended.

Appeal from the judgment of the District Court of Jaffa, dated 7.12.46 in Criminal Case No. 225/46 whereby Appellant was convicted on two counts of

causing death *contra* section 218 of the Criminal Code Ordinance, and one count of carrying firearms without lawful authority or lawful excuse *contra* section 66(A)(a) of the Criminal Code (Amendment) Ordinance, 1944, and was ordered to enter into a bond in the sum of LP. 5 for two years to be of good behaviour and to come up for judgment if called upon; preliminary objection overruled:—

It is not a defect fatal to the appeal if the Attorney General filed the appeal in the Registry of the Supreme Court instead of in that of the District Court.

(*A. M. A.*)

ANNOTATIONS:

1. On appeals filed in the wrong Court *cf.* C. A. 7/31 (1, P. L. R. 676; 1, C. of J. 322) and C. A. 259/40 (8, P. L. R. 63; 1941, S. C. J. 249; 10, Ct. L. R. 231).

2. *Vide* CR. A. 31/39 (6, P. L. R. 430; 1939, S. C. J. 372; 6, Ct. L. R. 103).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Hooton).

FOR RESPONDENT: Levitsky.

RULING.

Mr. Levitsky raised a preliminary objection that there is no appeal before this Court. There was, he says, a defect in procedure on the part of the Attorney General, in that he filed an appeal in the Registry of the Supreme Court instead of the Registry of the District Court. Before the amendment of section 66 * of the Criminal Procedure (Trial Upon Information) Ordinance, the Attorney General could have filed his appeal at the Supreme Court. It seems clear to us that the object of the amendment was purely administrative convenience.

Now it is of course essential in the interest of the efficient administration of justice that the rules of procedure should be strictly adhered to but what is paramount in a Criminal Court is that justice should be done. In this case it cannot be said that the Respondent in the appeal is in the slightest degree prejudiced by the procedure followed by the Attorney General. The fact that the appeal was filed in the Supreme Court instead of the District Court is in no way connected with the merits of the case.

For these reasons this technical objection is overruled.

Given this 2nd day of April, 1947.

Chief Justice.

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* Should read: "67".

CIVIL APPEAL No. 134/46

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

BEFORE: De Comarmond and Hubbard, JJ.

IN THE APPEAL OF:—

George Qaiser Habib Ghulmiyeh. APPELLANT.

v.

The Keren Kayemeth Leisrael Ltd. RESPONDENT.

Prior purchase — Land Code, Art. 41 — Evidence as to value of shares — Failure to establish value — Value ancillary to right — Onus of proof — Preponderance of probability.

Appeal from the judgment of the Land Court, Haifa, dated 29.3.46 in Land Case No. 11/44, allowed and case remitted:—

A plaintiff claiming prior purchase need not conclusively establish the value of the share claimed.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the Land Court is reported in 1946, S. C. D. C., at p. 279.

2. See the notes to the judgment under appeal for cases on assessment of value in *awlawiyeh* actions.

3. As regards the "preponderance of probability" rule see C .A. D. C. T. A. 198/46 (1947, S. C. D. C. 118) and the passage in Phipson cited in note 3 thereto.

(*H. K.*)

FOR APPELLANT: H. Atallah.

FOR RESPONDENT: J. Feiglin.

JUDGMENT.

De Comarmond, J.: This is an appeal from a judgment of the Land Court of Haifa in Land Case 11/44, whereby an action brought by the Appellant was dismissed.

The action was for the enforcement of the right of prior purchase established by Article 41 of the Ottoman Land Code.

The learned President held that the Plaintiff-Appellant had proved that he was co-owner of a certain property, that the Defendant had bought shares in the said property from another co-owner without the Plaintiff-Appellant's consent, and, finally, that the Plaintiff-Appellant had brought the action within time. Judgment was not, however, given in Plaintiff's favour because the learned President considered that the

evidence adduced by the Plaintiff did not enable him to arrive at the value of the shares "with anything approximating to certainty".

Article 41 lays down that where an owner of an undivided share in *miri* land transfers his share, by way of gift or for consideration, without the leave of the persons jointly interested, the latter have the right within one year to claim from the transferee restitution of the share on paying to such transferee the value at the time of the claim.

The Plaintiff gave evidence as to the value at the material time, but admitted that he did not know all the property. His valuation was LP. 7 or LP. 8 *per dunum*. The learned Judge stated that he could attach no weight to that evidence.

The Plaintiff also called a licensed land valuer who gave his estimate as being LP. 8 *per dunum* except for one parcel which he valued at LP. 12 *per dunum*. The learned President attached no weight to the land valuer's evidence and even expressed a doubt as to whether he had ever visited the land. The learned Judge's strictures are, to a certain extent, justified because the witness admitted that he had valued the land itself without paying much attention (if any) to trees growing thereon and even to buildings.

The extraordinary feature in this case is that the Defendant called no evidence.

The question to be decided is whether the Court below was right in dismissing the action.

Put shortly, the Appellant's submission is that his right of prior purchase having been duly established, he cannot be deprived of it because the Court considers that he has not proved satisfactorily the value of the land at the time of the claim. The learned advocate for the Appellant pointed out that he could not foresee that the Judge would find the evidence insufficient.

Is it incumbent on the plaintiff to prove how much he has to pay to the defendant to compensate the latter? Put like this, the question seems illogical, because it is obvious that it is in the Plaintiff's interest to set the value as low as possible. As a matter of fact, Article 41 does not in any way warrant the view that the plaintiff must establish the correct value or fail; had it done so, it would have expected too much of the generosity and fairness of human nature.

The correct view, in my opinion, is that once the essential ingredients of Article 41 have been proved, as they were in the present case, the question of value is ancillary. It is obvious that it is in the interest of the plaintiff to help the Court, because, until he knows what he has to pay, he cannot exercise his right. But it is very important for the defendant to see to it that a proper value be fixed.

I must now decide whether the learned President was right to take the step of dismissing the action on the ground that he was not satisfied that the Plaintiff had established sufficient data to enable the Court to fix the value of the shares at the time of claim. In my opinion, the learned Judge was not justified in dismissing the action. He had been supplied by the Plaintiff with certain data as to value, and in the absence of any data supplied by the Defendant he should have fixed the value on the available data or should, at least, have indicated that he wanted further enlightenment. The crux of this case is that the law does not lay down that the Plaintiff must establish the correct valuation or fail. Furthermore, there is the principle that a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision in civil proceedings (see Best on Evidence 12th Edition, page 82 and 95).

For the foregoing reasons I am of opinion that the finding of the Court below to the effect that the Plaintiff had failed to prove the element of value cannot stand and the decision must therefore be set aside and the case remitted back to the Court below with directions to determine the value of the shares at the time of claim and to give judgment after giving both parties the opportunity of calling witnesses and submitting arguments. I order accordingly and allow the Appellants costs of this appeal on the lower scale and LP. 10 (ten) advocate's attendance fee.

Delivered this 13th day of June, 1947.

British Puisne Judge.

Hubbard, J.: I concur in the result, but I have two comments to add. In the first place, I am of opinion that the learned trial Judge was correct in holding that it was for the Plaintiff to show the value of the land, if, by that, he meant that the Plaintiff must prove a value which the Court, acting on the principle of a mere preponderance of probability, could accept as the value of the land. Without proof of value the Court cannot order the restitution of the land; the Defendant has no desire to sell his land and if he thinks that the Plaintiff has failed to tender evidence of value on which the Court can act, there is no reason why he should himself call evidence. It is, therefore, in my view, incumbent on the Plaintiff to prove the element of value as part of his case.

Secondly, I wish clearly to reserve my opinion on the question whether the Plaintiff must prove the value of the land claimed as a whole and not merely a rate *per dunum*. The learned Judge referred to this matter in his judgment, but he merely said: "I leave aside the rough

and ready method employed of attempting to give a value merely *per dunum*". He did not base his judgment on this point, nor did Mr. Feiglin, who appeared for the Respondent, support the judgment on this ground. I would point out, however, that there are two separate sales involved in Appellant's claim under Article 41: one on 1st April, 1943, the other on 28th April, 1943. In each of those two sales the Respondent company purchased from co-sharers of the Appellant shares expressed in fractions whose numerators run into hundreds and whose denominators run into tens of thousands. These shares are shares in seven different parcels lying in four different blocks. The shares and the areas of the parcels are shown in Exhibits A.1—A.4. No doubt it is possible from these particulars to calculate the area in *dunums* purchased out of these seven parcels on each of the two occasions, to add those areas together, and then, a rate *per dunum* having been accepted, to calculate the total value of all the land. But it seems to me a matter for argument, if it is still the tendency of this Court to give the law a strict and narrow construction, whether a plaintiff who merely proves a price *per dunum* in such circumstances can be said to have proved the value of the land. A *"badl il misl"* is the value of a whole thing and not a value *per* unit of that thing.

This ground, however, as I have said, was not relied on by the trial Judge, nor was it argued by the Respondent before us. I therefore concur in the judgment just delivered.

Delivered this 13th day of June, 1947.

British Puisne Judge.

INCOME TAX APPEAL No. 6/46.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Hubbard, J.

IN THE APPEAL OF:—

The Palestine Discount Bank, Ltd., Tel-Aviv. APPELLANTS.

v.

The Assessing Officer, Tel-Aviv. RESPONDENT.

Income Tax — Income accruing abroad and not remitted to Palestine

— Sec. 5(1)(a) — "Derived from Palestine" — Commissioners of Taxation v. Kirk — "Accruing" — I. T. A. 9/42.

Appeal against the assessment No. LTD/287/5378 of the Assessing Officer, Tel-Aviv, dated 30th November, 1945, allowed:—

Income accruing abroad and not received in Palestine is not liable to income tax under the Ordinance.

(A. M. A.)

REFERRED TO: Commissioners of Taxation *v.* Kirk, 1900, A. C. 588, 69 L. J. (P. C.) 87, 83 L. T. 4.

APPLIED: I. T. A. 9/42 (10, P. L. R. 255, at p. 261; 1943, A. L. R. 278, at p. 284).

ANNOTATIONS:

1. *Vide* Stroud's Judicial Dictionary, 2nd ed., pp. 510—1 and Suppl., p. 283.
2. See now sec. 5(4) of the Income Tax Ord., 1947 (reproducing the amendment effected by the I. T. (Am.) Ord., No. 26 of 1946).

(H. K.)

FOR APPELLANTS: Smoira and Rosenblueth.

FOR RESPONDENT: A. Levin.

JUDGMENT.

This is an appeal against an assessment made by the Assessing Officer, Tel-Aviv. The only issue is one of law, namely, whether the Appellant Bank is chargeable in respect of certain sums of interest, credited to it abroad and not received in Palestine, on foreign securities and deposits in foreign Banks.

Mr. Levin, for the Assessing Officer, admits that these sums did not accrue in Palestine and were not received in Palestine. They are clearly part of the income of the Appellant Bank; and it remains to be decided whether they constitute income derived from Palestine in respect of profits from the business of banking within the meaning of section 5(1)(a) of the Income Tax Ordinance.

Dr. Smoira contends that taxable income under this section is subject to two kinds of qualifications, which he named the material and the territorial qualifications. The material qualifications are those set out in section 5(1)(a) — (h), that is to say, the income must be money gained in one of the ways specified by these paragraphs. The territorial qualification is that the place wherein the income accrues, wherefrom it is derived or wherein it is received, must be Palestine. He does not deny that the profits have been made by the banking business of the Appellant, for it is part of the Bank's business to invest its available funds, but he submits these profits are not derived from Palestine but from countries outside Palestine.

Mr. Levin's contention is that "derived from Palestine" means "derived from a source in Palestine", source being understood in the sense of one of the methods of making profits or acquiring money set out in section 5(1)(a) — (h), *e. g.* trade, business, dividends, rents, *etc.*

No authority directly in point appears to be available. No enactment of any other territory has been produced in which the words "derived from" are used in conjunction with a political geographical area. Where the words do occur in other enactments, they are used either in conjunction with the word "sources" in the sense of methods or means of acquiring money, or in conjunction with a named source.

In the Indian Income Tax Ordinance of 1922 (sec. 4(1)) the words "derived from" are used in conjunction with "sources" in this sense, and the sources themselves are specified in section 6, the final one being "other sources" (sec. 6(vi)). In the New South Wales Land and Income Tax Assessment Act of 1895, there occurs the phrase "derived from lands of the Crown held under lease" (sec. 15(3)). "Derived from" here too has the same meaning: it indicates that the income is made by some use of these lands, in the case of Commissioners of Taxation *v.* Kirk, by extracting ore from them (1900 A. C. 588, at 591). I think it appropriate to mention here that, with respect, I do not think there is any substance in Dr. Smoira's contention based on this case, that "derived" means the same as "accruing". It is true that the Board in this case said, "Their Lordships attach no special meaning to the word "derived" which they treat as synonimous with accruing or arising." But that decision is on a statute which has in one sub-section the words "arising or accruing to any person" (sec. 15(1), and in another sub-section "derived from lands of the Crown". (sec. 15(3)). The Board attached no special significance to the use of a different word in the later sub-section. But the case is different where these expressions, namely, "accruing in", "derived from", "received in", all occur in the same sub-section. It may be that these expressions overlap to some extent, but it is to be presumed that the words "derived from" were inserted to cover some cases which the other expressions do not cover. In my view, adopting the words of Gordon Smith, C. J., in Horowitz *v.* Assessing Officer of Jerusalem (I. T. A. No. 9/42, 10 P. L. R. 255, at 261) "the only safe rule is to look at the wording of our Ordinance, particularly sections 5 and 6, and see what is the intention expressed in the wording of these provisions."

My own first impression was that "accruing" in paragraph 5 relates to moneys which become payable to and are actually paid or credited to a person in Palestine; "received" to moneys actually received in Palestine, although they may have accrued abroad and been remitted

to Palestine; and "derived from" to moneys received outside Palestine from inside Palestine. It is no doubt true that generally speaking, moneys earned in Palestine may be said to have accrued there, to be received there, and to be derived from Palestine. But on the other hand, it is equally clear that in some cases money may be derived from Palestine although it does not accrue nor is it received there. For instance, under paragraph 35 of the Ordinance, if a borrower remits to a lender abroad a sum of money, being interest on a loan, the contractual place of payment of which is abroad, it appears to me that it is only by virtue of the words "derived from Palestine" that such sum of money can be said to be income chargeable under the Ordinance. It is not received in Palestine, nor, the contractual place of payment being outside Palestine, does it accrue in Palestine, but it is derived from Palestine. It appeared to me, therefore, that it was for cases where income was received outside Palestine that the words "derived from Palestine" were primarily intended.

On further consideration I have seen no reason to change this view, which I think is to some extent supported by a consideration of the connotations of the word "derived" as used in ordinary speech. When something has been derived from something else, it has usually been separated from, or taken out of the limits, physical or metaphorical, of the thing from which it is derived. You derive wool from a sheep, you derive milk from a cow, and you derive food for thought from a given situation. When you have derived it, it ceases to be within the limits of that whence it was derived. And as the word is normally used, I think it implies also that the speaker is outside the limits of the place of derivation. A Londoner might say he derives his income from a business in London, but he would not naturally say he derives his income from London. He would say he earns his living in London. Sitting in a café at Tel-Aviv I might say, "Tel-Aviv derives its vegetables from the *Kibbutzim*". But a member of a *Kibbutz*, being in the *Kibbutz*, would not naturally say, "We derive vegetables from our *Kibbutz*". He would say, "Our *Kibbutz* produces vegetables" or "we grow vegetables in our *Kibbutz*", "grow" being the etymological root also of the word "accrue". Put in a nutshell, I feel that one usually speaks of deriving things from abroad and not from home.

It might perhaps be argued that the order in which the words "accruing", "derived", "received" are placed is against this construction, and that if this construction were correct, then we should expect "accruing in" and "received in" to be placed together, as referring in both cases to money becoming available inside Palestine. It appears to me, however, that the words may quite well have been placed in their

present order for another reason, namely, because both the expressions "accruing in" and "derived from" relate to money which comes in some way from inside Palestine, while "received in" may relate, and perhaps was intended primarily to relate, to money received from outside Palestine.

I have carefully considered Mr. Levin's contention previously referred to, but I do not think it can be maintained. I cannot read words into the Ordinance to support the case of Government. The only geographical limitation is in respect of the accrual, derivation or receipt of the income. The recipient is just "any person", wherever he may reside. The source is "any trade, business, profession or vocation", wherever it may be carried on. Mr. Levin wishes me to read "derived from Palestine" as meaning derived from a source in Palestine, which would lead to the result that while as regards income received in Palestine it might be in respect of a source inside or outside Palestine, yet as regards income derived from Palestine it must be from a source in Palestine. I can see no reason for adopting such a construction.

It follows, therefore, that the income in dispute, which accrued abroad, has not been received in Palestine, and is not derived from Palestine, is not chargeable.

The appeal is therefore allowed. I fix an inclusive sum of LP. 60 (sixty) costs. Parties will agree assessment figure and lodge formal order.

Delivered this 10th day of June, 1947.

British Puisne Judge.

CRIMINAL APPEAL No. 42/47.

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

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

IN THE APPEAL OF:—

Atiyeh Ismail Faraj. APPELLANT.

v.

The Attorney General. RESPONDENT.

Discrepancy in prosecution evidence — R. v. Leonard Harris — Onus of proof, R. v. Stoddart; R. v. Jackson.

Appeal from the judgment of the Court of Criminal Assize sitting in Jerusalem dated the 1st day of May, 1947, in Criminal Assize Case No. 15/47 whereby the Appellant was convicted by majority of murder contrary to section 214 of the Criminal Code Ordinance, 1936, and sentenced to death, dismissed:—

In the circumstances of this case it was held that there had not been such discrepancies in the prosecution evidence as would make it negligible (as in R. *v.* Harris) and that the summing up did not offend against the principles laid down in R. *v.* Stoddart and R. *v.* Jackson (onus of proof after *prima facie* case by prosecution).

(*A. M. A.*)

CONSIDERED: R. *v.* Harris (Leonard), 1927, 20 Cr. App. Rep. 144; R. *v.* Stoddart, 1909, 25 T. L. R. 612, 2 Cr. App. Rep. 217; R. *v.* Jackson, 1936, "Times" 1.12.36.

ANNOTATIONS:

1. "A summing up must contain, either expressly or by implication, a caution that the onus of proof rests on the prosecution": Halsbury, Vol. 9, p. 171, 2nd paragraph; see also Lawrence *v.* R., 1933, A. C. 699, 102 L. J. (P. C.) 148, 145 L. T. 574, 50 T. L. R. 13.

2. On the effect of witnesses contradicting their own previous statements see CR. A. 129/43 (10, P. L. R. 596; 1943, A. L. R. 743) and note 2 in A. L. R.; see also CR. A. 118/45 (1945, A. L. R. 690, at pp. 696—7).

(*H. K.*)

FOR APPELLANT: A. Atallah.

FOR RESPONDENT: Crown Counsel — (Wicks).

JUDGMENT.

This is an appeal from the judgment of the Court of Criminal Assize sitting at Jerusalem whereby the Accused was convicted of murder and sentenced to death. Two grounds why this appeal should be allowed have been urged by Mr. Atallah, the first is that there were so many discrepancies in the evidence given by the main prosecution witness that the Court should have come to the conclusion that the evidence was unreliable *in toto*. In support of this contention he cited the case of R. *v.* Leonard Harris, XX Criminal Appeal Reports, p. 144. A careful analysis of the circumstances of the Harris case, and the case of the Appellant discloses, that no true analogy exists between them. The principle established in the Harris case is: If a person is proved to have made a statement which is in distinct conflict with his evidence, the proper direction to the Jury is that his testimony is negligible. Now in this case we have direct findings of fact by the Trial Court that there was no distinct conflict in evidence, but that there were certain discrepancies which were carefully examined by the Court. As a result of their analysis the conclusion formed by the trial Court was that those discrepancies were not such as would justify it

in rejecting the evidence of the prosecution. We proceed to examine those alleged discrepancies:—

The first one, and probably the only one which merits serious consideration, was the fact that the witness, the victim's mother, stated in her statement to the Police that she saw Suleiman holding the hand of the victim while she was being stabbed by the Accused. Later she denied having made this particular statement about Suleiman. Let us now consider the circumstances in which the statement was made. It has been established as a fact that Suleiman was present with the Accused. The mother had rushed out from the house; she was witnessing the murder of her daughter, and in circumstances such as these, one would not expect her to give a photographic reproduction of all incidents she had witnessed. The fact that Suleiman was present and that the position was confused, fully justified the Court in coming to the conclusion that this discrepancy was not such as would vitiate the whole of the evidence of the witness.

The other alleged discrepancy was the question as to whether or not Hassan was present. A careful analysis of the evidence in fact discloses that there was on this point no real discrepancy. It must be borne in mind that the statement to the Police was given in Arabic, it was taken down by a Policeman who possibly in the course of taking it down, would stress part of it more than the person making the statement would have wished. The only alleged discrepancy was that in her statement to the Police she said that Hassan was present and witnessed the killing whereas in her statement in Court she said that Hassan was in his own courtyard. But it is clear that he could have witnessed the killing from the courtyard. Here again, we think the Court was fully justified in coming to the conclusion that this was not such a discrepancy as would vitiate the evidence as a whole.

The third alleged discrepancy was in regard to the time of the committing of the murder. Here Mr. Atallah based his allegation of a discrepancy on the evidence of the doctor in regard to the time of setting in of *rigor mortis*. It is, of course, a well-known fact that medical men cannot settle with any degree of precision the time when *rigor mortis* sets in. The doctor himself has admitted a margin of error of two hours; added to this there is the fact that one would not expect unsophisticated villagers, such as those witnesses were, to gauge the time with exact precision. Here again we agree with the trial Court that there was no substance in the contention that this was such a variation as would vitiate the evidence in whole. The other contention of counsel was that the summing up on page 4 of the judgment was erroneous in that it had offended against the principle set out in Rex *v.* Joseph

Stoddart, Vol. II Criminal Appeal Reports, p. 217. The judgment in the case of Rex *v.* Stoddart dealt with the question of the burden of proof. The substance of it was that where a *prima facie* case is made out and the Defendant by his defence offers an explanation, the jury should be directed that the burden of proof that the offence charged has been committed is still on the prosecution and if upon a review of the evidence on both sides they are in doubt they ought to acquit. With all respect to the argument advanced by learned Counsel, we think that the summing up of the Court in every way complied with the principles of Rex *v.* Joseph Stoddart. The Court did not attempt to shift the burden of proof on to the Accused. Their words were as follows:—

> "It suffices if the prosecution proves that up to a very short period before the actual murder the Accused was unprovoked and that there is no reason to believe that the deceased did or was likely to have provoked the Accused within the intervening period, then the prosecution has established a *prima facie* case of murder with premeditation. It is, of course, then open to the Accused to show by evidence that the act on his part was either unintentional or provoked."

We are of opinion that this conveyed a correct appreciation of the law, and that it was strictly in accordance with the principle established in Rex *v.* Stoddart and Rex *v.* Jackson.

Finally, in regard to the presence of the elements required by section 216 of the Criminal Code Ordinance, we find no reason to criticise the arguments of the Court, and the conclusions at which they arrived.

For these reasons the appeal is dismissed.

Delivered this 29th day of May, 1947.

Chief Justice.

CIVIL APPEAL No. 156/46.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF:—

David Elazaroff. APPELLANT.

v.

The Estate of the Late Moshe Baum. RESPONDENT.

M. C. P. R. 147 — Case concluded by Magistrate on record — Reasons for proceeding under r. 147 to be recorded — English law.

Appeal against the judgment of the District Court of Tel-Aviv in C. A. No. 47/45, of 8.2.46, allowed:—

M. C. P. R. 147 is in very wide terms, giving the Magistrate absolute discretion. English decisions are inapplicable but, in the exercise of his discretion, a Magistrate would do well to pay due attention to the fundamental principles underlying these cases.

(*A. M. A.*)

ANNOTATIONS:

1. For authorities on r. 147 of the M. C. P. R., resp. r. 197 of the C. P. R. see C. A. 20/39 (6, P. L. R. 143; 1939, S. C. J. 116; 5, Ct. L. R. 150), C. A. 215/42 (9, P. L. R. 737; 1942, S. C. J. 988), C. A. 16/44 (11, P. L. R. 262; 1944, A. L. R. 401) and CR. A. 57/44 (*ibid.*, pp. 184 & 440).

2. On the applicability of English law in the interpretation of the C. P. R. see Annotated Laws of Palestine, Vol. 5, pp. 23 *et seq.*

(*H. K.*)

FOR APPELLANT: Sussman and Yeroushalmi.

FOR RESPONDENT: Hake.

JUDGMENT.

This appeal raises one point only. Unfortunately our decision on that point will not have the effect of determining the litigation. That point concerns the application of Rule 147 of the Magistrates' Courts Procedure Rules. The Trial Magistrate who had taken over a trial which had been commenced by another Magistrate, held that he was entitled so to proceed under the provisions of Rule 147. On appeal to the District Court the learned Judge held that the Magistrate was wrong. The only ground for so holding appears to have been that the learned Judge considered it more satisfactory and equitable that the case should be heard *de novo*. With all respect to the learned Judge, we would point out that the issue before him was one of law only and the question of whether a purely legal decision was on other grounds satisfactory does not appear to us to have been relevant. Now Mr. Hake has argued that the learned Magistrate was wrong on two grounds. He says that he should have recorded in his record the reasons why he decided that Rule 147 did apply. As to this, we need only say that with respect, we agree with the previous decision of this Court that it is highly desirable that a note of the reasons why a Magistrate proceeded under Rule 147 should be made by him. In law, however, such a note is not necessary because in matters of procedure a Court of Appeal will assume, unless there is patent evidence on the face of the record to the contrary, that the Judge has proceeded in accordance with the rules of procedure. But in this case the very issue as to whether the Magistrate was entitled to proceed was raised,

and in the record the Magistrate embodied his decision that he was so entitled. It must be inferred from this fact, that the Magistrate was satisfied that the condition precedent to the bringing into force of Rule 147 existed, which is that the previous Magistrate was prevented from sitting.

Mr. Hake has referred us to several English cases, which are all to the effect that it is only in special circumstances, and where the parties consent, that evidence heard before a previous Judge, can be taken into account by a continuing Judge without re-hearing the witnesses. As to this, we would point out that there is no rule in English procedure similar to Rule 147 in Palestine procedure. The rule in our opinion is in as wide terms as possible. We agree with Mr. Hake that the discretion given by the rule is permissive, but it is an absolute discretion. The Magistrate in considering whether he should exercise that discretion, would no doubt pay due attention to the fundamental principles underlying the English cases, but he is in no way bound by them. For these reasons we think that the District Court erred in reversing the Magistrate on this point. The result must be that the appeal is allowed. The case is remitted to the District Court for determination in the light of this judgment.

Costs will abide the issue for the purposes of this appeal. We assess the costs of the Appellant at LP. 10.

Delivered this 9th day of June, 1947.

Chief Justice.

CIVIL APPEAL No. 127/47.

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

BEFORE: Shaw and Hubbard, JJ.

IN THE APPLICATION OF :—

Hanotea Ltd. APPLICANT.

v.

Moshe Dankner. RESPONDENT.

Amendment of defence — Whether nature of defence altered — Absence of mala fides.

Application for stay of proceedings at the District Court of Tel-Aviv in Civil Case No. 310/45 pending the determination of the Civil Appeal lodged with this

Court on 1.6.47 from the decision of the District Court dated 28th April, 1947; appeal allowed:—

An amendment of the statement of defence should be allowed if not made with *mala fides* and if it does not alter the nature of the defence.

(*A. M. A.*)

ANNOTATIONS:

1. Upon the suggestion of Applicant's counsel the Court decided to hear the appeal itself, thereby obviating the necessity of dealing with the application for stay of proceedings in the District Court pending the determination of the appeal.

2. *Cf.* C. A. 338/45 (1946, A. L. R. 67) with cases therein cited and the note thereto; see also Mo. D. C. Jm. 23/47 (1947, S. C. D. C. 77).

(*H. K.*)

FOR APPLICANT: Zeltner.

FOR RESPONDENT: Scharf.

JUDGMENT.

This is an appeal from the decision dated 28.4.47 by His Honour Judge Windham refusing an application of the present Appellant for the amendment of para. 3 of the statement of defence in C. C. 310/45 of the District Court of Tel-Aviv.

The Appellant sought to alter the date in para. 3 of the defence from 28.8.34 to 18.12.33.

It is not denied that at the hearing of 21.1.47 the Appellant made verbally the same application as he subsequently made by motion, and he made it before the Plaintiff (present Respondent) had led any evidence. He had already, on that date, been allowed to amend the date from 28.8.33 to 28.8.34, and when asked by this Court whether he would have objected if the Appellant had, in the first instance, asked for an amendment of the date to 18.12.33, Mr. Scharf said that he did not know whether or not he would have objected.

The matter has been argued before us at considerable length. Mr. Zeltner for the Appellant has told us that what he alleges is an oral assignment which took place at some date between 18.12.33 and 14.1.34. That is to say, he does not want to be tied down to proving that the assignment was in writing and that it took place on 28.8.34. He also states that the date which he wishes to substitute (18.12.33) is that of the original contract, and that the word "contract" in para. 3 of the defence refers to that original contract, and not to a separate contract of assignment.

The question whether the amendment should be allowed is a matter for the learned Judge's discretion, but we are unable to agree with him, and we think that he misdirected himself when he said, that the amend-

ment "would alter the whole structure of the defence". The defence remains the same — that there was an assignment. There is a change only in respect of the date and form of that assignment. We take note of the fact that the learned Judge did not consider that there had been any *mala fides* on the part of Defendant's counsel in applying for the further amendment. He held that there was incompetence in the original drafting of para. 3 of the defence. On the Appellant's own showing that finding of the learned Judge is fully justified.

Having carefully considered the whole matter we have come to the conclusion that the amendment was one which ought to have been allowed, and we therefore allow the appeal. The Appellant must serve an amended defence on the other side not later than 22.6.47 and in order that there may be no doubt as to what contract is referred to, the amendment should state "... and assigned unto him his rights under the contract dated 18.12.33 referred to in para. 1 of this statement of defence".

The Appellant must, however, pay the Respondent's costs of this appeal which we fix in the sum of LP. 20 (twenty pounds).

Delivered this 20th day of June, 1947.

British Puisne Judge.

CIVIL APPEAL No. 355/46.

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

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF :—

Itzhak Rokach. APPELLANT.

v.

Moshe Volpert. RESPONDENT.

Law of Execution, Art. 36 — Declaratory judgment that Defendant complied with terms of consent judgment — Implied condition to accept delivery in accordance with terms of judgment — Failure to accept delivery.

Appeal from the judgment of the District Court, Tel-Aviv, dated 25.10.46 in C. A. 105/46, allowed:—

A sum of money payable if default is made in delivering goods within a

certain time may not be claimed by a party who refused to accept the goods when tendered within the time stipulated.

(*A. M. A.*)

ANNOTATIONS: For authorities on Art. 36 of the Execution Law see H. C. 22/44 (1944, A. L. R. 234) and note in A. L. R., H. C. 73/45 (12, P. L. R. 490; 1945, A. L. R. 813) and note 2 in A. L. R., and C. A. D. C. T. A. 36/45 (1946, S. C. D. C. 89).

(*H. K.*)

FOR APPELLANT: Pratt.

FOR RESPONDENT: Kleinzeller.

JUDGMENT.

De Comarmond, J.: In February, 1945, Moshe Volpert filed an action in the Magistrate's Court of Tel-Aviv claiming from Itzhak Rokach the return of wire netting 309 metres long or alternatively payment of the value of the said netting that is LP. 169.950. The parties reached a compromise which was made a judgment of the Court. The judgment by consent was to the effect that Mr. Rokach undertook to return to Mr. Volpert within two months from the date of the judgment the wire netting which was then in the Lamport grove or to pay him the aforementioned sum in case of failure to return the netting. At the end of the two months Mr. Volpert had not received delivery of the netting and took steps to recover the sum agreed upon. Mr. Rokach protested that he had done everything in his power to deliver the netting and that it was due to Mr. Volpert's fault that the netting had not been delivered to him. An action was begun before the Magistrate's Court of Tel-Aviv by Mr. Rokach. The action was for a declaration that the Defendant, that is Mr. Volpert, was not entitled to recover the sum of LP. 169.950, and in the statement of claim the Plaintiff mentioned that he was still prepared to deliver the netting. The action was based on Article 36 of the Execution Law of 28th *Nissan* 1330. The learned Magistrate dismissed the action. On appeal to the District Court the Magistrate's decision was upheld and the matter then came before us.

The first point of importance in the case is that the judgment by consent provided for the delivery of the netting at Mr. Volpert's grove without any stipulation regarding its condition. The evidence adduced by the Plaintiff/Appellant was that, in compliance with his undertaking, he had had the netting removed from the Lamport grove and had made arrangements for its transport and delivery to the Defendant. He called witnesses to establish that the Defendant had intimated that he was not yet ready to receive the netting. A letter dated 14.6.45 written on behalf of Plaintiff to the Defendant was put in: that letter requested the Defendant to fix the time and place for the delivery of

the netting. It is abundantly clear from the evidence that the Defendant-Respondent did signify that he was not ready to take delivery. On this point, the carter Roteblut gave evidence and was not even cross-examined. It therefore seems to me idle to suggest that the Plaintiff was bound to take further steps to effect delivery within the time fixed: he certainly could not risk depositing the wire-netting outside the Respondent's grove and leave it at the mercy of any thief. I am of opinion that the Appellant has established that he did everything that could be expected in the circumstances to discharge his obligation, and that it was for the Respondent, after causing the delivery to be delayed, to make the next move. This he did not do and I am of opinion that he cannot invoke non-delivery within the specified time in order to obtain the cash payment.

It seems to me that the learned Magistrate misdirected himself on several points, the most important being that he was impressed by the fact that in the judgment by consent there is an undertaking on the part of the Plaintiff to deliver the netting but no undertaking on the part of the Defendant to accept the netting. This is a most extraordinary finding. It is impossible to accept the view that it was open to the Defendant to make it practically impossible for the Plaintiff to fulfil his undertaking and then to invoke the non-fulfilment for his own ends.

On appeal, the learned Judge of the District Court pointed out that the agreement was not an ordinary one, and that the matter was governed by a particular law which required proof of actual fulfilment. I take this to be a reference to Article 36 of the Execution Law and I would point out that that Article (properly translated) does refer to release after judgment and that it is clear that the Defendant's conduct did amount to a release of the Plaintiff from the obligation to deliver, in so far as the time factor was concerned.

I therefore hold that the decision of the District Court and that of the Magistrate must be set aside. I consider that the proper decision to be recorded in Plaintiff-Appellant's favour is that the Defendant-Respondent is not entitled to claim the sum of LP. 169.950 mils, unless and until the Plaintiff-Appellant fails to deliver the netting after being requested in writing by the Defendant-Respondent to do so within a reasonable delay to be specified by the Defendant-Respondent within two weeks from the date of this decision if given in his presence (or that of his representative) or within one week from the notification of the decision if not given in presence. I order accordingly.

The Appellant will have costs in this Court on the lower scale with LP. 10 advocate's attendance fee. The costs granted to the Defendant-

Respondent in both Courts below are reversed and will go to the Appellant.

Delivered this 9th day of May, 1947.

British Puisne Judge.

Frumkin, J.: The object of Article 36 is to secure a stay of execution on one of certain grounds to enable a judgment debtor to apply to a competent Court. This stay was obtained by the Appellant and we are not here to consider whether or not the Execution Officer was right in granting the stay. The fact is that a stay was granted and the Appellant was thus enabled to apply for relief. And all we are called upon to decide is whether he is entitled to such relief.

This depends on one point only, namely, was the Respondent justified in refusing to accept the netting wire when it was offered to him on behalf of the Appellant? If he was not justified then the Appellant has done all what was incumbent upon him to do, and the Respondent could have no claim for the money, but for the goods. On the other hand if the Respondent was justified in his refusal he has a claim for the money. This in turn would depend on the fact whether the Appellant was entitled to insist that the goods be handed over to him in good condition. It is true that no mention was made in the consent judgment that the netting must be in good condition but under common sense rules this must be taken as a matter of course. It could not have been the intention of the parties that the Appellant who without lawful excuse has taken away netting wire belonging to the Respondent should not have to pay for it if he delivers netting rusted, torn or in any other way not capable of making use of.

The difficulty is that the Respondent did not allege that all the netting was not in good condition, but only a proportionate small part of it. That a certain part of the netting was rusted was not seriously contested. The question therefore arises whether the Appellant should have accepted that part of the netting which was in good condition leaving out the unfit part.

After careful consideration it seems that the Respondent is himself to blame for the consequences of his attitude. Had he been willing to accept the parts which were in good condition and, as stated before, formed the greatest part of it, he would probably have a good claim for the value of the small part which was not in good condition. But he included the lesser into the greater and refused acceptance *in toto,* and is therefore not entitled to the money.

In the result, I concur in the judgment of my learned brother.

Delivered this 9th day of May, 1947.

Puisne Judge.

CIVIL APPEAL No. 119/46.

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

BEFORE: De Comarmond and Hubbard, JJ.

IN THE APPEAL OF :—

Guiseppe Vincenti & an. — APPELLANTS.

v.

John (Hana) Asfour & 4 ors. — RESPONDENTS.

Striking out S/C — C. P. R. 21, 21A, Netz v. Ede — Receiver purchasing property, Nugent v. Nugent — Issue of ownerhsip in Land Court, C. A. 237/43 — Amending S/C — Crown Actions Ord.

Appeal from the judgment of the Land Court of Haifa, dated the 15th of March, 1946, in Land Case No. 9/45 (Motion No. 153/46), allowed:—

1. Rule 21 applies to striking out an action on certain grounds; rule 21A to the dismissal of an action on certain other grounds.

2. Great care must be taken in exercising the power given by those rules, and where reasonable, leave to amend the statement of claim should be granted rather than striking out or dismissing the action.

(*A. M. A.*)

REFERRED TO: Nugent *v.* Nugent, 1908, 1 Ch. 546, 77 L. J. (Ch.) 271, 98 L. T. 354; 24 T. L. R. 296; Netz *v.* Chuter Ede, 1946, 1 Ch. 224, 115 L. J. (Ch.) 197, 174 L. T. 363, (1946) 1 All E. R. 628; C. A. 237/43 (1944, A. L. R. 17).

ANNOTATIONS:

1. On the difference between rr. 21 & 21A of the C. P. R. see C. A. 201/46 (13, P. L. R. 508; 1946, A. L. R. 767) and note 1 in A. L. R.

2. On the caution to be exercised in making use of the provisions of rr. 21 & 21A *cf.* C. A. 237/45 (13, P. L. R. 305; 1946, A. L. R. 615) and note in A. L. R.; see also Hirsch & an. *v.* Somervell & ors., 1946, 2 All E. R. 430 which was referred to in Mo. D. C. T. A. 170/46 (1946, S. C. D. C. 676).

3. See C. A. 8/46 (13, P. L. R. 603; 1946, A. L. R. 823) and note 2 in A. L. R. on the jurisdiction point.

4. On a receiver's disability to purchase the property committed to his charge see Halsbury, Vol. 28, pp. 73—4, sec. 8.

(*H. K.*)

FOR APPELLANTS: Smoira and Rosenblueth.

FOR RESPONDENTS: No. 1 — In person.
No. 2—4 — Wittkowski.
No. 5 — No appearance.

JUDGMENT.

De Comarmond, J.: This is an appeal from a decision of the Acting Relieving President of the Haifa Land Court, in Land Case No. 9/45, whereby he dismissed an action brought by the present Appellants. A motion for dismissal was made by four Defendants to the action on four grounds, namely, that the Court had no jurisdiction, that the action was barred because it had been brought too late, that the formalities prescribed by the Crown Actions Ordinance had not been complied with, and lastly that the Plaintiffs "had not alleged the facts necessary to support the relief claimed by them or any relief at all".

There were five Defendants. The first four moved the Court praying for dismissal. The fifth Defendant (the Registrar of Lands, Haifa) took no part in the proceedings before the lower Court or before us.

The first remark I wish to make is that there is a difference between Rules 21 and 21A of the Civil Procedure Rules, 1938. The former provides for the striking out of a statement of claim on certain specified grounds, one of which being that the statement of claim does not disclose a cause of action; the latter provides for the dismissal of a case on the ground of *res judicata*, lack of jurisdiction, and other grounds. It is obvious that the difference between striking out of a statement of claim and the dismissal of an action is a very important one, and I am not sure that the learned Judge in the Court below did pay sufficient attention to that difference. As the action was dismissed, I must assume that the order was made under Rule 21A.

The three grounds upon which the order was made were stated by the learned Judge as follows:—

> "(i) I am not satisfied that this Court has jurisdiction to try the case;
> (ii) The cause of action is not properly made out; and
> (iii) The provisions of the Crown Actions Ordinance have not been complied with."

The wording of the first ground is rather vague and therefore unsatisfactory, because it does not state definitely whether the finding was that the Court had no jurisdiction.

The second ground does not go so far as to declare that no cause of action was disclosed.

The statement of claim sets out that the Appellants were the registered owners of a certain immovable property which was mortgaged. In 1940 they were interned because they were Italian nationals, and the mortgagees applied to the Court for an order for the sale of the property. The first four Respondents became the purchasers, and an order was made directing the Registrar of Lands, Haifa, to register the

property in their names. The Plaintiffs-Appellants aver in their statement of claim that one of the purchasers had been appointed receiver under section 14 of Chapter 81, as amended by section 2 of Ordinance 39 of 1939, and could not in the circumstances be a purchaser without leave of the Court (Nugent *v.* Nugent, 1908, 1 Ch. D. 546). The Plaintiffs also averred that the consent of the Custodian of Enemy Property had not been obtained for the transfer, as required by Article 6 of the Trading with the Enemy (Custodian) Order, 1939. These averments do, in my view, disclose a cause of action, but I must concede that some difficulty does arise when one is faced with the prayers at the end of the statement of claim, which were that the 5th Defendant, *i. e.* the Registrar of Lands, be ordered to rectify the Land Register by striking out the registration of Defendants 1 to 4, and by reinstating the Plaintiffs on the register as owners of the property. The Plaintiffs also prayed for such other relief as the Court might deem fit. Before the lower Court the Plaintiffs' advocate seems to have realised that an amendment of the statement of claim was necessary.

I feel I must refrain from indicating what, if any, change should be made. I must confine myself to decide whether the learned Judge below was right in dismissing the action.

As already mentioned, the Court below did not clearly hold that the case was outside its jurisdiction. When a Judge in such a case says that he is not satisfied, it does imply that he is not quite certain.

I find it difficult to accept that where a plaintiff avers that the sale and transfer of his property is void, he is not raising the issue of ownership, and I therefore consider that the first ground given by the learned Judge cannot be sustained. I would here mention that in Civil Appeal 237/43, the Supreme Court allowed an appeal from a dismissal of a claim by the same learned Judge (then Chief Magistrate) in circumstances somewhat similar to the present case.

With regard to the cause of action, I have already indicated that, in my opinion, a cause of action was disclosed, and I have mentioned that the Plaintiffs' advocate himself asked for leave to amend the statement of claim in order, no doubt, to bring out more clearly what remedy he was praying for and against whom. Was it reasonable to refuse him the opportunity of doing so? I am of opinion that the opportunity should have been afforded him. Rules 21 and 21A of the Civil Procedure Rules are no doubt very necessary and useful, but on the other hand, great care must be taken when exercising the powers given by these rules. In this connection I would invite reference to the remarks of Wynn-Parry, J., in Netz *v.* Ede, L. T. R., Vol. 174 at page 365.

It is not without interest to note that the Defendants 1 to 4 did not

move to have the statement of claim dismissed or struck out when they were served with it; they filed a statement of defence, and only had recourse to the aforesaid rules at a later stage. Their move resulted in an application by the Plaintiffs to amend the statement of claim, and in the circumstances I consider that the application to amend should have been granted. In the case of Netz *v.* Ede already cited, the learned Judge at the end of his decision stated that he had no doubt that the action could not possibly succeed and that he would strike out the statement of claim, subject to any application which Plaintiff's counsel might make for leave to amend.

It remains to mention the third ground given by the learned Judge below for dismissing the action, namely, that the provisions of the Crown Actions Ordinance had not been complied with. This obviously refers to the fact that the Registrar of Lands at Haifa had been cited as one of the Defendants. I consider that it is not desirable at this stage to give a ruling on the question whether the procedure traced out by the Crown Actions Ordinance need be followed in the circumstances of this case, because the application for leave to amend was, I gather, made with the object, *inter alia*, of clarifying the position of the fifth Defendant in the case.

I therefore conclude that the proper decision in this case would have been to grant leave to amend. I need hardly add that the Defendants will be fully entitled to file a new statement of defence or to take such other steps as they may deem fit when the amended statement of claim is served on them.

The decision of the Court below is set aside, and the case remitted back with the direction that an amended statement of claim may be filed not later than ten days from the date of this judgment, if delivered in presence of the Appellants, or within five days from the notification of this judgment, if delivered in their absence.

As regards costs, if the Appellants succeed ultimately, they will have one set of costs here on the lower scale, with an advocate's attendance fee of LP. 10 against Respondents 1 to 4 jointly and severally. If the Respondents 1 to 4 ultimately succeed, then Respondent No. 1 will have costs on the lower scale, and Respondents 2 to 4 will have one set of costs on the lower scale and LP. 10 advocate's attendance fee.

Delivered this 17th day of June, 1947.

British Puisne Judge.

CRIMINAL APPEAL No. 136/46.

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

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

IN THE APPEAL OF:—

Jacob Hasson & 2 ors. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Town Planning prosecutions — Authority of A. G. to prosecute, Municipal Corporations Ord., sec. 131 — *"May" and "shall" — Law of Procedure (Am.) Ord., secs.* 3, 6A — *Whether there is a Town Planning Scheme — Uncontradicted evidence that a building is within Town Planning area — Liability of purchaser, sec.* 35(9) — *Demolition.*

Appeal from the judgment of the District Court of Jaffa, sitting as a Court of Appeal, dated the 20th day of September, 1946, in Criminal Appeal No. 58/46 dismissing an appeal from the judgment of the Magistrate's Court of Jaffa dated 9.5.46 in Criminal Case No. 4361/45 whereby the Appellants were convicted of an offence contrary to sections 11 and 35 of the Town Planning Ordinance, 1936, as amended by the 1941 Ordinance and sub-section 1 of Cap. 15 of the Building Bye-Laws 1929, Jaffa, and each fined to pay LP. 7 and given seven months to obtain a licence from the Municipal Corporation and in case they fail to obtain the licence that the building be demolished after the seven months; appeal dismissed:—

1. The A. G. may prosecute Town Planning Offences.

2. A purchaser of land on which a building is being put up contrary to Town Planning regulations is participating in the offence.

3. On conviction the Court must order demolition unless the Defendant shows good cause.

(*A. M. A.*)

ANNOTATIONS:

1. As regards the first point *cf.* CR. A. 88/44 (11, P. L. R. 451; 1944, A. L. R. 506) where it was held that sec. 35 of the Town Planning Ord. does not oust the jurisdiction of the District Court.

2. On the construction of the word "may" see H. C. 62/44 (11, P. L. R. 337; 1944, A. L. R. 604) and note 1 in A. L. R.

3. See, on the last point, CR. A. D. C. Jm. 115/46 (1947, S. C. D. C. 99) and note 1.

(*H. K.*)

FOR APPELLANTS: E. Z. Fellman.

FOR RESPONDENT: H. Homsi.

JUDGMENT.

This is an appeal from the judgment dated 20.9.46 of the District Court, Jaffa, in Criminal Appeal 58/46.

The Appellants were charged in the Magistrate's Court of Jaffa with having contravened sections 11 and 35 of the Town Planning Ordinance, 1936, as amended in 1941, and para. 1 Cap. 15 of the Building Regulations (Municipal Area of Jaffa), 1929. The particulars of the offence were that on 28.6.45 or thereabouts the accused persons "commenced in building a market place consisting of 37 shops in Hatikva, Lydda Street, Block No. 6155, Jaffa, without a licence".

Para. 1 of sec. 15 of the By-Laws (at p. 548 of the Official *Gazette*, 1929) provides that:—

> No building or structure or work shall be commenced until notice shall have been given to the Local Commission by the builder on the prescribed form, giving such particulars as are hereunder specified and such additional particulars as the Local Commission may require, and until a building permit has been obtained".

The Magistrate found as a fact that the accused persons "were at the time of filing and committal of the offence true owners of the building in question", and he convicted the three Appellants and sentenced each of them to pay a fine of LP. 7. He also gave the Appellants seven months time within which to obtain a licence from the Municipal Corporation, and in case they failed to obtain it he ordered the demolition of the building by the Local Building and Town Planning Commission.

An appeal from that judgment of the District Court was dismissed, but the Presiding Judge gave leave to appeal to this Court.

The first ground of appeal is that the Attorney General was not authorised to institute proceedings in the Magistrate's Court. Mr. Felman who appeared for the Appellants has referred to sec. 131 of the Municipal Corporation Ordinance, No. 1 of 1934, which provides that any Municipal Corporation or Council may institute proceedings in and appear before any Court, or may appear in any legal proceedings by their Town Clerk, *etc.* He submits that the word "may" means "shall". We are unable to agree. Sec. 3 of the Law of Procedure (Amend) Ordinance, No. 21 of 1934, provides that criminal proceedings before any Magistrate's Court or Municipal Court may be instituted by any of the following persons, that is to say:—

(a) The Attorney General or his representative, or
(b) any Police Officer, or
(c) any person authorised by any Ordinance in force for the time being to institute such proceedings.

It is abundantly clear that this law, which is later than Ordinance No. 1 of 1934, does empower the Attorney General to institute these proceedings, and sec. 6A of the Law of Procedure (Amend) Ordinance, No. 15 of 1945, further declares that the Attorney General or his representative is empowered to represent such a body as a Municipal Council in such proceedings.

The second ground of appeal is that the learned Magistrate erred in finding the Appellants guilty in the absence of any proof that there was a lawfully made Town Planning Scheme in respect of the Block in question, and in the absence of proof of the contents of such scheme, and that the relevant provision was *intra vires* the Town Planning Ordinance, and that the work complained of had been done otherwise than in accordance with the relevant provision of the Scheme.

The fourth ground of appeal is that there was no sufficient evidence to support a finding that the building was within the Jaffa Town Planning area.

The question whether or not there is a Town Planning Scheme affecting this block does not arise. Sections 11 and 35 of the Town Planning Ordinance No. 28 of 1936 (as amended), and para. 1 of sec. 15 of the By-Laws, all prohibit the erection of a building without a permit, irrespective of whether there is a Town Planning Scheme in existence. As regards the fourth ground of appeal we find that there was sufficient evidence before the Magistrate to support a finding that the Block in question was within the Jaffa Town Planning Area. The evidence which was given on that point was uncontradicted.

The third ground of appeal is that there was no evidence sufficient to support a finding that the three Appellants were the true owners of the building in question at the time of the commission of the offence. It is not denied that the three Appellants were the registered owners of the land on which the shops stand from 28.6.45 to 10.7.45. There was evidence, given by P. W. 2 Yusef Boimholtz who is a building inspector of the Jaffa Municipality, that on 27.6.45 he found 37 small shops which had been built to a height of 50 cm. to 1 m., and that two days later (*i. e.* on 29.6.45) he found the work still proceeding, and the building was then nearly 3½ metres high. So there was evidence that after the land had been registered in the names of Appellants (on 28.6.45) the illegal building operations still went on. The Appellants must have been aware, when they negotiated for the purchase of the land, that there was a partly constructed building on it, and they were put on enquiry as to whether that construction was lawful, and it is quite clear that building operations continued after the Appellants had become the registered owners. Their liabilities as

owners are fixed upon them by sec. 35(9) of the Town Planning Ordinance as amended by Ordinance No. 30 of 1941. The genuineness of the sale of the property by the Appellants, after they had been the registered owners for only a few days, may well be doubted in view of the admission of the first Appellant that he sold to his son and of the second Appellant that he transferred his rights to his father. There is more than a suspicion that those transfers were made with a view to making it more difficult for the Municipal Council of Jaffa to prosecute.

The only questions which remain are whether the learned Magistrate was right in ordering demolition, and whether the period of seven months which he allowed is sufficient to enable the Appellants to obtain a permit. Where, as in the present case, the building has been constructed without a permit, sec. 35(1)(ii) makes the giving of a demolition order obligatory unless the Defendant shows good cause to the contrary.

In the present case there is no question of an honest mistake. The Appellants, with their eyes open, wilfully took part in illegal building operations. If they chose to invest their money in such an enterprise they cannot reasonably ask the Court for sympathy or leniency, and they have shown no good cause why a demolition order should not be made. Mr. Homsi has told us that unless it is necessary for some definite purpose, such as the construction of roads, the Municipal Council will not insist on demolition, and we feel sure that the Council can be relied upon not to make any vindictive use of its rights. But we do not want to say anything that might encourage others to do what the present Appellants have done. Such persons must not expect their illegal acts to be condoned.

In the result we dismiss the appeal.

Delivered this 25th day of May, 1947.

Chief Justice.

CIVIL APPEAL No. 208/45.

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

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

IN THE APPEAL OF :—

Heirs of Mohammad Yousef Qaddoura (34 in number). APPELLANTS.

v.

Hussein Yousef Mohammad el Haj & 485 ors. RESPONDENTS.

Prescription — Miri land awarded in judgment, period of prescription — Law of Execution, Art. 144.

Appeal from the decision of the Settlement Officer, Safad, Settlement Area, in case No. 1/Es-Samoui, dated 16th February, 1945, allowed:—

The period of prescription in respect of a judgment is fifteen years, even if the judgment relates to *miri*.

(*A. M. A.*)

ANNOTATIONS: For authorities on Art. 144 of the Ottoman Law of Execution see H. C. 126/43 (11, P. L. R. 539; 1944, A. L. R. 665) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANTS: Eliash and Scharf.

FOR RESPONDENTS: No. 475 — Assistant Government Advocate — (Wa'ari).
Nos. 23 & 28 — A. Atalla.
Nos. 1—465 (Save 23 & 28) — Kussa.
Remaining Respondents — Absent — served.

JUDGMENT.

This is an appeal from the Settlement Officer, Safad Settlement Area, in Case No. 1/Es Samoui. It appears there has been a protracted dispute between the Appellants and Respondents in regard to the ownership of the lands of Samoui. The Appellants, who are a Safad family, claim that by virtue of various deals with the head of the Respondents' village they became entitled to approximately one half of the village lands, and that their title thereto was supported by registration and by possession.

The land concerned was found to be suitable for the growing of the profitable tobacco crop, and there is no doubt that the land has been advantageously exploited by the villagers. The resultant profits were the source of the disputes between the Appellants and the villagers. There was evidence that leases were signed by some of the villagers which, it was said, constituted a recognition of the title of the Appellants. In any case, the whole matter was referred to arbitration, and the arbitrator's award which was given in 1922 substantially upheld the claim of the Appellants. This arbitration award was confirmed by the Land Court in 1923. After judgment objection was taken both to the arbitration and to the Land Court proceedings, on the ground that all the villagers were not a party.

We have come to the conclusion that there is no substance in those

objections. It follows that the arbitration award must determine the issue, if that award is still legally enforceable. The question now arises — can the Appellants rely on the arbitration award, confirmed as it has been by the Land Court? In 1928 there was a delivery by the Execution Officer of certain lands which were covered by the arbitration award of 1923. We have now to decide whether between the date of the execution proceedings of 1928 and 1940, which is the date of commencement of the settlement proceedings, the award became prescribed.

It can be accepted as established that the Respondents have been in possession of the land between 1928 and 1940, and the prescriptive period for possession of this *miri* land is ten years. The prescriptive period had therefore been exceeded, and relying on this alone the Settlement Officer would have been justified in confirming the Respondents in their possession. But it must be borne in mind that the Land Court judgment of 1923 gave the Appellants a decree in respect of this land.

We have now to consider the effect of section 144 of the Execution Law. That section provides that a decree does not become prescribed until a period of fifteen years has elapsed. The question therefore arises whether this decree supersedes the provision in regard to the ten years prescriptive period for possession of *miri* lands. We are of opinion that it does. To hold otherwise would be to make section 144 of the Execution Law meaningless in so far as decrees affecting land are concerned. The section is a statutory enactment promulgated long after the theory of prescription in regard to *miri* land had been accepted, and if it was intended to exclude decrees in respect of land from the ambit of section 144 the section would have stated so in specific terms. It follows that the decree of the Land Court which was in favour of the Appellants was enforceable at the date of the settlement proceedings, and effect should have been given to it by the Settlement Officer.

The appeal must therefore be allowed, the judgment of the Settlement Officer set aside, and the case remitted to the Settlement Officer to determine in the light of this judgment. Costs of this appeal to be on the lower scale to include LP. 15.— advocate's fees.

Delivered this 23rd day of April, 1947.

Chief Justice.

CIVIL APPEAL No. 99/46.

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

BEFORE: Shaw and Hubbard, JJ.

IN THE APPEAL OF:—

Hussein Yousef el Khalidi & 62 ors. APPELLANTS.

v.

The Palestine Jewish Colonization Association. RESPONDENT.

Cultivators — Application for declaration and injunction — Proper remedy.

Appeal from the judgment of the District Court of Haifa, in Civil Case No. 4/46, dated 13th March, 1946, whereby Appellants' claim for a declaratory judgment and injunction was dismissed; appeal dismissed:—

The proper remedy for persons who claim grazing and water rights exercisable throughout the year is to set up their right as a defence when eviction proceedings are taken against them.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C., at p. 464.

2. See the notes to the judgment under appeal.

(*H. K.*)

FOR APPELLANTS: No. 1 — A. Nuweihid.
Rest — E. Koussa.

FOR RESPONDENT: A. Levin and Miss Salomon.

JUDGMENT.

We do not consider it necessary to call on Mr. Levin to reply.

This is an appeal from the judgment dated 13th March, 1946, of the District Court of Haifa in Civil Case No. 4/46.

Having heard the submission of Mr. Koussa for the Appellants, and having considered the judgment, we are unable to find any merit in this appeal. The case for the Appellants is that they have a right to graze and water their stock every day of the year. The matter had already come before a Special Commission which gave its decision on 31st March, 1944. We agree with the learned President of the District Court when he says:—

"If the Plaintiffs consider that they have a practice protected, in

view of the decision of the Commission, under section 18, and that it amounts by virtue of that section to a permanent, as distinct from an intermittent, right, it is surely open to them to act in that belief and wait until and if they are attacked in proceedings for eviction."

And we think that he came to the proper conclusion when he said that "this Court cannot enter into the question here raised by the Plaintiffs or grant the relief sought".

In result we dismiss this appeal with costs on the lower scale to include a hearing fee of LP. 10 (ten pounds).

Delivered this 16th day of May, 1947.

British Puisne Judge.

CIVIL APPEAL No. 371/46.

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

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

IN THE APPEAL OF:—

Joseph Goldzweig. APPELLANT.

v.

Isaac Trubovitz & an. RESPONDENTS.

Action for eviction under sec. 8(1)(c), *R. R.* (*D. H.*) *Ord.* — *Principles of "Greater Hardship Clause"* — *Magistrate's discretionary power under sec.* 8(1)(c) *R. R.* (*D. H.*) *Ord.* — *C. A.* 140/46 *distinguished.*

Appeal from the judgment of the District Court of Tel-Aviv dated the 25th day of October, 1946, in Civil Appeal No. 11/46, dismissing an appeal against the judgment of the Magistrate's Court, dated the 30th day of December, 1945, in Civil Case No. 1041/45, dismissed:—

1. While it is true that the principle embodied in "Greater Hardship Clause" in English legislation has no part in Palestine R. R. (D. H.) Ord. yet sec. 8(1)(c) of the Ord. gives Magistrate such a wide discretion as would entitle him to give consideration to balance of inconvenience between the parties.

2. According to sec. 8(1)(c), R. R. (D. H.) Ord. the Magistrate even if satisfied that the premises are reasonably required and there is alternative accommodation available, has still a latitude to decline to make an order

for eviction if he comes to conclusion that in all the circumstances such order would not be reasonable.

DISTINGUISHED: C. A. 140/46 (1947, A. L. R. 347).

FOLLOWED: Chiverton *v.* Ede 2 K. B. 1921.

(*M. L.*)

ANNOTATIONS:

1. The judgment appealed from is reported in Hebrew in 1946 *Hamishpat* 266.

2. See case distinguished (*supra*) and annotations in A. L. R. (especially para. 3 of the annotations).

(*A. G.*)

FOR APPELLANT: Goitein.

FOR RESPONDENTS: Scharf.

JUDGMENT.

This is an appeal from the District Court of Tel-Aviv which sitting in its appellate capacity dismissed an appeal from the Magistrate, Tel-Aviv, refusing to issue an eviction order under the Rent Restrictions (Dwelling Houses) Ordinance against the Respondents.

The case has been fought out in three Courts with all the tensity which those eviction cases evoke. In regard to the persons who should be considered as constituting the respective families for the purposes of this action, and in regard to the details of furniture and division of living space in each of the flats, we accept the finding of the lower Courts. Only one issue therefore remains for this Court to consider. Indeed, Mr. Goitein quite rightly confined his main appeal to this issue; it was whether the Magistrate was entitled to take into consideration the elements which he did in arriving at his conclusion. Mr. Goitein's contention is that the Magistrate was influenced throughout by a consideration of the principles embodied in the "Greater Hardship Clause" which appears in English legislation, and which, he alleges, has no part in the Palestine Rent Restrictions (Dwelling Houses) Ordinance. He referred us to C. A. 140/46. Now it is true that if one sentence of this judgment were taken away from its context it would appear to be an authority for Mr. Goitein's proposition. But a careful perusal of the learned Judge's judgment does not permit us to attach the same interpretation to the sentence as Mr. Goitein does. It is quite clear that in that case the Appeal Court reversed the Magistrate Court's judgment because they were unable to find that there was any justification for its conclusion that the person applying for eviction had acted capriciously. We think that the purport of the decision in C. A. 140/46 was that on the facts of that case no question

of balance of inconvenience did arise. It seems to us that sec. 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance gives such a wide discretion to the Magistrate as would entitle him to give consideration to the balance of inconvenience between the parties. In the case of Chiverton *v.* Ede 2 K. B. 1921, it was argued that a County Court Judge was wrong because he took into account the fact that the order for possession if made would oblige the Defendant to get rid of some of her furniture. On appeal it was held that if the County Court Judge, in the exercise of his general discretion under the Clause, considered that it would not be reasonable to make the order asked for, he was entitled to look upon all the circumstances including the fact that the Defendant had this furniture. According to the section 8(1)(c) the Judge, although he may be satisfied that the premises are reasonably required and that there is alternative accommodation available, has still a latitude to decline to make an order for eviction if he comes to the conclusion that in all the circumstances such an order would not be reasonable. As in the case of Chiverton *v.* Ede it seems to us that in this case both the Magistrate's and the District Courts had materials upon which to act and we cannot see that they decided inconsistently with any principle of law.

For these reasons the appeal must be dismissed. Costs at the lower scale to include LP. 10 advocate's attendance fees.

Delivered this 23rd day of June, 1947, in the presence of Mr. Goitein for Appellant and Mr. Scharf for Respondents.

Chief Justice.

INCOME TAX APPEAL No. 24/46.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Curry, A/J.

IN THE APPEAL OF:—

Wolf Nagler. APPELLANT.

v.

The Assessing Officer, Lydda District, Tel-Aviv. RESPONDENT.

Income Tax — Shares bought cum dividend — Appropriation of divi-

dends — C. I. R. v. Forrest, Wigmore v. Thomas Summerson & Sons Ltd. — Contracting out.

Appeal from the assessment of the Assessing Officer, Tel-Aviv dated 30.4.46 No. NAT 112/442, dismissed:—

A purchaser of shares cannot set off the extra price paid to buy a share *cum* dividend, against the dividend received on that share.

(*A. M. A.*)

FOLLOWED: I. R. C. *v.* Forrest, 1924, S. C. 450, 8 Tax C. 704; Wigmore *v.* Summerson (Thomas) & Sons, Ltd., I. R. C. *v.* Oakley, 1926, 1 K. B. 131, 94 L. J. (K. B.) 836, 134 L. T. 408, 41 T. L. R. 568, 9 Tax C. 577.

ANNOTATIONS: See Halsbury, Vol. 17, pp. 251—2, para. 509.

(*H. K.*)

FOR APPELLANT: S. Wolf.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

This is an appeal from the assessment of the Assessing Officer of Tel-Aviv.

The Appellant entered into an agreement dated 19.11.41 with a Mr. Hegmoni to buy the shares of the latter in Shamir Diamond Enterprise Ltd. The purchase price for those shares was stated to be as follows:—

(a) LP. 750.— for the shares;

(b) LP. 1000.— for the goodwill;

(c) LP. 679.436 — a sum loaned to the Co. by Hegmoni;

(d) LP. 750.— on account of the profits.

Clause 4 provided that in consideration of the above Hegmoni would transfer the shares. On 4.10.1942 the Co. declared a dividend of some LP. 2,500 which the Assessing Officer held to be chargeable income. The Appellant's contention is that LP. 750 of that amount should be chargeable to Hegmoni as dividend paid to him under their agreement.

It is true that the Income Tax Ordinance contains no special provisions concerning the sale of shares *cum* dividend but there cannot be any argument that a dividend is chargeable income and if one buys shares in the ordinary way on the Stock Exchange one naturally pays more for those shares *cum* dividend than *ex* dividend, and there is nothing in the Ordinance which enables one to set off the extra price one is naturally paying when buying *cum* dividend against the actual dividend received. That clearly is the general principle. The next thing is to consider whether in view of the terms of the agreement between the parties this case can be distinguished therefrom. Prior to 1927 the English Income Tax Law like ours had no special provision regarding the purchase of shares *cum* dividend. One is therefore in

my opinion fully justified in looking at the English Cases on this point. In the Commissioners of Inland Revenue *v.* Forrest 1924 (28 Digest 111C), "A" purchased shares for a sum exceeding their par value by £ 50 — the excess in the contract to be paid "to cover the portion of the dividend accrued to date". "A" contended that, of the dividend so receivable on his shares £ 50 should be treated as capital in view of the terms of the contract of purchase and should not be included in the computation of his income. The facts there are almost identical with our case.

Again in Wigmore *v.* Thomas Summerson & Sons Ltd. 1926 1 K. B. — 131, it was contended by the Revenue Authorities that when a security passes by sale during the currency of an interest period, an apportionment must be taken of the income, the seller being assessed on the income accrued up to the date of sale. In other words it was the reverse side of our case for there it was contended that part of the purchase price received by the seller should be chargeable for tax as it included interest rights. It was held that the increase in price received by the seller by reason of the interest accruing is not "interest" within the meaning of the Act and therefore not liable to tax. I do not think it is necessary for me to repeat the arguments to be found in those cases but they merely support my view and the general principle that if you receive the dividend, that is a receipt of taxable income and you cannot set off the extra amount you paid for the share on account of the accrued interest. It matters not what is the particular wording of the agreement into which you have entered with the vendor, you cannot contract out and the dividend remains chargeable income and until some amendment is made in the law, as was done in England in 1927 the Appellant cannot claim that the vendor shall pay tax on the amount he has received in respect of interest accrued due. I cannot agree with the Appellant that there is a gap in the law. It may be that as the law stands at present cases such as these may arise which result in hardship to the purchaser. That is capable of adjustment by the legislator as in England, but it would be wrong for me to try to take this case out of the law and treat it as an exception.

As Mr. Wittkowski quite rightly argued, the law as it stands, would not permit of their claiming the tax from Hegmoni although he shows the LP. 750 as income, because in fact it is not income but part of the consideration for the purchase of the shares.

For the foregoing reasons this appeal must be dismissed with costs fixed at LP. 10.—.

Delivered this 20th day of June, 1947.

A/British Puisne Judge.