133393

ANNOTATED
LAW REPORTS
1946

Edited by

M. LEVANON
Advocate
Approved Law Reporter

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

Dr. H. KITZINGER & A. GORALI Advocates

VOL. I

Rcd
KMQ
1002.23
.A35
A56
1946
RBK
v.1.
c.1.

23364

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

Copyright by the Publisher.

Printed in Palestine.

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

CIVIL APPEALS Nos. 54/45 & 57/45.

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

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

IN THE APPEAL OF:—

C. A. No. 54/45:—

Mohammad Ahmad Abu Shanab & 5 ors. APPELLANTS.

v.

Sheikh Saleh Omar Sherif el Mughrabi el Jazairli & an. RESPONDENTS.

C. A. No. 57/45:—

Sheikh Saleh Omar Sherif el Mughrabi el Jazairli & an. APPELLANTS.

v.

Mohammad Ahmad Abu Shanab & 5 ors. RESPONDENTS.

Void lease — L. T. Ord., sec. 11 *— No rent payable under a void lease.*

Appeals from the judgment of the District Court of Jaffa in Civil Cases No. 73/41 dated 24.1.45, dismissed as regards C. A. 54/45 and allowed as regards C. A. 57/45:—

No rent may be claimed under a lease which is void under sec. 11 of the Land Transfer Ordinance.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 99/44 (11, P. L. R. 533; 1944, A. L. R. 777).

See also C. A. 389—397/44 (12, P. L. R. 240; 1945, A. L. R. 430) where a claim for equivalent rent under Art. 472 of the *Mejelle* was allowed in respect of occupation under a void sale.

(*H. K.*)

C. A. No. 54/45:—

FOR APPELLANTS: Kehaty & Levontin.

FOR RESPONDENTS: Azar.

C. A. No. 57/45:—

FOR APPELLANTS: Azar.

FOR RESPONDENTS: Kehaty & Levontin.

JUDGMENT.

These are two appeals which have been consolidated from the judgment of the District Court of Jaffa in Civil Case No. 73/41. The facts are that the Respondents entered into a contract with the two Appellants under which they purported to lease an orange-grove and buildings to the Appellants. This contract had, however, one flaw, which is not unusual in Palestine and which leads to endless litigation, in that it did not conform with the provisions of the Land Transfer Ordinance. The District Court in due course declared the contract null and void under the provisions of section 11 of the Ordinance. After that pronouncement, the lessors set about to get the money which undoubtedly they would have been entitled to get from the lessees had the contract been a valid one. Before the District Court they partly succeeded because they got judgment for LP. 312.500 mils with interest and fees. They were not satisfied and they now appeal from that judgment on the ground that they were entitled to more. The lessees on the other hand also appeal on the ground that they (the lessors) were entitled to nothing at all as the contract was null and void. It will be observed that the proviso to section 11(1), despite declaring the contract null and void, enables money in certain circumstances to be recovered. Those circumstances are set out and they are confined to cases where money has been paid in respect of dispositions. It cannot be argued, and indeed it was not argued, that the original Plaintiffs' claim came within the ambit of the proviso.

The case was argued at considerable length. Several technical points were made, but in our opinion the real issue can be dealt with briefly.

Counsel for the Plaintiff, when asked on what basis of law he founded his claim, answered that he relied on equity and on wrongful conversion. It seems to us that there could not have been any wrongful conversion because what the lessees did was with the full acquiescence of the lessors over a period of years. This being so, counsel must fall back on his equitable claim if such exists. Before this Court will grant equitable relief it must enquire into the true nature of the transaction. Now, camouflage it as you will, it is quite clear that the true nature of this transaction was the taking of the produce under the presumed authority of a contract which is null and void. The only rights which the Plaintiffs had were contractual rights, and when the contract failed their right failed, because they were not protected by the proviso to section 11(1). Indeed, it is clear that if the Plaintiffs were to succeed in this case it would render nugatory the provisions of the Land Transfer Ordinance because all that a person who failed to comply with these

provisions would need to do to avoid the consequences would be to advance, as has been advanced in this case, a claim founded on wrongful conversion and a demand for equitable relief. The Court having held, and in our opinion rightly held, that the contract was a void one no claim lies for the value of the fruits which the alleged lessees purported to take under that contract.

For these reasons we decide that the appeal in case No. 54/45 must be dismissed and the appeal in case No. 57/45 must be allowed. No costs in either case.

Delivered this 2nd day of January, 1946.

Chief Justice.

CRIMINAL APPEAL No. 205/45.

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

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

IN THE APPEAL OF:—

Jamal Hussein Mahmoud. APPELLANT.

v.

The Attorney General. RESPONDENT.

Identification parade — Sentence.

Appeal from the judgment of the District Court, Nablus, dated 18.12.45, in Crime No. 185/45, whereby Appellant was convicted of robbery *contra* sections 287 and 288(1) of the Criminal Code Ordinance, 1936, and sentenced to six years' imprisonment; appeal dismissed, but sentence increased:—

1. The fact that the officer in charge of an identification parade cannot testify in Court does not make evidence of the identification inadmissible.

2. The Court should record any attenuating circumstances which lead them to decrease the sentence substantially below the statutory maximum.

(*A. M. A.*)

ANNOTATIONS:

1. On identification parades see CR. A. 147/45 (1945, A. L. R. 781) and annotations.

2. On the second point *cf.* CR. A. 90/45 (1945, A. L. R. 551) and note. *Vide* CR. A. 46/45 (12, P. L. R. 263; 1945, A. L. R. 597) and note in A. L. R.

(*H. K.*)

FOR APPELLANT: Hamoudeh — by delegation.

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

JUDGMENT.

Only one point has been raised on appeal in this case. There are decisions of this Court to the effect that where an accused person in a case of robbery was not previously known to a witness who was also a victim to the robbery, identification of the accused person in Court by the witness is not sufficient, that his evidence should be re-inforced by what is known as an Identification Parade.

It is contended by the Crown that there was an Identification Parade. There were two sergeants present, a British Sgt. who was in charge of the parade and who is now in South America, and another sergeant who gave evidence as to what happened at the parade. That evidence undoubtedly satisfactorily established the identity of the accused person as the robber, and we are not prepared to say that the mere absence of the officer who was technically in charge, particularly in the circumstances of this case, was such a defect in procedure as to nullify the evidence as to the parade; the conviction was therefore in order. The Accused has been found guilty of robbery and the circumstances in which the crime was committed make him liable to imprisonment for life, but the Court awarded only six years' imprisonment. We reserve our decision on the question of sentence as we wish to ascertain what were the extenuating circumstances, if any, which led the Court to give such an apparently lenient sentence for an offence which, as we have said, is punishable with life imprisonment.

The conviction is confirmed and the decision as regards sentence is reserved.

Delivered this 9th day of January, 1946.

Chief Justice.

SENTENCE.

In this case the Accused has been convicted of robbery in circumstances such as to render him liable for life imprisonment and he has been sentenced to six years' imprisonment.

Now, where there is such a marked divergence between the sentence provided by the legislature and that awarded by the Court, we would expect the judge to set out in some detail for the benefit of the Court of Appeal the extenuating circumstances which enabled him to award a sentence, which *prima facie* appears to fall short of that demanded by the seriousness of the offence.

In this case we cannot avoid the conclusion that this sentence was unduly lenient considering the brutality of the crime. Having indicated

our view in regard to this aspect of the matter we bear in mind that the Appellant appealed on a point of law only, and in these circumstances we think that an increase of two years will suffice.

Delivered this 9th day of January, 1946.

Chief Justice.

CRIMINAL APPEAL No. 210/45.

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

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

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Petors Dimitric Varkhalamas & 5 ors. RESPONDENTS.

Immigration offence — Aiding and abetting — More than one person brought in illegally, only one offence — Immigration Ord. sec. 12(3) (i), (ii) (a) — Objection on the ground of uncertainty, of dublicity — When should be raised — Discharge or acquittal — D. C. (Summary Trials) Rules — Sentence.

Appeal from the judgment of the District Court of Haifa given in Summary Trial No. 344/45 on 22nd day of December, 1945, whereby Respondents were acquitted and discharged; appeal allowed as regards Respondent No. 1:—

1. Unlike an objection on the ground of duplicity, which may be taken at any time, an objection to the charge on the ground of uncertainty must be taken at an early stage of the proceedings.

2. Bringing in more than one immigrant contrary to sec. 12, although it may affect the punishment, does not constitute more than one offence.

3. The proper order to make, when quashing the charge for nullity, is to discharge and not to acquit the Accused.

(*A. M. A.*)

ANNOTATIONS :

1. On charge sheets being bad for duplicity or uncertainty see Halsbury, Vol. 9, p. 136, para. 178; *cf.* CR. A. D. C. Jm. 137/45 (1945, S. C. D. C. 508).

2. On the proper time to object against the charge sheet see CR. A. D. C. Jm. 96/44 (1944, S. C. D. C. 434), CR. A. D. C. Jm. 1/45 (1945, S. C. D. C. 62) and CR. A. D. C. Ha. 24/45 (*ibid.*, p. 284).

3 On the last point *cf.* CR. A. 144/43 (1943, P. L. R. 619; 1943, A. L. R.

780), CR. A. D. C. Jm. 1/45 (1945, S. C. D. C. 62) and CR. A. D. C. T. A. 77/44 (1945, S. C. D. C. 619).

(*H. K.*)

FOR APPELLANT: Solicitor General — (Griffin, K. C.) and Asst. Govt. Advocate — (Hazou).

FOR RESPONDENTS: J. Shapiro (M. Goldberg with him).

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Haifa whereby the present Respondents (hereinafter referred to as the "Accused") were acquitted at a summary trial of aiding and abetting a number of persons to enter Palestine in contravention of section 12(3)(1) and 12(3)(ii)(a), Immigration Ordinance, 1941. The facts found by the learned Acting Relieving President District Court (hereinafter referred to as the "trial judge"), shortly stated, were that the first Accused was the captain and the other Accused the crew of a small ship of about two hundred tons called the "Demtrious" which at about 11 *p. m.* on 22nd November, 1945, was lying about half a mile off the shores of Palestine about ten kilometres north of Tel-Aviv. About four rowing boats were observed between this ship and the shore, two of which were practically on the beach. To put it briefly, the trial judge found, on the evidence of the Prosecution witnesses — evidence which he implicitly believed — that there were on board this ship twenty passengers whom he characterized at page 4 of the typed judgment as "illegal immigrants". He went on to say "As to the master of the ship, I think that there is clear evidence that, he being in charge of the ship, on which he can be held to have aided and abetted the passengers to enter Palestine illegally — in particular since he kept no log books of the trip and was a part owner of the ship as we see from Exhibits C. W. 6 (Register of Nationality) and in that respect there is proof that he did what he was alleged to have done in the particulars of the offence contained in the charge. As to the crew, however, in the absence of evidence of any active assistance by them in the commission of the offence, I do not see my way to convict them of aiding and abetting merely because they were working on board under the directions of the master. On the facts alone, therefore, I would acquit them".

We would at once say that, notwithstanding the persuasive argument of the learned Solicitor General, as this is a finding of fact, we are unable to interfere on an appeal brought by the Attorney General.

The appeal against the acquittal of the Accused Nos. 2, 3, 4, 5 and 6 is accordingly dismissed.

The first Accused (the captain or master of the ship) stands on a different footing. The first ground of appeal against the acquittal is that the trial judge erred in hearing an objection to the charge on the ground of duplicity after the defence had closed its case. Now, if the objection to the charge had been based on duplicity alone, and if we were satisfied that the charge sheet was bad for duplicity we would reject this ground of appeal as the authorities make it clear that an objection to a charge of this nature can be taken at any stage of the trial (Archbold's "Criminal Pleading and Practice" (31st Edition) top of page 305). The next ground of appeal is that the learned trial judge erred in holding that the charge sheet was bad for duplicity and uncertainty. As regards duplicity, Mr. Shapiro, at the Bar before us, frankly conceded that he attached more importance to the alleged uncertainty than to the alleged duplicity. He, in fact, scarcely argued the question of duplicity and, as we think that there is nothing in this point, we merely say that we think that the learned trial judge erred when, at page 6 of the typed copy of the judgment, he said — "It is clear that alleging that the Accused brought in a number of immigrants they (*i. e.* the Prosecution) are alleging the commission of more than one offence and that, of course, is duplicity which is fatal to the charge. For that reason I hold the charge sheet to be bad".

In arriving at this conclusion the trial judge seems to have been influenced solely by the words at the end of sec. 12(3)(1) "Any person so aiding abetting or harbouring more than one person at the same time or by the same means shall be deemed to be guilty of an offence in respect of each person whom he so aids or abets or harbours". This, in our view, is too far reaching an effect to attribute to the concluding words of sec. 12(3)(1). In our view, all that the Legislature intended by these words was to subject convicted persons to separate penalties (or additional penalties) in respect of each illegal immigrant over the number of one. But it does not mean that the Accused had committed or been guilty of more than one illegal transaction.

It is the illegal transaction which, in our view, is the test to be applied in ascertaining whether the charge sheet is bad for duplicity. In this connection, we refer to the last sentence at the bottom of page 46 of Archbold (31st Edition).

The next question falling for decision is whether the charge sheet was bad for uncertainty. In approaching this we would, at the outset, say that this was certainly a matter which should have been raised at a much earlier stage of the trial than almost at the close of the defence. A scrutiny of the record shows that the first witness for the Prosecution,

Lt. Strafford, definitely gave the number of passengers as twenty. The defence, therefore, were made aware, at an early stage, of the actual number. We would say that, once it was proved that even one illegal immigrant was assisted in entering Palestine, the offence is established, although it may well be that, unless the Prosecution definitely alleged and proved the presence of a specific number of passengers more than one, the Accused could not be made liable to more than one penalty. We accordingly fail to understand in what respect the charge sheet was bad for uncertainty. This ground of appeal therefore succeeds. We would mention that, before us, Mr. Shapiro contended that, although the first Accused might properly be charged with harbouring, he could not be charged with assisting passengers to enter Palestine inasmuch as the passengers were already within the territorial limits of Palestine when the Prosecution witnesses first saw them. This, to say the least, is a far fetched argument because the only inference there can be is that the first Accused was master of a ship which, shortly before the Prosecution witnesses saw it, had been brought by the first Accused from outside the territorial limits, or waters, of Palestine. The trial judge found that the first Accused had brought the immigrants from Greece. Mr. Shapiro also faintly argued that there was no evidence that any of the twenty passengers was without a passport. The learned trial judge at page 4 of the typed judgment held that there was a very strong presumption "that the passengers had come from outside Palestine and had not valid permission to enter it". With the findings of fact of the learned trial judge we are unable to interfere. As we have held that he erred in holding that the charge sheet was bad for duplicity or uncertainty we consider that the guilt of the first Accused was established and that he should accordingly have been convicted. There remains to consider the last ground of appeal, namely, that, as the Court below held that the charge sheet was, in effect, a nullity, the Accused should have been discharged and not acquitted. Mr. Shapiro relies on the entire absence in the District Court (Summary Trials) Rules, 1938, of the word "discharge", and he argues that, unless there is a conviction, there can only be an order of acquittal (see Rules 11, 21, 22 and 23). This may be so; and, while the matter is not easy and does not seem yet to have been definitely decided in Palestine, we are of the opinion that, as a matter of practice, it is desirable that, unless a Court of trial acquits on the merits, the order should be one of discharge. In the case now before us, because of the view we take, the point is of only academic importance. We refer to section 46 and 51 Criminal Procedure (Trial Upon Information) Ordinance. In England

where a Court of summary jurisdiction tries summarily an indictable offence and finds the Accused not guilty, the Court "dismisses the information". This, however, is done in pursuance of the provisions of a statute, namely, section 44 Criminal Justice Act 1914 (see Stone's Justice's Manual (1945) page 113). In any event, it seems to us at least doubtful whether an order of "acquittal" such as was made in this case would necessarily act as a bar to further proceedings.

For all the foregoing reasons we allow the appeal as against the first Accused and set aside the order acquitting him and by virtue of the powers given to us by section 72(1)(e) Criminal Procedure (Trial Upon Information) Ordinance we convict him of an offence contrary to section 12(3)(i) Immigration Ordinance, 1941.

British Puisne Judge.

Court asks Accused whether he wishes to say anything and whether he wishes to show cause why he should not be sentenced and also whether he wishes to say anything with regard to the sentence.

The Accused replies that he wishes his advocate to speak for him.

Mr. Goldberg.

I wish to make the following observations:—

This Accused has been charged and convicted of the offence of aiding and abetting a number of Jewish immigrants to enter Palestine. He did not bring criminals but Jewish immigrants. The very expression "Jewish immigrants" nowadays brings to our minds a very sad picture. I am confident that Your Lordships are aware of the plight of what Jewish immigrants have to undergo to-day. I wish to point out the fact that the immigrants who were brought were not tried and convicted nor were they taken for deportation under the Immigration Ordinance, but it appears that His Excellency the High Commissioner has exercised his discretion under the Immigration Ordinance to allow them to remain in Palestine although they had no immigration certificates or a proper visa. An irresistible inference is that in the opinion of the High Commissioner they were desirable persons.

In section 5, paragraph (g) and (h) of the Immigration Ordinance it says:—

"Provided that in special cases the High Commissioner may, *etc.*"

Probably most of the immigrants are close relatives of persons who are Palestinian citizens. May be they are parents or brothers or sisters who could not find any other possibility to join them.

As regards the Accused himself I wish to add that during this war he was on active service. He was aiding the war effort and he was even wounded in action on the high seas and the signs of his wound can still be seen on his body, and if any long period of imprisonment were to be inflicted upon him it would not only be a punishment for him but also for his family who are expecting him. As a Greek, a stranger to this country, he was not supposed to know the law of immigration and the sentence that he may expect for this offence. I therefore pray that Your Lordships will be lenient in passing sentence upon the Accused taking into consideration all these facts.

Mr. Griffin K. C. — Solicitor General.

Your Lordships are, of course, the best Judges of a suitable sentence. I do not wish to suggest that any words of mine should in the last resort strongly influence you but I merely feel it is my duty to invite Your Lordships' attention to the fact that the section under which this accused person has been found guilty has provided a very heavy sentence for persons found guilty of the offence of aiding and abetting illegal immigration. This is the law of the land and because it is the law of the land to which this Court directs its mind, a very serious view is obviously taken of this offence. The law is in the Immigration Ordinance itself. The very fact that we have such an ordinance requires that immigration into Palestine shall be conducted along the lines laid down. Immigration shall be made within the law and within the ambit of control. That is the law, My Lords. It is impossible merely because one's natural sympathies extend to persons who have suffered elsewhere and wished to come to Palestine to forget that the law is there and notwithstanding the suffering of persons who may have wanted to come it is still the law of the land that they should come along proper channels and in accordance with the right procedure; otherwise the law is flouted and chaos takes the place of order and regularity. It is very significant, My Lords, that the law visualises that the real person to be blamed and to be punished for an offence of illegal immigration is the person who has made it possible. It is for that reason that such an offence requires a heavy penalty such as imprisonment for eight years and LP. 1000 fine. It is clear, My Lords, the law is there and this man has offended it and the law requires that such man be heavily punished. It is quite clear, My Lords, you have found him guilty and it is no excuse of course that he is a foreigner and he does not know the law. It is in fact quite clear from his actions that he was well aware that he was committing an offence and I feel that he knew full well that his action was against the law of Palestine. I suggest that the proper penalty for the accused person should be a heavy one.

SENTENCE.

Petros Dimitric Varkhalamas, we have listened carefully to what your advocate has said on your behalf but we feel that the least sentence which we can properly pass is one of two years' imprisonment. We accordingly sentence you to undergo two years' imprisonment to commence from to-day, with special treatment.

Delivered this 11th day of January, 1946.

British Puisne Judge.

CIVIL APPEAL No. 230/45.

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

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

IN THE APPEAL OF :—

Mahmoud Nayef Hassan el-Madi. APPELLANT.

v.

1. Government of Palestine,
2. Nayif Hassan el-Madi & 4 ors. RESPONDENTS.

Prescriptive title — Article 78 of the Land Code — Evidence of cultivation.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated 18th of May, 1945, in Case No. 22/Ijzim, parcel 12032/1, 7, 12 & 13, dismissed:—

Once a prescriptive title has been acquired under Art. 78 of the Land Code — after ten years' possession and cultivation — cultivation is no longer required to retain title.

(*H. M. A.*)

ANNOTATIONS: For authorities on Art. 78 of the Ottoman Land Code see the note in A. L. R. to C. A. 21/43 (10, P. L. R. 231; 1943, A. L. R. 331).

(*H. K.*)

FOR APPELLANT: Goitein and Mogannam.

FOR RESPONDENTS: No. 1 — Asst. Govt. Advocate — (Touqan).
Nos. 2—6 — Absent — served.

JUDGMENT.

This is an appeal from the Land Settlement Officer of Haifa Settlement Area, which concerns Parcel No. 12032/1, 7, 12 and 13. The original Plaintiffs before the Settlement Officer were claimants to a certain area of land which was contested by the Government. The total area involved some 670 *dunums*. The Settlement Officer awarded Plaintiffs some 285 *dunums* and dismissed the claim of the present Appellant in so far as his claim to the parcels under appeal was concerned.

The Plaintiffs' claim is based on Article 78 of the Land Code which is to the effect that if a person has possessed and cultivated state land for ten years without dispute he acquires it by prescription. Now, the Settlement Officer held that the claimants, in so far as the 385 *dunums* of land which were awarded by him to Government were concerned, had not acquired a title under Article 78. The gist of Mr. Goitein's argument was that the Settlement Officer misdirected himself in law in regard to this Article, in that he conceived it to be a legal requirement to the granting of such a title that the claimant should have continuously cultivated the land even after the period when he originally acquired the prescriptive title, that is, after possession for ten years. I think Mr. Goitein's appreciation of the law is correct. It

is true that possession alone under Article 78 is not sufficient; the possession must also be coupled with cultivation; but once the prescriptive title is vested in a person by reason of ten years possession with cultivation it is not necessary, in order that title may be confirmed at settlement, to establish that the claimant continuously cultivated it after the prescriptive period. Taking this judgment of the Settlement Officer as a whole, I am unable agree that he has fallen into the error that Mr. Goitein alleges. The real problem before the Settlement Officer as in most of these land settlement cases, was to define the area purported to be included within one of the loosely worded *kushans* of Turkish times. This, as the Settlement Officer pointed out, involved inspection for the purpose of identifying the boundaries referred to in the *kushan*. The *kushan* itself, I would remark, mentioned an area of 9 *dunums* only whereas the area claimed for is 670 *dunums*. Strange as it may appear such a wide divergence between the area set out in the *kushan* and the area claimed, is not unusual. It is true as Mr. Goitein pointed out, that witnesses were called to show that certain land had been cultivated by the claimants and from that the Settlement Officer could reasonably assume that they acquired a title. It seems to us that in fact he did do this, and he gave them a title to 285 *dunums* which as he said, generously covered the area which they could have been said to have cultivated; but he emphasised in his judgment that the result of his inspection led him to believe there were certain areas of land "uncultivable" that is land which never could have been cultivated, and therefore land in respect of which a title under Article 78 could not have been acquired because one of the conditions precedent to that title, that is cultivation, could not exist. The question as to whether land is uncultivable is one of fact, and this Court would not be prepared to upset the decision of the Settlement Officer who took evidence on the spot and inspected the ground, unless there was before us evidence which convinced us that the Settlement Officer's conclusion was unreasonable. There was no such evidence.

For these reasons we are of opinion that the appeal must be dismissed and the judgment of the Settlement Officer confirmed, with costs to include LP. 10.— advocate's attendance fee.

Delivered this 29th day of January, 1946.

Chief Justice.

CIVIL APPEAL No. 238/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Nafisa Ahmed A'mar & 4 ors. APPELLANTS.

v.

Latifa Dib Nasrallah. RESPONDENT.

Land Settlement — Informal partition not binding on strangers to partition.

Appeal from the decision of the Land Settlement Offiter, Haifa Settlement Area, delivered on 6.6.45 in Case No. 30/Ijzim, allowed and case remitted:—

A consent family partition is not binding on members of the family who were not parties to it.

(*A. M. A.*)

ANNOTATIONS: For a similar decision see C. A. 138/44 (1944, A. L. R. 721). *Vide* also note 1 in A. L. R. to P. C. 66/38 (12, P. L. R. 282; 1945, A. L. R. 611).

(*H. K.*)

FOR APPELLANTS: F. Atalla.

FOR RESPONDENT: Tcherniak.

JUDGMENT.

This is an appeal from a decision of the Land Settlement Officer, Haifa, relating to certain properties inherited from two brothers, namely, Ahmad and Saleh. The present fifth Appellant who was the fifth Plaintiff before the Land Settlement Officer, is a daughter of Anisseh who was a daughter of Ahmad. In 1940 the fourth Plaintiff, now the fourth Appellant, Najib, wished to borrow money and accordingly an agreement of partition was drawn up among the members of the family on the 5th of January, 1940, under which an unregistered plot in Abu Atshan was allocated to Najib in whole, while the other parties retained their own and his undivided shares in three registered plots. It is admitted that the fifth Appellant was not a party to this partition and we are satisfied that there is no evidence that her father was authorised to sign this partition on her behalf. By a document dated 25th May, 1940, the Land Settlement Officer held that in the agreement of sale Najib agreed to sell the property allocated to him under the partition to the present Respondent who apparently paid the purchase price and entered

into possession and cultivated and improved the land. The Land Settlement Officer dismissed the claim of the present Appellants and ordered that the parcels in suit be recorded in the names of the present Respondent by virtue of section 54 of the Land (Settlement of Title) Ordinance. Against that decision all the unsuccessful Plaintiffs now appeal to this Court.

The Land Settlement Officer in paragraph 5 of his decision held that Hind had established no right to the property and that she had lost nothing by the agreement of partition. We are unable to agree with this finding because it seems clear that she had lost her share which had come to her by inheritance through her mother, Anisseh. We, therefore, hold that the partition was not binding on her and that she was not a party to it.

The decision of the Land Settlement Officer is accordingly set aside and the case remitted to the Land Settlement Officer for a fresh hearing and for him to decide whether effect can still be given to the partition as regards the first four Plaintiffs, that is to say, the parties who actually did agree to the partition of the 25th January, 1940. The Land Settlement Officer must treat the partition as if Hind were not a party to it. We wish to make it clear to the Land Settlement Officer that we definitely hold that the partition is not binding on Hind, who is entitled to whatever share devolves on her by inheritance from her mother, Anisseh.

The first four Appellants will pay their own costs of this appeal and the Respondent will pay the fifth Appellant's costs of this appeal, namely, fixed or inclusive costs of LP. 5.

Delivered this 30th day of January, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 203/45.

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

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

IN THE APPEAL OF:—

Mohammad Suleiman Akileh. APPELLANT.

v.

The Attorney General. RESPONDENT.

Co-accused — Acquittal of one accused and conviction of another on the evidence of one witness — CR. A. 80/45 distinguished — Sec. 6 Evidence Ord. — Corroboration.

Appeal from the judgment of the District Court, Jaffa, dated 13.12.45, in Crime No. 188/45, whereby Appellant was convicted of Robbery *contra* section 288 of the Criminal Code Ordinance, 1936, and sentenced to 18 months' imprisonment, dismissed:—

Unless, as in CR. A. 80/45, the evidence regarding two co-accused is identical, the Court may accept that evidence against one only of the co-accused and acquit the other.

(*A. M. A.*)

DISTINGUISHED: CR. A. 80/45 (1945, A. L. R. 602).

ANNOTATIONS:

1. See the cases cited in the note to CR. A. 80/45 (*supra*).
2. On the evidence point see note 2 to CR. A. 105/43 (1943, A. L. R. 754).

(*H. K.*)

FOR APPELLANT: Nakhleh.

FOR RESPONDENT: Assistant Government Advocate — (Touqan).

JUDGMENT.

In this case there were two persons charged with robbery. In the event one was acquitted and the other one was convicted. The convicted man now appeals to this Court.

The judge found that the robbery was a joint effort on the part of two persons. The whole issue before the learned Judge turned on the question of identification. The only witness as to identification was Salem Salameh. The learned Judge accepted his evidence as identifying the Appellant as the robber and rejected it in regard to the other persons,

Mr. Nakhleh has referred us at great length to Criminal Appeal No. 80/45 which he has quoted as an authority for stating that having rejected the evidence as regards one Accused the learned Relieving President should not have convicted the other Accusd. But in our opinion a very clear distinction can be drawn between Criminal Appeal No' 80/45 and the facts of this case. In Criminal Appeal No. 80/45 the Court accepted the evidence of a witness in regard to one accused and rejected it against the other. The evidence of that witness was the same against both accused. Despite this fact the Court convicted one and acquitted the other. The Court of Criminal Appeal in dealing with the case pointed out that where the evidence was the same against all accused, the Court could not reasonably hold that it was good in one case and bad in another unless it could be proved that there were some additional facts which would justify a distinction in connecting each

of the accused with the crime. In case 80/45 the Court of Appeal came to the conclusion that the record disclosed no such distinction and quashed the conviction. But the difference in this case is that the Court did draw a distinction between the evidence of the identification of the Accused who now appeals, and that of the man who was acquitted. Briefly, the evidence of identification against this Accused is that a mask which he was wearing fell off and the witness had an opportunity of seeing his face and thereby identifying him beyond any shadow of doubt. In regard to the other Accused the witness only saw part of his face and the trial Court came to the conclusion that it could not be fully satisfied that that sufficiently established identity and the learned Judge gave him the benefit of the doubt. The Court was perfectly entitled, on these two different lines of evidence of identification, to accept one and reject the other.

It appears that added to the evidence which was adduced there was also a statement made by the Accused to the Police. That statement was rejected by the learned President in regard to the second Accused and Mr. Nakhleh points out that following the judgment in Criminal Appeal No. 80/45 it should also have been rejected in regard to the first Accused. Here again the same principle applies. If the same ground for rejection applies to each it cannot be admitted against one and rejected against the other. But it is quite clear that in this case the conviction was not founded on the statement. The statement was only taken into account by the Judge in so far as it favoured the Accused.

It is clear to us that the learned Relieving President made up his mind as to the guilt of the Accused on the evidence adduced before him in the Court by Salameh — which he was quite entitled to do.

Another point raised in favour of the Accused was the effect of the amendment of section 6 of the Evidence Ordinance. Mr. Nakhleh says that he has been unable to find any case of the Court of Criminal Appeal dealing with the effect of the amendment. He invites us to write a considered judgment on the point. We are unable to appreciate why a considered judgment is necessary, because the effect appears to us to stand out clear from the enactment itself. The effect is that the law of this country is now the same as the law in England on this point that is, that the Court is perfectly entitled to convict on the evidence of one witness if it is satisfied as to the credibility of that witness. In a word, if the Court is satisfied that the single witness is true and reliable his evidence is just as effective as if it were corroborated by ten witnesses. We quite agree with Mr. Nakhleh that the Court of Criminal Appeal would need to be satisfied that the lower

Court appreciated the fact that the evidence was that of a single witness and was alive to the necessity of weighing that evidence carefully. But in this case the learned Relieving President recorded in his judgment that these facts were in his mind. He has emphasized that the only evidence was the evidence of a single witness, and he goes on to say:—

> "I have seldom had before me a witness who appeared so certain of the identity of an accused and Salameh certainly gave me the definite impression that he was genuine and not actuated by improper motives".

Here is a clear indication that the Judge had warned himself in a proper manner.

For these reasons we are of the opinion that the appeal must fail. The sentence and the conviction are confirmed.

Delivered this 9th day of January, 1946.

Chief Justice.

CIVIL APPEAL No. 187/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Haj Ismail Hamdi & an. — APPELLANTS.

v.

Amineh Rashid on behalf of the Estate of her husband Ibrahim Hamdi & an. — RESPONDENTS.

Arbitration — Procedure — Affidavit in support of application to set award aside — Certified copy of award, sec. 15(4) — Point not taken in trial Court.

Appeal from the judgment of the District Court of Jaffa dated 4th November, 1944, in Civil Case No. 83/41, dismissed:—

1. A technical defect (filing of affidavit) made good before hearing on the merits will not invalidate the subsequent proceedings.

2. The same applies to failure to file a certified copy of the award if the original is subsequently produced by the arbitrators on an application to set aside an award.

(A. M. A.)

ANNOTATIONS: On sec. 15(4) of the Arbitration Ord. *vide* Annotated Laws of Palestine, Vol. 2, p. 169.

(H. K.)

FOR APPELLANTS: A. R. Siksik.

FOR RESPONDENTS: A. S. Dajani.

JUDGMENT.

We do not consider it to be necessary to call on the advocate for Respondents to reply.

This is an appeal from a judgment dated 4.11.44 of the District Court, Jaffa, in C. C. 83/41, whereby the District Court set aside an award dated 19.7.43 by two Arbitrators.

Two points have been argued before us by Mr. A. R. Siksik for the Appellants. In the first place he submits that the application to set aside the award was not supported by an affidavit. This point was raised in the District Court. It appears that the Attorney for the Applicants alleged that an affidavit had been filed, and he was given time to find it in the file. Being unable to find it he filed another affidavit on 9.3.44, and the Court having heard arguments on the point, decided that this affidavit should be accepted. Thereafter there was hearing on the merits.

We think that as the original defect had been made good before the matter was heard on the merits the objection is now very technical and does not afford a ground for allowing this appeal. The second point raised by Mr. Siksik is that section 15(4) of the Arbitration Ordinance (Cap. 6) was not complied with. That is to say a signed copy of the award was not produced before the Court on the hearing of the petition. We are unable to find that this point was raised before the District Court, and Mr. Siksik has admitted that the Arbitrators sent their original award to the Court. So the Court had before it the award itself. In these circumstances we can see no sufficient reason for allowing the appeal on this ground.

In the result the appeal fails and we dismiss it with costs on the lower scale to include an advocates' fee of LP. 10 (ten) for attendance at the hearing.

Delivered in open Court this 12th day of December, 1945, in the presence of Mr. A. R. Siksik, advocate for Appellants and Rageb Eff. Abu Soud Dajani, advocate, for Respondents.

British Puisne Judge.

CRIMINAL APPEAL No. 179/45.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ali Deeb Sha'ban & 4 ors. APPELLANTS.

v.

The Attorney General. PROSECUTOR.

Manslaughter — Jurisdiction of Court of Criminal Assize — Established practice — T. U. I. Ord., secs. 31(2), 52 — Acquittal of one and conviction of another accused on evidence of same witness, CR. A. 142/41, CR. A. 80/45 — Secondary offenders in manslaughter charges — Sentence.

Appeal from the judgment of the Court of Criminal Assize sitting at Jaffa in Assize Case No. 38/45, dated 16th of October, 1945, whereby the Appellants were convicted of manslaughter contrary to section 212 of the Criminal Code Ordinance, 1936, and sentenced to eight, three, ten, ten and eight years' imprisonment respectively; appeals dismissed:—

An Assize Court may, during the trial, amend an information by changing the charge from murder to manslaughter, and try the charge on the amended information.

(*A. M. A.*)

REFERRED TO: CR. A. 9/42 (9, P. L. R. 46; 1942, S. C. J. 43; 11, Ct. L. R. 10).

DISTINGUISHED: CR. A. 142/41 (1941, S. C. J. 591); CR. A. 80/45 (1945, A. L. R. 602).

ANNOTATIONS :

1. See CR. A. 119 & 121/43 (1943, A. L. R. 732) and cases cited in note 1 thereto.

2. As regards the two cases distinguished in the judgment see CR. A. 203/45 (*ante*, p. 16) and note 1.

3. On the effect of the accused having been a long time in custody see CR. A. 172/42 (1942, S. C. J. 846) and annotations.

(*H. K.*)

FOR APPELLANTS: Nazzal.

FOR RESPONDENT: El-Wa arie.

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Jaffa whereby the five Appellants were convicted of manslaughter and sentenced to varying terms of imprisonment. At the

trial the second Appellant pleaded guilty and two other persons who were among the Accused were acquitted. The Appellants were all originally charged with murder; but, during the course of the trial, the Court amended the information to manslaughter under section 212. This was done by virtue of the provisions of section 31 sub-section (2) Criminal Procedure (Trial Upon Information) Ordinance. Faiz Eff. Nazzal, for the Appellants, has argued that the Court of Criminal Assize has no power to try an information (even an information which they themselves have at the trial amended) for manslaughter, as their jurisdiction is limited to trying offences of a capital nature. He says that they could, at the end of the trial, by virtue of the provisions of section 52 have convicted of manslaughter. However much technical merit there may be in this argument, we think that it must fail because it has been for many years the practice of the Court of Criminal Assize in Palestine when trying charges of murder to amend the information during the trial to manslaughter.

It is next argued that the judgment of the trial Court is defective in that it is not stated which of the witnesses they believe but that they merely say that the witnesses "implicate" the various Appellants and it is contended that the word "implicate" is equivocal. We have carefully perused the judgment and also the record of evidence from which it is abundantly clear that the trial Court implicitly accepted the evidence of the first prosecution witness, Hassan Yussef Mustafa. We quote from the judgment:—

> "P. W. 1 Hassan says that he saw Accsued 2 and 3 following close behind the deceased and talking to him. Accused 2 and 3 were carrying sticks. P. W. 1 says that when he first reached the place he heard the deceased ask Accused 3 why he was carrying a stick and Accused 3 replied that he carried it in order to drive his oxen. P. W. 1 says that the deceased was going towards the north — along a street which crosses another street leading to the east. When Accused 2 and 3 (who were only about half a metre behind the deceased) reached the crossing he (P. W. 1) saw Accused 3 make a sign to Accused 1, 4, 5, 6 and 7, who were all at a point about 15 to 20 metres to the east of the crossing, and who were all carrying sticks too. When Accused 3 signalled to those men they came to the crossing and then followed the deceased and Accused 2 and 3. When the other five Accused were about 5 metres behind the deceased and Accused 2 and 3, the witness said Accused 2 and 3 caught hold of the deceased. Then the other five Accused began to beat the deceased with their sticks till the deceased fell down — at a point about 50 metres to the north of the crossing — and they continued to beat him till he was dead".

No good reason has been advanced by the Appellants' advocate why the Trial Court should not have accepted this witness's evidence. On

this evidence alone, we think that the convictions of the Appellants were justified. There was also the evidence of other witnesses whom the Trial Court seem to have believed. Faiz Eff. has also contended that there were discrepancies between earlier statements made by the second prosecution witness and the evidence which he gave in the Court of Trial. That Court, however, in its judgment, dealt with this and we do not think that they erred.

It is next contended that the Trial Court acquitted the sixth Accused although the evidence against him was in many respects the same as that led against the Appellants and reliance has been placed on CR. A. 142/41 Apelbom (1941) p. 591 and CR. A. 80/45. We think, however, that the facts of the present case can be distinguished from the facts of those two cases. It may be that the sixth Accused was fortunate in being acquitted.

The last ground of appeal is that, as the Trial Court had found that there was no premeditation, the only persons who should have been convicted of manslaughter were those against whom it could be said that they were the actual strikers or hitters. It has also been argued that the medical evidence shows that there were two sets of wounds and that one cannot tell which set of wounds caused the death. Faiz Eff. also says that the medical witness referred to a "semi sharp" instrument whereas the evidence against the Appellants was that they were armed with sticks. In support of his argument Faiz Eff. has referred to Archbold (30th Edition) p. 1448; Roscoe's Criminal Evidence (15th Edition) pp. 875, 876, and English & Empire Digest Vol. 14, p. 85, No. 525, and Criminal Appeal 9/42, Annotated Supreme Court Judgments (1942) p. 43.

In view, however, of the evidence given by the first prosecution witness, it is clear that all the Appellants beat the deecased with sticks and continued to beat him until he was dead.

For the foregoing reasons, the appeals are dismissed.

Delivered this 28th November, 1945.

British Puisne Judge.

Faiz Eff.: Appellant No. 2 was sentenced to three years' imprisonment. The others were sentenced to 10 and 8 years' imprisonment. Too great a discrepancy. Appellant No. 2 carried the lethal weapon. Criminal Appeal 132/45. All Appellants have been in custody since 14th February, 1945, and sentences run from 16th October, 1945. Criminal Appeal 172/42, Annotated Supreme Court Judgments (1942) Vol. 2, p. 846.

Rigby (Crown Counsel): Reason for sentences is clearly set out in the judgment. Very grave crime. Two had previous convictions for manslaughter.

JUDGMENT.

We have heard Faiz Eff. Nazzal and also Mr. Rigby, Crown Counsel, on the question of sentence. We are not prepared to hold that the sentences passed on the Appellants were excessive. It does not, however, appear that the Court of trial realised that the Appellants had been in custody since the 14th February, 1945.

The sentences will stand; but we order them to run from the 14th February, 1945, in each case.

Delivered this 28th day of November, 1945.

British Puisne Judge.

CIVIL APPEAL No. 303/43.

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

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

IN THE APPEAL OF:—

Sayed Shaheen. APPELLANT.

v.

Mitri Eissa Abboud. RESPONDENT.

Succession — Who may apply for certificate of succession — Sec. 10, Rule 20 — Son-in-law.

Appeal from the judgment of the District Court, Haifa, dated 27th July, 1945, in PR. Case No. 23/45, allowed and case remitted:—

An application for a certificate of succession may be made not only by an heir but by a person entitled to a share in the estate of a deceased heir.

(*A. M. A.*)

FOR APPELLANT: Heth.

FOR RESPONDENT: W. Atallah.

JUDGMENT.

This is an appeal from the District Court of Haifa in which the Relieving President refused an application for a certificate of succession in respect of the estate of one Eissa Elias Abboud. The facts are that a certain person who was the father-in-law of the Applicant died in 1895 leaving as heirs, amongst others, the wife of the Applicant. The wife died in July, 1943. The learned Relieving President refused the appli-

cation on the first ground of objection taken, which was that as a son-in-law he had no direct or legal interests in his father-in-law's estate. It has been argued by Mr. Atallah that the learned Relieving President was right in that his son-in-law could not succeed as an heir to his father-in-law's estate under any of the provisions of the Provisional Law relating to the inheritance of immovable property of 1331. It is true that the Applicant had no right of succession *qua* heir, but it appears to us that he did not apply for the certificate of succession *qua* heir of his father-in-law; it is on this point that we think, with respect, that the learned Relieving President erred. Section 10 of the Succession Ordinance provides that a person interested in the estate of a deceasd person is any person who upon the distribution of the estate by a Civil Court would be entitled to any shares therein. Rule 20 of the Succession Rules provides that an application for a declaration such as that made by the Appellant may be made by any person claiming any interest in the estate of the deceased whether as an heir or a creditor of the deceased or by any person claiming to be entitled to the estate of deceased or to any part thereof. It is admitted, that the daughter was entitled to a part of the estate of the deceased; it equally must be admitted that on her death her husband was entitled to the rights that she had. It follows that the Appellant was entitled to a part of the estate of the deceased and he, therefore, was a person who upon the distribution of the estate by a Civil Court could be entitled to a share therein. This being so, he comes within the category of persons who under section 10 of the Ordinance and Rule 20 of the Rules was entitled to apply for the issue of a certificate of succession. The appeal must be allowed. The judgment is set aside and the case is remitted to the District Court for completion, with inclusive costs of LP. 10 to be awarded to the Appellant.

Delivered this 5th day of January, 1946.

Chief Justice.

CRIMINAL APPEAL No. 208/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

The Attorney General. — APPELLANT.

v.

Rashid Aref El Nashef & 3 ors. — RESPONDENTS.

Construction — What is an offence — Dangerous Drugs Ord., secs. 4, 5, 6, 7, 8, 16 — Gould & Co. v. Houghton — Acquittal of one offender, Morris v. Tolman — CR. A. 3/41.

Appeal from the judgment of the District Court, Haifa, dated 24th October, 1945, in Summary Trial No. 305/44, whereby the three Respondents were acquitted on a charge contrary to sections 7, 8 and 16 of the Dangerous Drugs Ordinance, 1936, appeal allowed and case remitted for new trial:—

1. The discharge of the principal offender does not entitle other co-accused to acquittals.

2. Sec. 8 of the Dangerous Drugs Ordinance creates an offence, provided the Crown has proved the commission of an offence contrary to secs. 4, 5, 6 or 7.

(*A. M. A.*)

REFERRED TO: CR. A. 3/41 (8, P. L. R. 45; 1941, S. C. J. 10; 9, Ct. L. R. 56); Gould & Co., Ltd., *v.* Houghton, 1921, 1 K. B. 509, 90 L. J. (K. B.) 369, 124 L. T. 566, 37 T. L. R. 291; Morris *v.* Tolman, 1923, 1 K. B. 166, 92 L. J. (K. B.) 215, 128 L. T. 118, 39 T. L. R. 39.

ANNOTATIONS:

1. In addition to CR. A. 3/41 (*supra*) see also CR. A. 89/38 (6, P. L. R. 22; 1939, S. C. J. 10; 5, Ct. L. R. 55).

2. *Vide* Halsbury, Vol. 9, p. 38, second paragraph of para. 37 and *ibid.*, p. 40, para. 40 with footnote (*f*).

(*H. K.*)

FOR APPELLANT: Assistant Government Advocate — (Salant).

FOR RESPONDENTS: No. 1 — Cherniak.
Nos. 2 & 3 — Boustany.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court, Haifa, acquitting all the present three Respondents of aiding and abetting the offence of unauthorised possession of dangerous drugs contrary to sections 7 and 16 of the Dangerous Drugs Ordinance, 1936.

The three Respondents were charged in one Charge Sheet, at one trial, along with one Bargouti, who was the first Accused. Bargouti was charged with the principal offence of possession contrary to sections 7 and 16. The present first Respondent was charged with the offence of procuring the commission of the offence under section 7, and it was alleged that he had committed an offence contrary to sections 8 and 16. The present second and third Respondents were charged with aiding and abetting the principal offence contrary to section 7, and it was likewise alleged that they had committed offence contrary to sections 8 and 16. It will, therefore, be observed that against all the Accused it

was alleged that the principal offence was one of unauthorised possession contrary to section 7.

At the hearing before the District Court on 19th September, 1945, all the Accused pleaded not guilty and, after their pleas had been taken, the Asst. Government Advocate said that he offered no evidence against Bargouti whose acquittal he requested. The learned Acting Relieving President thereupon acquitted him. Walid Eff. Salah, the then advocate for the present first Respondent, at once submitted that, in order to obtain a conviction against his client, it was necessary that Bargouti should have been found guilty. He also argued that section 8 did not create an offence. Faud Eff. Boustani, advocate for the present second and third Respondents, associated himself with the arguments of Walid Eff. Salah. The learned Acting Relieving President adjourned the case and on the 24th October, 1945, delivered a considered judgment, acquitting all the three Respondents. He did not agree with the submission of the defence that because Bargouti had been acquitted the prosecution could not proceed against the other three Accused. He relied on the case of Morris *v.* Tolmen, 1923, 1 K. B. p. 160. He, however, upheld the submission of the defence that section 8, Dangerous Drugs Ordinance, created no offence. In arriving at that conclusion he was apparently influenced by the decision of the Earl of Reading, Lord Chief Justice, in Gould & Co. *v.* Houghton, 1921, 1 K. B. pages 509 and 519, especially the words:—

> "Section 5 of the Summary Jurisdiction Act, 1848. is to the same effect. It is to be observed that this section 5 does not create an offence, as the justices seem to have thought, but merely regulates procedure and punishment".

We agree with the learned Acting Relieving President that the mere fact that the proceedings were dropped against Bargouti did not make it impossible for the prosecution to prove that an offence contrary to section 7 had been committed by someone. Before section 8 could come into play the prosecution, of course, would have to prove that an offence contrary to either section 4 or 5 or 6 or 7 had been committed by someone.

The main controversy in this appeal centres round the question as to whether section 8 has created an offence. Mr. Cherniak, who has very ably argued the appeal on behalf of the first two Respondents, contends that the Legislature should between the word "be" and "punishable" in the penultimate line of section 8, have inserted the words "deemed to have committed an offence contrary to this Ordinance". He also contends that, unless there is clear legislative provision, aiding and abetting an offence against the Dangerous Drugs Ordinance is not an offence,

and in support of his argument has cited Criminal Appeal No. 3/41, Vol. 8, P. L. R. p. 45. Since the date of that judgment section 7 has been amended. We think that section 8 must be read together with the amended section 7.

Mr. Salant, for the Crown, contends that the words of section 8 are clear. He says that the only meaning that can be attached to the words "punishable with a like penalty as if he himself had committed the offence" is that the Legislature have laid it down that any person who does any of the acts referred to in section 8 is guilty of an offence. "What is an offence?" An offence is anything punishable by law. We think that it is impossible to avoid the conclusion that that is the real meaning and effect of the word "punishable", and we also think that the wording of section 8 is sufficiently clear to remove any doubt that an offence has been created by section 8 itself, subject always to the Crown having to prove the commission of an offence contrary either to section 4 or 5 or 6 or 7.

We accordingly allow the appeal and set aside the order acquitting the three Respondents and we remit the case to the District Court for a new trial under section 72(1)(c), Criminal Procedure (Trial Upon Information) Ordinance.

Delivered this 16th day of January, 1946.

British Puisne Judge.

CIVIL APPEAL No. 149/45.

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

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

IN THE APPEAL OF:—

Fatmeh el Husseini, in her personal capacity and on behalf of the estate of the late Hussein Salim el Husseini and in her capacity as attorney and guardian of Salim Hussein el Husseini, & 2 ors. APPELLANTS.

v.

The Mamur Awqaf of Jerusalem. RESPONDENT.

Bey bil wafa — Undertaking by purchaser in execution to retransfer to the debtor — Specific performance.

Appeal from the judgment of the Land Court, Jerusalem, in Land Case No. 27/44 delivered on the 25th day of March, 1945, dismissed:—

An undertaking by the purchaser in execution to retransfer the property to the debtor against payment of the purchase price, is not a *bey bil wafa*. Such an agreement can only be enforced by specific performance.

(*A. M. A.*)

ANNOTATIONS: For authorities on *bei' bil wafa* see C. A. 155/41 (9, P. L. R. 417; 1941, S. C. J. 573; 10, Ct. L. R. 147) and the cases quoted in note 2 thereto in S. C. J.

(*H. K.*)

FOR APPELLANTS: Goitein.

FOR RESPONDENT: Abdul Hadi.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jerusalem, dismissing an action by the present Appellants who had prayed that certain plots of *miri* land in Deir Amr village which had belonged to their ancestor, Hussein Eff. Salim Husseini, be registered in their names. The facts, shortly stated, are that in 1929 Hussein owed money to the Anglo-Palestine Bank which bank obtained judgment against him. This judgment they proceeded to execute by way of sale of his land. On 27th November, 1929, the Chief Execution Officer ordered final sale for the sum of LP. 5855 declaring the last bidder to be the *Mamour el Awqaf* who, at that time, was one Badr Yunis. The latter on 19th December, 1929, signed a document (Exh. P/1) in which he declared that he undertook (in the event of the heirs of Hussein paying him the sum which he had paid to the Execution Office) to revoke the sale on condition that, on parcellation, four *dunums* be excluded on which a mosque would be built. We have been told by the Appellants' advocate that the reason for this arrangement was that the Moslem Religious Authorities, being afraid that the land might be bought by Jews, were prepared to buy the land and pay to Husseini's heirs the balance remaining after payment of the judgment debt and certain other sums.

The case for the Appellants is that, as they are now willing to pay whatever sums have been paid by the Defendants' predecessor (*i. e.* the *Mamour Awqaf*) to the Execution Office and the other sums referred to in Exhibit "P/1", the land should be transferred to them on their depositing such sums as may be found to have actually been paid. The Land Court dismissed the Appellants' action chiefly on the ground that it had not been proved that the then *Mamour Awqaf* had executed Exh. P/1 with the consent of the *Awqaf* Committee or that the confirmation of the Supreme Moslem Council had been obtained. The Court

BIRZEIT UNIVERSITY
LAW CENTER / LIBRARY

below were also influenced by the fact that the document was not given till 19th December, 1929, that is, more than three weeks after the final order of sale had been made. We find it unnecessary to decide whether the Court below erred in its finding that it had not been proved that Exh. P/1 was executed with the consent of the *Awqaf* Committee confirmed by the Supreme Moslem Council because we think that the Plaintiffs' action was bound to fail on another ground, namely, that the only possible claim which the Plaintiffs could have advanced was one for specific performance.

In his reply, Mr. Goitein for the Appellants informed this Court quite definitely that his clients' case is that this land was bought by the *Mamur Awqaf* on certain conditions which were set out in Exh. P/1 and that, as a result, he held the land on trust for the Appellants until such time as they repaid the money. The fallacy of this argument at once becomes apparent when one realises that this was a forced sale in the Execution Office in execution of a judgment debt. The *Mamur Awqaf* had been declared the purchaser and the Appellants had no say in the matter whatsoever. There was the clear evidence of the Execution Officer, Bahai' Eff. Kuteini, to the effect that the lands were sold for LP. 5855, LP. 3,300 of which was paid by the *Mamour Awqaf* and that there was an admission by Mrs. Fatimeh Khaldi through her attorney, Sheikh Ata Eff. Sorouri, that she had received the balance of the price of the lands.

As Awni Bey for the Respondent pointed out in his final speech in the Court below, Mrs. Fatimeh Khaldi was not called upon to give evidence nor was any evidence led in rebuttal of this admission. The Execution Officer also swore that, on the file, there was an admission by Sheikh Ata Eff. Sorouri that the heirs of Hussein had received from the *Awqaf* Department LP. 2603.313.

Mr. Goitein further contended that the transaction was what is known in Palestine as a *"be bil wafa"*. We are satisfied that the transaction was not a *"be bil wafa"* and we are also satisfied that Exhibit P/1 was not a mortgage. Mr. Goitein's argument is that, in England, the transaction would be regarded as a mortgage with an equity of redemption but in Palestine it would be treated as a sale with a right of redemption. (English and Empire Digest Vol. 35, p. 243 Item 34). It is clear that there was no sale by the heirs of Hussein, as the sale was by the Execution Office at the instance of the judgment creditors. This argument accordingly fails. In our view, the only possible remedy which the Plaintiffs could have sought was specific performance. In view of the facts, especially the long delay, and the fact that no money

has yet been refunded, any action for specific performance must inevitably have failed.

While we must not be taken as agreeing or disagreeing with the finding of the Court below on the point as to the authority of the *Mamur Awqaf* to execute Exh. P/1 we hold that the appeal must fail in any event. The appeal is accordingly dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 25.—.

Delivered this 15th day of January, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 202/45.

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

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

IN THE APPEAL OF:—

Mohammad Suleiman Salim. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Record — T. U. I. Ord., secs. 35, 65(1), *A. A.* 10/32 *— No miscarriage of justice — Conviction on the evidence of a single witness.*

Appeal from the judgment of the District Court, Jaffa, dated 10.12.45 in Criminal Case No. 265/45, whereby Appellant was convicted of robbery *contra* sections 287 and 288(1) of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment, dismissed:—

> The record of the proceedings in a criminal case can only be taken down by the Presiding Judge; but failure to observe this requirement does not prejudice the Accused if the record is actually taken down by another member of the Court.
>
> (*A. M. A.*)

REFERRED TO: A. A. 10/32 (1, P. L. R. 723; 2, C. of J. 629).

ANNOTATIONS:

1. Note that the report in P. L. R. of A. A. 10/32 (*supra*) states: "... Counsel for the Appellant did not raise any objection on this score and the Court ... made no reference to the departure from the usual practice".

2. *Cf.* CR. A. 130/43 (10, P. L. R. 578; 1943, A. L. R. 772).

(*H. K.*)

FOR APPELLANT: Nakhleh.

FOR RESPONDENT: Assistant Government Advocate — (Touqan).

JUDGMENT.

Two points have been taken in this appeal. The first was that there was not sufficient evidence on which to convict the Accused. The advocate for the Appellant relied on the fact that the evidence against the Accused was that of a single witness, *i. e.* the complainant. As to this, it will suffice if we say that it is abundantly clear from the judgment that the learned Judges were fully conscious of the necessity of taking great care before convicting on the evidence of a single witness. They were satisfied that that evidence was entirely trustworthy. We see no reason to differ from the opinion formed. The appeal must fail on this ground.

The second ground taken was that there was not sufficient compliance with section 35 of the Criminal Procedure (Trial Upon Information) Ordinance. The Court was constituted of two Judges of whom the senior was Judge Shehadeh. It appears that the proceedings were conducted in the Arabic language and the notes were taken down in the handwriting of Judge Salameh who is the junior and consequently not the presiding Judge. This was clearly a failure to comply with the provisions of section 35. A similar situation arose in the case of Criminal Assize Appeal No. 10/32 and this Court accepted the record although it was not taken down by the presiding judge. I confess I find some difficulty in reconciling the view taken in Criminal Assize Appeal No. 10/32 with what appears to me to be a very clear provision of section 35, but as I am satisfied that the present case is pre-eminently one where the proviso to section 65(1) of the Criminal Procedure (Trial Upon Information) Ordinance should be applied, I am of opinion that the appeal must fail on this second ground also.

The appeal is, therefore, dismissed and the conviction and sentence confirmed.

Delivered this 23rd day of January, 1946.

Chief Justice.

CIVIL APPEAL No. 78/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mary Elias Bandack, widow of the late Michail, son of Yusef Tuma Mikail & an. APPELLANTS.

v.

Yusef Michail Yusef Yuma Mikail & 3 ors. RESPONDENTS.

Succession — Legitimacy, Succession Ord., sec. 23, C. A. 8/32, Khayat v. Khayat.

Appeal from the order of the District Court, Jerusalem, dated 5th February, 1945, in Succession Case No. 152/44, dismissed:—

The question of legitimacy of persons claiming as heirs must be determined in accordance with the law of the Community to which the deceased belonged at the time of his death.

(*A. M. A.*)

REFERRED TO: C. A. 8/32 (5, C. of J. 1673); Khayat *v.* Khayat (4, C. of J. 1244).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. 82.

2. *Cf.* C. A. 208/42 (9, P. L. R. 748; 1942, S. C. J. 785), Pr. D. C. T. A. 203/43 (1944, S. C. D. C. 75), upheld on appeal in C. A. 71/44 (11, P. L. R. 381; 1944, A. L. R. 460) and Pr. D. C. T. A. 372/44 (1945, S. C. D. C. 519).

(*H. K.*)

FOR APPELLANTS: F. Haddad and R. Haddad.

FOR RESPONDENTS: H. Atalla.

JUDGMENT.

This is an appeal from a judgment dated 5th February, 1945, of the learned Relieving President of the District Court of Jerusalem in Succession (Appl.) No. 152/44.

The first Appellant — Mary Elias Bandack, widow of Michail Ben Yusef Tume Mikail — was the Petitioner in the District Court, and the first Respondent — Yusef Michail Yusef Tuma Mikail — was the Opposer. Mary Elias Bandack sought a declaration of succession to her former husband Michail, who died intestate in Jerusalem on 19.6.44. She claimed a half share of the estate as widow of Michail, and she submitted that the other half share should devolve upon the sister of

the deceased. That sister (Jamileh) is the second Appellant. Yusef, who is a son of the deceased, opposed the petition, and contended that he and his three sisters (daughters of the deceased) were the only heirs entitled to succeed as descendants. The three sisters of Yusef are Respondents Nos. 2, 3 and 4. It was argued in the alternative that at most Mary Bandack could inherit only a quarter share of the estate as a surviving spouse.

The facts as found by the learned Relieving President are as follows: On 5th June, 1898, Mary Bandack was married to the deceased according to the rites of the Roman Catholic Church. At that time Mary Bandack and the deceased were members of the Latin (Catholic) Community, and Mary Bandack remained (anl still is) a member of that Community. Mary Bandack and the deceased lived together till 1902, when they separated, never to come together again. There were no children of that marriage. On 15th October, 1911, the deceased went through a form of marriage with the late Azizeh Bint Khalil Hishmeh, according to the full rites of the Eastern (Orthodox) Church, the issue being the four Respondents. Upon this event, in 1911, Mary Bandack obtained a decree for alimony against the deceased from the Ecclesiastical Court of the Latin Patriarchate in Jerusalem, and the deceased ceased to be a member of the Latin (Catholic) Church and Community, from which he was excummunicated. In March, 1914, the deceased was received into the Eastern (Orthodox) Church, and became a member of that Community and so remained down to the time of his death. On 28th February, 1921, Mary Bandack, through her lawfully appointed attorney, entered into an agreement (bearing the heading "Deed of Discharge") with the deceased whereby she relinquished her right to future payments of alimony in return for the consideration provided and in fact received. Clause 2 of that agreement reads:—

> "This deed completely settles all legal rights of the first party (the Petitioner) claimed or to be claimed from the second party (the deceased) whether in the past, present or future, until death and thereafter".

It may be observed at this point that the trial Judge held that the discharge was clearly intended to cover future payments of alimony, and that in construing Clause 2 and having regard to the whole tenor of the agreement it would be going too far to hold that Mary Bandack had given up or barred in any way a right in law to share in his succession in the event of her husband dying intestate. There has been no cross-appeal against that part of the judgment, and in any event there are no grounds for upsetting this finding.

The only question to be decided is whether the learned Relieving

President rightly held that the four Respondents (who are the issue of the deceased's marriage with Azizeh Bint Khalil Hishmeh in 1911) are legitimate. If they are legitimate then they are undoubtedly entitled to inherit. The trial Judge has referred in his judgment to the facts of Civil Appeal No. 8/1932 (5 Rutenberg 1673). He observed that there was this important difference between the two cases, namely, that in the present case the deceased changed his religion and community And later in his judgment the trial Judge says:—

> "I think, with Mr. Atallah, that Civil Appeal No. 8 of 1932 may be distinguished, for in that case there was nothing to show that the law governing the personal status of the deceased was the law of the Eastern (Orthodox) Community, nor is it at all apparent from the judgment that the marriage in 1908 was carried out in proper accordance with the rites of the Orthodox Ecclesiastical Church, or that section 23 of the Succession Ordinance was considered at all".

The relevant portions of section 23 read as follows:—

> "23. For the determination of any question as to whether any person is a member of a class, or possesses a character or quality, whereby he is entitled to share in a succession, the civil courts shall apply the following rules:—
>
> (a) if the claimant is a Moslem or a member of one of the communities, the Moslem law or the law of the community shall apply;
>
> — — — — — — — — — — —
>
> (d) the Court shall, in all cases, determine any question of personal status in favour of legitimacy if the claimant would be deemed to be legitimate under the law governing the personal status of the deceased from whom succession is claimed and no change of religion or nationality on the part of the claimant or the deceased shall be taken into account".

The following passage appears in the judgment of the Chief Justice in the case of Selim Khayat *v.* Marie Khayat at page 1251 of Rutenberg, Vol. 4:—

> "A man may be validly married in the Orthodox Church and his children legitimate according to the view taken by that Community, while according to the view of a community to which he formerly belonged he may be regarded as living in concubinage and his children illegitimate. That state of affairs naturally arises in a country where a marriage is regulated solely by the religious laws of different communities living side by side, where a man may pass from one community to another, from one order of marriage laws to another".

The trial Judge heard the evidence of Father Nicola Khoury, who is a priest of the Eastern (Orthodox) Church and a member of the Orthodox Ecclesiastical Court of First Instance, who was called by the Opposer (first Respondent) to give evidence in regard to Eastern (Orthodox) Ecclesiastical law. And at the hearing of the 9th October, 1944,

when Mr. Atallah (for the Opposer) had expressed his intention of calling an old priest from Bethlehem to prove the Eastern (Orthodox) marriage in 1911, Mr. Haddad (for the Petitioner) said:—

> "I agree there was a marriage performed according to rites of Greek Orthodox Church between deceased and second lady. But I contend it is a nullity under Latin law and law of the land".

On the strength of that admission Mr. Atallah said that he would call only the Opposer as witness, but later the trial Judge (rightly in our opinion) allowed Mr. Atallah to lead evidence in regard to the Eastern (Orthodox) Ecclesiastical law, and that evidence was given by Father Nicola Khoury.

So what we have to decide is whether on the evidence of this priest the learned Relieving President could reasonably find that the four Respondents are legitimate. Having considered the evidence which the priest gave we do not feel that we, sitting as a Court of Appeal, can say that the learned Relieving President was wrong in finding as he did that the four Respondents are legitimate.

In the result the appeal must be dismissed, with costs on the lower scale to include a fee of LP. 15 for the attendance of the Respondents' advocate at the hearing.

Delivered in the presence of Rashid Eff. Haddad for the Appellants, and Mr. Atallah for the Respondents, this 5th day of January, 1946.

British Puisne Judge.

CIVIL APPEAL No. 162/45.

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

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

IN THE APPEAL OF:—

Jamil Atalla & an. — APPELLANTS.

v.

Subhi Tarsha. — RESPONDENT.

Onus of proof — Cheque — Evidence of a promise to pay — Allegation of fraud.

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated the 19th of March, 1945, in Civil Appeal No. 2/45, from the judgment of

the Magistrate, Haifa, dated 26th December, 1944, in Civil Case No. 2109/44; appeal dismissed:—

1. A cheque, although it does not constitute *prima facie* evidence of a loan, is evidence of an undertaking to pay.

2. If the maker alleges fraud, the onus is on him to establish fraud.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* C. A. D. C. Ha. 166/44 (1945, S. C. D. C. 111), upheld on appeal in C. A. 131/45 (1945, A. L. R. 744) and notes.

2. See, on the second point, C. A. 9/43 (10, P. L. R. 102; 1943, A. L. R. 100) and notes in A. L. R.

(*H. K.*)

FOR APPELLANTS: Elia.

FOR RESPONDENT: H. Atalla.

JUDGMENT.

This is an appeal by leave from the District Court of Haifa sitting as an appeal Court from the Magistrate's Court. In regard to the main ground on which the District Court gave leave, which is the question of onus of proof, we find it difficult to appreciate the point of novelty or complexity, because we should have thought the law on the subject was well settled. In the appeal before us a point was raised by Mr. Elia which does not appear to have been considered, if indeed it was raised, by the District Court.

It was whether in fact the cheque was ever properly before the District Court. We have come to the conclusion that it was. The whole statement of claim is based on this cheque, the giving of which was admitted by the Defendants. The cheque was the issue on which judgment was given in the Magistrate's Court, the issue upon which the appeal was taken to the District Court, and the issue on which the appeal was taken in this Court. In these circumstances we find it impossible to hold now that the cheque was never before the Court.

We now come to the main ground of appeal, which was on whom was laid the burden of proof. In the course of his judgment the learned Magistrate appears to have appreciated the law, but his final decision certainly did not give effect to what did seem to have been in his mind.

Mr. Elia quoted us several cases of this Court to the effect that the tendering of a cheque was not *prima facie* evidence of a loan. We entirely agree that it is not *prima facie* evidence of a loan, but that is a very different thing from saying that the tendering of a cheque is not *prima facie* evidence of an undertaking on the part of the drawer to pay.

Now what is the Appellants' case? It is, "Yes, we gave the cheque".

In our view that amounted to an undertaking to pay. They seek now to avoid that undertaking to pay, by an allegation of fraud. As to this, in our opinion, the law is quite clear. He who alleges fraud must prove fraud, and once it is raised, the burden of proof shifts on him who makes the averment.

For these reasons we are of the opinion that the judgment of the District Court was right, and the appeal must be dismissed with LP. 10 inclusive costs.

Delivered this 11th day of December, 1945.

Chief Justice.

CIVIL APPEAL No. 205/45.

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

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

IN THE APPEAL OF:—

Ahmad Abdel Hafeez & 9 ors. as members of the Village Settlement Committee, Tira. APPELLANTS.

v.

Edmond Levy & 4 ors. RESPONDENTS.

Village Settlement Committee — How proceedings should be instituted — Appeals — L. S. O., sec. 14 — Grounds for leave to appeal.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated 19.4.45, in case No. 48/Tira, dismissed:—

An appeal made on behalf of a village should be filed by the Village Settlement Committee. If part of the Committee act, they should follow the procedure laid down in sec. 14(4) of the Ordinance.

(*A. M. A.*)

ANNOTATIONS: For authorities on the functions of a village settlement committee see H. C. 108/42 (9, P. L. R. 668; 1942, S. C. J. 883) and cases therein cited.

(*H. K.*)

FOR APPELLANTS: J. Sahyoun.

FOR RESPONDENTS: No. 1 — Weinshall.

Nos. 3—5 — In person.

JUDGMENT.

A preliminary point has been taken by Dr. Weinshall that there is no appeal before this Court in that only the Village Committee can appeal and if they do so, the appeal must be lodged within the framework of section 14 of the Land (Settlement of Title) Ordinance.

This is an appeal from the Settlement Officer of Haifa. The appeal is lodged before this Court. It purports to be on behalf of ten persons who according to the Statement of Appeal, are members of the Village Settlement Committee of Tira. The Settlement Officer granted the application for leave to appeal, for the reasons which he gave in paragraph 10 of his letter dated the 23rd May, 1945. That reason was founded on the fact that this case caused considerable excitement and violence in the village which, it seems to us, is in itself no sufficient ground for granting leave to appeal. In the course of his letter he stated that not all the persons who applied for leave to appeal were members of the Village Settlement Committee. That is contested by Mr. Sahyoun on behalf of the Appellants. Be that as it may, one thing which appears clear is that the Appellants did not sue on behalf of the whole of the Settlement Committee. The Land (Settlement of Title) Ordinance does provide that in settlement cases the interests of the village shall be represented by the Settlement Committee. The Committee are vested with statutory powers to bring and defend actions in connection with land settlement. The Committee could therefore lodge this appeal under Section 14(1) of the Land (Settlement of Title) Ordinance. But even accepting the contentions of Mr. Sahyoun, the Appellants although they may well be members of the Committee, do not constitute the whole Committee. It is true that the Ordinance also provides that part of the Committee may bring the appeal. The provision in this respect is contained in sec. 14(4). We are of opinion that when part of the Committee purport to act in legal matters within the framework of the Ordinance they can only do so in accordance with the procedure set out in Section 14(4).

It is quite clear that the Appellants in this case were not acting under the authority of Section 14(4). We therefore consider that the preliminary point succeeds. The Appellants as such had no right to appeal before this Court and the appeal is therefore dismissed with LP. 10.— inclusive costs.

Delivered this 7th day of January, 1946.

Chief Justice.

CIVIL APPEAL No. 217/45.

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

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

IN THE APPEAL OF:—

Nimer Yousef Mohammad Ismail & an. APPELLANTS.

v.

Saleh Mohammad el-Hamad. RESPONDENT.

Abatement of nuisances — Non-user or demolition — Jurisdiction of Courts — Mejelle 1200 — Procedure relating to the appointment and hearing of experts.

Appeal from the judgment of the District Court, Nablus, dated 30th of May, 1945, in Civil Case No. 43/44, dismissed:—

1. The Court may order the abatement of a nuisance either by non-user or by demolition.
2. Where an order of abatement is sought in respect of immovable property, the District Court is solely competent to determine the case.

(*A. M., A.*)

ANNOTATIONS:

1. Palestinian authorities on nuisances are collated in note 1 in S. C. J. to C. A. 167/41 (1941, S. C. J. 465; 11, Ct. L. R. 180); see also C. D. C. T. A. 221/43 (1944, S. C. D. C. 37), upheld on appeal in C. A. 57/44 (1944, A. L. R. 438).

2. On the second point *cf.* C. A. 93/36 (3, P. L. R. 207; 1937, S. C. J. (N. S.) 413), which is to the same effect.

3. As regards the point of hearing the expert's evidence, *vide* C. A. 393/43 (11, P. L. R. 305; 1944, A. L. R. 528).

(*H. K.*)

FOR APPELLANTS: Budeiri.

FOR RESPONDENT: Khamash.

JUDGMENT.

The Appellant in this case based his appeal on two grounds, irregularity in procedure and mistake in law. As to the first, the judgment may not be as exhaustive as we might have expected considering the importance of the issue before the Court but the question we have got to ask ourselves is whether it adequately sets out those issues to enable this Court to come to a decision. We have come to the conclusion that it does.

Taking first the alleged irregularity in procedure, it is clear from the record that both sides consented to the Judge appointing an expert to investigate the issue on the spot. That consent was not made subject to any limitations or restrictions on the Judge's discretion as to whom

he would appoint. They were therefore in our opinion quite entitled to appoint the Chief Clerk of the Court.

The second objection was the method of the production of the report. Here again undoubtedly the Court acquiesced in a certain looseness in procedure which we think is always undesirable, but in this case it is not fatal. In regard to this the judgment reads:—

> "Hearing of 30.5.45. Counsel present for Plaintiff and counsel present for Defendants. The report of the Chief Clerk was read in open Court".

If counsel for either side objected to this and insisted on the person who made the report formally tendering it in evidence, he would have been entitled to do so but neither counsel objected, they both accepted the report and we consider it now too late to raise this technical objection.

Turning now to the points of law. Counsel for the Appellant states that this was a claim in the nature of an order for the abatement of a nuisance, and that something less than demolition could have been ordered. It is true that in many cases of this type an order by the Court for a non-user might have been sufficient. However, having arrived at the conclusion that the fact of nuisance had been established, it was entirely within the discretion of the Court to dictate the effective steps which in their opinion should be taken to abate that nuisance. In this case the judges were of opinion that the only effective method of abatement would be demolition, and on this point we would not be prepared to disagree with them. It was argued further that as this was an action concerning house or property which are included in the definition of land in the Land Courts Ordinance, the action should have been brought in the Land Court. If so, it would indeed give rise to a paradoxical situation. It is clear that the Respondent who seeks the abatement could not bring an action in the Land Court, because he claimed no right to this land. We would therefore arrive at the situation that where the nuisance was so great that only its demolition would suffice to abate it, no remedy at law was available to enforce it. We are satisfied that this, in fact, was a claim, as was stated in the statement of claim, under Article 1200 of the *Mejelle* and the District Court not only had jurisdiction to deal with the claim but it was the only Court that did have jurisdiction. For these reasons we are of opinion that the appeal must fail. The judgment of the Court below is confirmed with LP. 10 inclusive costs.

Delivered this 14th day of January, 1946.

Chief Justice.

CRIMINAL APPEAL No. 186/45.

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

BEFORE: Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Itzhak ben Zvi Tondovsky. RESPONDENT.

Evidence — Adjournments — Evidence of appointment under sec. 2 of the Criminal Procedure (Evidence) Ord. — Secondary evidence — Sec. 4(1)(2) — Value of certified copies.

Appeal from the judgment of the District Court of Tel-Aviv in Summary Trial No. 144/45, dated 11.9.45, whereby the Respondent was acquitted of giving false evidence contrary to section 4(1)(2) of the Criminal Procedure (Evidence) Ordinance, (Amendment), 1944; appeal dismissed:—

It is for the prosecution to establish, in prosecutions under sec. 4(1)(2) of the Criminal Procedure (Evidence) Ord., that the false statement was given to an officer authorised to take statements under sec. 2 of that Ordinance. The prosecution should be ready with its evidence and should produce the appointment or a certified copy thereof. Secondary evidence of the appointment is not admissible.

(*A. M. A.*)

ANNOTATIONS: On the adjournment point *cf.* C. A. 485/44 (12, P. L. R. 174; 1945, A. L. R. 156) and note in A. L. R.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Kowler.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Tel-Aviv discharging the Respondent who was tried at a Summary Trial for an offence contrary to section 4(1)(2), Criminal Procedure (Evidence) Ordinance as amended in 1944.

At the trial Constable Wolfson gave evidence for the prosecution whereby it was apparently sought to establish that Respondent had made a certain statement to him under section 2 of the Ordinance. The witness said "I work in the Investigation Branch and I am authorised to take statements by virtue of this warrant". It seems that he then produced to the Court a document signed by the Inspector-General of Police informing him, (Constable Wolfson) that he, Wolfson, had been

authorised by the Chief Secretary to hold enquiries as provided for by section 2. Objection was then taken by Respondent's advocate on the ground that the evidence was merely hearsay. The Court which upheld the objection seems then to have refused to grant an adjournment which had been applied for by the Prosecutor. The trial Court then proceeded to give judgment with the result which we have indicated.

Crown Counsel (Mr. Rigby) first contends that there was sufficient *prima facie* evidence before the trial Court to establish that Mr. Wolfson had, in fact, been authorised and that the onus of proof should then have shifted to the Accused whose advocate has however before us again argued that Mr. Wolfson's evidence was hearsay. We agree with the Respondent's advocate.

The only question with which we need now deal is whether the trial Court properly exercised its discretion in refusing an adjournment. Mr. Rigby says that the trial Court made no ruling on the question of adjournment. It is true that no specific ruling appears on the record; but we must assume that as the Court refused an adjournment they did consider the representations of both parties.

The main ground on which Mr. Rigby relies for his argument that the trial Court erred in refusing to grant an adjournment is that during a long period of years many prosecutions under section 4 have been successfully launched without this point ever having been taken. This may well be true; but we think that there is force in the argument of the Respondent's advocate that the prosecution should have been ready with sufficient proof. We think it only fair to the Crown, however, to say that, in our view, it would be quite sufficient if each Police Officer authorised to hold enquiries under section 2 were to be supplied with a certified true copy of an extract of the letter from the Chief Secretary to the Inspector-General showing the particular officer's name as being authorised. This letter could be certified by the Inspector-General and handed to the particular Police Officer concerned. It would not be necessary for the certified extract to contain the names of all the police officers. It would be sufficient if it showed the name of the officer in question.

For the foregoing reasons we are not prepared to hold that the District Court erred in refusing to grant an adjournment, keeping in mind the fact that it was a Summary Trial and that Courts are busy and that prosecutors are expected to be ready at the hearing with sufficient proof.

The appeal is accordingly dismissed.

Delivered this 28th day of November, 1945.

British Puisne Judge.

HIGH COURT No. 108/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE PETITION OF:—

Batya Rafaeli. PETITIONER.

v.

Assistant Chief Execution Officer & an. RESPONDENT.

Rabbinical Court ordering in their judgment attachment of husband's property — Jurisdiction of Rabbinical Court — Function of C. E. O. — Natural justice.

Return to an order *nisi*, issued on the 11th of December, 1945, directed to the 1st Respondent calling upon him to show cause why his order dated 2nd December, 1945, given in Execution File No. 17/45 (District Court, Jerusalem), should not be set aside; order *nisi* made absolute:—

1. Rabbinical Court has jurisdiction to order in their judgment attachment of husband's property to secure payment of alimony due and which might become due in future.

2. Chief Execution Officer — not a Court of Appeal from Rabbinical Court; he has no authority to set aside an order for attachment ancillary to their judgment.

3. Judgment of Rabbinical Court cannot be said to be contrary to natural justice merely because wife's prayer for alimony and for attachment of husband's property was made verbally at time of hearing and not in writing.

4. Where Court orders attachment of judgment debtor's house and it is not suggested that he has more than one house, judgment cannot be said to be bad for uncertainty.

(*M. L.*)

ANNOTATIONS:

1. As to C. E. O. or H. C. not being a Court of Appeal from a Religious Court see H. C. 49/45 (12, P. L. R. 426; 1945, A. L. R. 659) and note 4 thereto in A. L. R.

2. On the question of judgment which are contrary to natural justice see — C. A. 36/44 (1944, A. L. R. 601) with note 2 thereto.

3. As to the last point in the headnote see H. C. 18/44 (1944, A. L. R. 188) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Gilead.

FOR RESPONDENTS: No. 1 — Absent — served.

No. 2 — M. Cohen.

ORDER.

Dr. Gilead for the Petitioner is not called on to reply.

This is a return to an Order *nisi* calling upon the 1st Respondent to show cause why his order dated 2.12.45, given in Execution File No. 17/45 (District Court, Jerusalem) should not be set aside. That order directed the release of an attachment which had been ordered by the 1st Respondent on 12.7.45 on the property of the second Respondent. That attachment had been levied in execution of a judgment dated 22nd *Tamuz* 5705 of the Rabbinical Court of Jerusalem, and the object of it was to conserve the property of the second Respondent so that it might be available for the payment of alimony due, and which might become due in future, to the Petitioner who is the wife of the second Respondent.

Mr. Cohen, for the second Respondent, has argued three points. He submits, in the first place, that a Rabbinical Court had no jurisdiction at all to order an attachment. He has referred us to no decided case on the point, but he asks us to infer, from the provisions of Articles 51 and 53 of the Palestine Order-in-Council, 1922 (Vol. 3, Laws of Palestine, p. 2581) that the Rabbinical Court has no jurisdiction to order an attachment. Mr. Cohen does not argue that the Chief Execution Officer himself could not order such an attachment in execution of the judgment of a Rabbinical Court, but he submits that the Rabbinical Court itself cannot do so.

Having considered the provisions of Articles 51 and 53 we are unable to agree with Mr. Cohen's submission. The attachment is only ancillary to the judgment, and we find nothing in Articles 51 or 53 to prevent the Rabbinical Court, if the circumstances so warrant, from ordering the attachment of specific property in execution of a valid judgment. It is true, of course, that the Rabbinical Court could not through its own officers effect that attachment. The actual execution has to be effected by the process and officers of the Civil Courts as provided in Article 56. The Chief Execution Officer has no authority to set aside the order for attachment made by the Rabbinical Court as he has no appellate jurisdiction in respect of judgments of the Rabbinical Court. His function is to give effect to valid judgments.

Mr. Cohen's second submission is that the judgment of the Rabbinical Court is contrary to natural justice. His chief point in this connection is that the Plaintiff's prayer for alimony and for the attachment of the house was not made in writing. But there is provision in the Rules of Procedure of the Rabbinical Courts for the making of a verbal claim at the time of the hearing. It is not suggested that the second Respond-

ent made any request for an adjournment when the Petitioner made her claim, and that such request was refused, and we see no grounds for believing that he was prejudiced by the mere fact that the claim was not in writing.

Mr. Cohen's third submission is that the judgment of 22nd *Tamuz* 5705 did not contain an order of attachment that could be acted on. It is not, however, suggested that the second Respondent had more than one house, and we are unable to find that the judgment was bad for uncertainty.

In the result we find that the Order *Nisi* must be made absolute with fixed costs in the amount of LP. 10 to be paid by the second Respondent.

Given in open Court this 18th day of January, 1946, in the presence of Dr. Gilead, for Petitioner, and in the presence of Mr. M. Cohen, for second Respondent.

British Puisne Judge.

CIVIL APPEAL No. 182/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Municipal Council of Khan-Younis. APPELLANT.

v.

Abdallah Abu Samra Shahin el Batta. RESPONDENT.

Demolition — Defective notice — Damages — Demolition of Dangerous Buildings By-Laws 1938, 4(1).

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity dated the 26th day of April, 1945, in Civil Appeal No. 1/45 from the judgment of the Magistrate's Court of Jaffa dated 13.12.44 in Civil Case No. 989/44; appeal partly allowed:—

Where a building is pulled down after service of the statutory notice, but the time given in the notice is too short, the damage suffered by the owner is purely nominal.

(*A. M. A.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: T. Dajani.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, in its appellate capacity, dismissing an appeal from a judgment of the Magistrate, Jaffa, who had ordered the present Appellant to pay to the Respondent LP. 100 damages or compensation for the demolition of a certain building. The defence of the Appellant was that the demolition was done in pursuance of action taken as a result of a report by the Municipal Engineer under By-Law 4(1) (Demolition of Dangerous Buildings) By-Laws, 1938, Revised Laws of Palestine, Vol. 2 *, p. 579.

It was argued in the Courts below and also here that the report of the Municipal Engineer was not a genuine one and that although recourse to these By-Laws had been taken yet the true reason for the demolition was the desire of the Municipality to widen a street the parties having failed to agree on a reasonable figure as compensation. It is clear, however, from his judgment that the Magistrate was satisfied that this allegation was not substantiated and he also seems to have had no reason to doubt that the Municipality acted properly under the By-Laws. He, however, found that the notice under By-Law 4(2) was defective in that it required the Respondent to take action within five days of the date of the notice instead of five days after service of the notice. He therefore held that because the notice was defective the whole action of the Appellants was illegal and that the Respondent was accordingly entitled to full compensation for the loss of his building. In this, however, we think that he was mistaken. It was not very clear from the evidence when the demolition actually took place; but we accept the suggestion that it took place one day after service of the notice, instead of after five days. There can be no question that the action of the Municipality was in all ways legal except for the fact that they commenced to demolish four days too soon.

Mr. Elia, for the Appellant, argued that the sole effect of this would be to deprive the Municipality of the power to claim expenses. We think, however, that the Respondent is entitled to nominal damages for the possible loss suffered by him by reason of the demolition taking place four days too soon. It is difficult to estimate these damages; but we think that a sum of LP. 10 is adequate.

We accordingly allow the appeal in part, and order the Appellant to pay LP. 10 instead of LP. 100. The Orders of the Courts below as to costs will stand. There will be no costs of this appeal.

Delivered this 10th day of December, 1945.

British Puisne Judge.

---

* *Scil.*: Palestine *Gazette*, Suppl. II.

(*Ed.*)

CIVIL APPEAL No. 282/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Shlomo Florentine. APPELLANT.

v.

Naim Kadouri & an. RESPONDENTS.

Lease of joint property by one co-owner without consent of other co-owners — Action for recovery of possession — Recovery of possession by one co-owner.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated 26.7.45, in Civil Case No. 13/45, from the judgment of the Magistrate's Court of Tel Aviv, dated 9.1.45, in Civil Case No. 1537/44, allowed:—

1. Lease by one joint owner without consent of co-owners is void under Art. 429 of *Mejelle*, and lessee is a trespasser.

2. Actions for recovery of possession need not be covered by Art. 24, Ottoman Magistrates' Law, they can be brought and decided under sec. 3(c) Magistrates' Courts Jurisdiction Ordinance.

3. A co-owner is entitled to recover possession of property in dispute on proving that other co-owner leased it without his (Plaintiff's) consent.

(*M. L.*)

FOLLOWED: C. A. 384/44 (12, P. L. R. 87; 1945, A. L. R. 200); C. A. 66/44 (12, P. L. R. 310; 1944, A. L. R. 590).

APPROVED: C. A. 232/37 (5, P. L. R. 77; 1938, 1 S. C. J. 72); C. A. 91/41 (8, P. L. R. 290; 1941, S. C. J. 534).

ANNOTATIONS:

1. On the first point see C. A. 250/43 (11, P. L. R. 99; 1944, A. L. R. 133) and note 2 thereto in A. L. R.

2. On the second point see in addition to cases followed also C. A. 37/45 (12, P. L. R. 354; 1945, A. L. R. 678).

(*A. G.*)

FOR APPELLANT: Levison.

RESPONDENTS: In person.

JUDGMENT.

Frumkin, J.: The facts of this case are not disputed and are fully set out in the judgment of the lower Courts. There are two points of law involved in this appeal. The one is relating to the effect of a

lease by one co-owner without the consent of the other co-owners. On this point the District Court decided in favour of the Appellant and said:—

> "It is settled law that such a lease, which is prohibited under Article 429 of the *Mejelle,* is void, and that the purported lessee, if he has entered upon the land, becomes a trespasser",

and the Court rightly referred to C. A. 232/37 and C. A. 91/41 where it was held that if one joint owner leases the joint property without the consent of the co-owner the lease is void.

The second point of law is whether in a case for the recovery of possession it is necessary to prove the existence of all the ingredients embodied in Article 24 of the Ottoman Magistrates Law. On this point the learned Judge of the Court below held that Article 24 does apply and came to the conclusion that the ingredients embodied therein have not been fully established. He gave judgment against the Appellant. It seems, however, that the attention of the learned Judge has not been drawn to judgments recently given by this Court where it was held that cases of recovery of possession must not necessarily be covered by Article 24 of the Ottoman Magistrates Law, and that actions of that sort might be brought and decided under section 3(c) of the Magistrates' Courts Jurisdiction Ordinance. We refer to C. A. 384/44 following C. A. 66/44. There were also later judgments to the same effect. It follows, therefore, that once it has been proved that the lease was made by one of the co-owners of the property in dispute without the consent of the others it is bad and the other co-owners can ask to have it set aside, and the Respondents being now on that land without any legal lease or any legal right whatsoever the Appellant is entitled to the recovery of his possession.

Both the judgments of the District Court and the Magistrate's Court are, therefore, set aside, and the Respondents ordered to vacate the land in dispute.

As to costs the Appellant will get his costs here and below as per receipts to be produced, and we assess an inclusive advocate's attendance fee of LP. 10 for all the three Courts. The Appellant is also to recover the amount of his deposit.

Delivered this 22nd day of January, 1946.

Puisne Judge.

I concur.

British Puisne Judge.

CIVIL APPEAL No. 264/45.

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

BEFORE : Shaw J. and Frumkin J.

IN THE APPEAL OF:—

Mustafa Ali Ahmed Sheikh Ali. APPELLANT.

v.

Dr. George Cornu. RESPONDENT.

Abatement — Death of a party — Rights of heirs to proceed with the action — C. P. R. 225, and 223—4 as re-enacted — Date of coming into operation of new rule of procedure, C. A. 14/31, C. A. 471/44 — Proper order where heir does not establish his right to proceed.

Appeal from the order of the District Court of Jaffa, in Civil Case No. 18/43, dated the 29th June, 1945, allowed:—

Rules of procedure come into effect, with a retrospective action, as soon as enacted. Under the new rules, as amended, an action does not abate by the death of a party.

(*A. M. A.*)

REFERRED TO: C. A. 14/31 (3, C. of J. 1067); C. A. 471/44 (12, P. L. R. 156; 1945, A. L. R. 235).

ANNOTATIONS :

1. See Halsbury, Vol. 26, pp. 21—2 on the effect of a party's death; *cf.* C. A. 75/39 (6, P. L. R. 504; 1939, S. C. J. 448; 6, Ct. L. R. 173) and C. A. 390/43 (11, P. L. R. 217; 1944, A. L. R. 415).

2. On retroactivity of laws of procedure see note in A. L. R. to C. A. 471/44 (*supra*); see also CR. A. 1/45 (12, P. L. R. 71; 1945, A. L. R. 405) and note 1 in A. L. R.

(*H. K.*)

FOR APPELLANT: Ben-Yamini.

FOR RESPONDENT: Gluckman.

JUDGMENT.

Shaw, J.: This is an appeal (by leave) from an order dated 29.6.45 of the District Court, Jaffa in C. C. 18/43 whereby the action was struck out.

The point for decision is whether the Appellant was a proper party to the proceedings, that is to say whether he could continue the proceedings which had been originally commenced by his father who has since died.

After the death of Ali Ahmad Sheikh Ali the Appellant filed a motion dated 26.2.44, asking for an order that he be made a plaintiff and that the Court do proceed with the action. In support of that motion the

Appellant filed an affidavit in which he swore that he was one of the heirs of his father the deceased Plaintiff.

There was a hearing on 24.5.43 before Judge Hubbard. Mr. Malak who appeared for the Appellant did not challenge the affidavit, and an order was made in the following terms — "Application granted. Applicant to be made the Plaintiff". At the time when that order was made Rule 225 of the Civil Procedure Rules, 1938, was in force and it read as follows:—

> "(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the action.
>
> (2) Where within the time limited by law no application is made under sub-rule (1) of this rule, the action shall abate so far as the deceased plaintiff is concerned and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the action to be recovered from the estate of the deceased plaintiff".

Mr. Benjamini, for the Appellant, has submitted that the order which Judge Hubbard made on 24.5.44 was a final order (no appeal having been made against it) and that it entitled the Appellant to proceed with the action. Mr. Benjamini admits that the affidavit which the Appellant filed in support of his motion did not state that he was the legal representative of his deceased father. Mr. Goitein, for the Respondent, admits that the Appellant is an heir.

In the order, dated 29.10.45, from which this appeal arises Judge Rogers held that he could only read Judge Hubbard's order as meaning that the Appellant could be a party to the action, but that his right to proceed as Plaintiff depended on his ability to satisfy the Court at a later date that he was the legal representative of the deceased.

In my view Judge Rogers' finding on this point is correct. The Appellant's affidavit did not state that he was his father's legal representative. There was no evidence upon which Judge Hubbard could have so found, and his order did not so state.

Rule 225 was repealed on 3.5.45 (see Supplement No. 2, page 491) so that when Judge Rogers made his order (on 29.6.45) the new Rules 223 and 224 were in force. Those Rules read as follows:—

> "223. An action shall not become abated by reason of the death or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title ***pendente lite;*** and whether

> the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the case and the judgment, but judgment may in such case be delivered notwithstanding the death.
>
> 224. In case of death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court may, if it be deemed necessary for the complete settlement of all the questions involved, order that the executor, administrator, all or any of the heirs, trustees or other successor in interest, if any, of such party, be made a party, or be served with notice in such manner or form as hereinafter prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the action as may be just".

In Civil Appeal No. 14/31 (3 Rutenberg 1067) the Court stated:—

> "In our opinion the general principle is that a rule of procedure comes into operation as soon as it is enacted and has a retrospective effect".

That case was followed in Civil Appeal No. 471/44 (12, P. L. R. p. 156).

So the position as I find it to be is this: — On 29.6.45 when the action came before Judge Rogers it had not yet been struck out or dismissed, so it was governed by the new rule. Under that new Rule 223 the action had not become abated by reason of the original Plaintiff's death. But the Appellant not being the legal representative was not a person who could go on with the action.

In the result I find that the learned Judge erred in striking out the action as the action (to be distinguished from the cause of action) had not abated. It may be observed that the notes made by the learned Judge show that Mr. Goitein was not asking for the case to be struck out under Rule 21. Mr. Goitein said that the question was whether the cause of action survived.

The appeal is therefore allowed, and the following order is submitted for the one which was made by the learned Judge — "Mustafa Ali Ahmed Sheikh Ali having failed to show that he has any legal authority to proceed with it the case is adjourned *sine die*. The Defendant, having been brought unnecessarily before the Court, must have fixed costs in the sum of LP. 5 (five pounds)".

This appeal arises out of the Appellants' failure to establish his legal position before proceeding with the action, and I would therefore order no costs.

Delivered in open Court this 19th day of February, 1946.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 278/45.

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

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

IN THE APPEAL OF:—

Amine Beidas & an. — APPELLANTS.

v.

1. David Moyal, Trustee of the property of Eissa Beidas, bankrupt,
2. The Official Receiver. — RESPONDENTS.

Bankruptcy — Remuneration of trustee — Secs. 77—8 — Trustee solicitor, English Law compared, In re Wayman — Taxation — Payments to trustee can only be under B. R. 247.

Appeal and cross-appeal from the Order of the District Court, Tel-Aviv, sitting in Bankruptcy, dated 27.7.45 in Civil Case No. 271/39; appeal allowed:—

1. The proper way to challenge the remuneration of a trustee, which is alleged to be excessive, is to proceed under sec. 77(2).

2. A trustee who is an advocate may contract for special fees to be paid for his professional work. But these should be in the nature of a commission or percentage.

3. Such a trustee can apply for taxation of costs, failing special agreement, only if not paid *qua* trustee.

4. A trustee is not entitled to retain amounts waived by the creditors, such amounts forming part of the estate.

(*A. M. A.*)

REFERRED TO: Wayman, *Re, ex parte* Board of Trade, 1889, 59 L. J. (Q. B.) 28, 61 L. T. 644.

ANNOTATIONS: On remuneration of trustees in bankruptcy see Halsbury, Vol. 2, pp. 172 *et seq.*, particularly para. 232 at p. 174.

(*H. K.*)

FOR APPELLANTS: G. Berouti.

FOR RESPONDENTS: No. 1 — Elia.
No. 2 — Deputy Administrator General — (Gavison).

JUDGMENT.

The first question to be decided concerns the 7½% on the amount realised and 7½% on dividends distributed which was awarded to the trustees by virtue of a unanimous resolution passed by the creditors on

the 15th September, 1940. It is admitted that the creditors were fully entitled to pass such a resolution by virtue of section 77(1) of the Ordinance. It has been argued both by Mr. Berouti and Mr. Gavison of the Administrator-General's Department that the amount was unduly high. They urged that the usual amount in Palestine did not exceed 4%. That may well be so, but if it were, the remedy would lie in an application under section 77(2) of the Bankruptcy Ordinance. One fourth of the creditors did not dissent from the resolution nor did the Official Receiver apply to the Court to fix the amount of the remuneration. The presumption must be that the creditors passed the resolution with their eyes open, and the fact that if they could have anticipated at the time that the liquidation of this estate would have been a less intricate affair, the trustee might have accepted less, is an inadequate reason for interfering with it now.

In regard to the 10%: The trustee solicitor is claiming his remuneration on the strength of a resolution dated 13th May, 1940, passed by the creditors. This brings me to an examination of the question, is a solicitor who is trustee of an estate in a special position in regard to contracting for his fees for professional services to the estate of which he is a trustee? I am of the opinion that he is. He can, it is true, provide for payment for his services, but he must do so in a particular way. Sections 77 and 78 of the Bankruptcy Ordinance follow the lines of sections 72 and 73 of the English Bankruptcy Act of 1883. Section 77(1) provides for the remuneration of trustees, and any remuneration paid must fall within the ambit of that section. Section 78(2) indicates the manner in which an advocate who is a trustee may provide for remuneration for his professional services. In *Re* Wayman, *ex parte* Board of Trade, L. T. R. Vol. 61, decided in regard to a solicitor trustee:—

> "Where a trustee is a solicitor he may contract that the remuneration for his services as a trustee shall include all professional services. The remuneration would be, therefore, higher than that of an ordinary trustee, but it must be in the nature of a commission or percentage within section 72".

The same principle applies here. Rule 247 of the Bankruptcy Rules provides:—

> "Except as provided by the Ordinance or Rules, no trustee shall be entitled to receive out of the estate any remuneration for services rendered to the estate, except the remuneration to which under the Ordinance and Rules he is entitled as trustee".

Once a solicitor becomes a trustee he is not entitled to charge the estate with separate costs for professional services. He may provide

for remuneration of his services but it must be in the nature of a commission or percentage within section 77(1). There was nothing to prevent the creditors from awarding him a higher percentage than they awarded the other trustees, but I cannot regard the resolution passed on the thirteenth of May, 1940, as a commission or percentage within section 77(1). This so called resolution is something independent of section 77(1). It is a separate agreement providing for the trustee's costs *qua* solicitor. It appears to me, therefore, that as in the *Re* Wayman's case the purported resolution was worthless.

The question now arises as to whether in place of this 10% agreement or resolution which I have held to be worthless, the advocate can have his costs taxed. I have come to the conclusion that he cannot do so. It is true that in *Re* Wayman the solicitor was permitted to have his costs taxed; in that case, however, the Court came to the conclusion that no remuneration had been awarded at all to the trustee but in this case remuneration has been awarded by the resolution of 15th September, 1940. My view is that once a solicitor becomes trustee there are only two ways in which he can provide for his professional charges: — either by resolution under section 77(1) or if no such resolution has been passed, he can, as in the case of *Re* Wayman, have his costs as a solicitor taxed under 77(4). As in this case a resolution providing for the remuneration of trustees in accordance with section 77(1) was passed, he is not entitled to take advantage of 77(4). It follows that he is not entitled to any further remuneration other than the 7½% provided by the resolution of 15th September, 1940.

There remains the question as to whether the solicitor trustee is entitled to keep for himself the sum of LP. 1,047.504 mils which he obtained by short payment of the creditors. Here again I refer to Rule 247 of the Bankruptcy Rules which provides that except as provided by the Ordinance and Rules no trustee shall be entitled to receive out of the estate any remuneration for services rendered to the estate except the remuneration to which under the Ordinance and Rules he is entitled as trustee. The remuneration to which an advocate trustee is entitled is the remuneration provided for under sections 77 and 78 of the Ordinance. This sum of LP. 1,047.504 mils is undoubtedly remuneration for work in connection with the estate and camouflage it as you will, I am of opinion that it is out of the estate because if the advocate trustee succeeded in persuading the creditors to renounce part of their legal claims against the estate, amounting to this sum of LP. 1,047.504 mils, the advantage should accrue to the estate. It follows that it must be disallowed and he must refund this sum to the estate.

Fixed costs which we assess at LP. 15.— to Appellant, LP. 10.— to be paid by advocate trustee and LP. 5.— from the estate.

Delivered this 25th day of February, 1946, in the presence of Mr. G. Beirouti for Appellant, and in the presence of Mrs. Rubinstein & Mr. Gavison for Respondents.

Chief Justice.

Shaw, J.: I concur, with this reservation — that I am not prepared to say that in a case where a trustee who is an advocate has not contracted under section 78(2) of the Bankruptcy Ordinance he cannot, with the sanction of the Committee of Inspection or Official Receiver under section 53(3) be himself employed as an advocate.

British Puisne Judge.

CRIMINAL APPEAL No. 176/45.

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

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

IN THE APPEAL OF :—

Muhammad Turki Ja'far Qasem. APPELLANT.

v.

The Attorney General. RESPONDENT.

Amendment of charge — T. U. I. Ord., secs. 31, 36, 39 — *Time of delivery of judgment in secs.* 47, 51 — *Credibility, C. A.* 93/42 — *Confessions, "Judges Rules" — R. v. Abramovitch — C. C. O.* 309, 310.

Appeal from the judgment of the District Court of Haifa given on 9th and 10th October, 1945, in Crime No. 166/45, whereby the Appellant was convicted on a charge of receiving stolen property, contrary to section 309 of the Criminal Code Ordinance, 1936, and sentenced to four years' imprisonment; conviction under sec. 310 substituted and sentence reduced:—

1. When the information is amended by a Court during the trial, the Accused should be asked whether he wishes to recall for further cross-examination any of the prosecution witnesses.

2. When acquitting the Accused, the Court may limit itself to a notification of the acquittal and deliver judgment subsequently. This practice cannot be followed in the case of a conviction.

3. Once the police have made up their mind to charge the Accused, he should be cautioned before being questioned.

(A. M. A.)

REFERRED TO: C. A. 93/42 (9, P. L. R. 554; 1942, S. C. J. 908; 12, Ct. L. R. 240); R. *v.* Schama, R. *v.* Abramovitch, 1914, 84 L. J. (K. B.) 396, 112 L. T. 480, 31 T. L. R. 88, 11 Cr. App. R. 45.

ANNOTATIONS:

1. Rule 2 of the Judges Rules which is relied upon in the judgment runs as follows: "Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be".

For Palestinian authorities on the requirements of a proper caution see CR. A. 30/43 (10, P. L. R. 188; 1943, A. L. R. 308) and note 2 in A. L. R.; *cf.* CR. A. 20/43 (1944, A. L. R. 152), CR. A. 47/45 (12, P. L. R. 227; 1945, A. L. R. 559) and CR. A. 44/45 (12, P. L. R. 260; 1945, A. L. R. 587).

2. On what is "recent possession" of stolen property see Halsbury, Vol. 9, pp. 555—6, para. 944.

For Palestinian authorities on secs. 309—311 of the C. C. O. see CR. A. 55/42 (9, P. L. R. 255; 1942, S. C. J. 954), CR. A. 151/43 (10, P. L. R. 708; 1944, A. L. R. 144) and CR. A. 32/45 (12, P. L. R. 207; 1945, A. L. R. 522) and notes in S. C. J. & A. L. R.

(*H. K.*)

FOR APPELLANT: Habibi.

FOR RESPONDENT: Assistant Government Advocate — (Akel).

JUDGMENT.

This is an appeal from a judgment of the District Court, Haifa, whereby the Appellant was convicted of receiving stolen property contrary to section 309, Criminal Code Ordinance, and sentenced to four years' imprisonment. The information alleged that the Accused had committed robbery on the 25th October, 1944, but after hearing the evidence for the prosecution the learned trial Judge, doubting the evidence of a witness who said that he had identified the Accused as the robber, amended the charge to one under section 309.

The Appellant's advocate argues that, as the Court in effect acquitted the Appellant of robbery, it had no power to make the amendment. We are unable to uphold this contention because we think that section 31, Criminal Procedure (Trial Upon Information) Ordinance, covers the matter. We would only say that when a Court amends an information during a trial it should ask the Accused whether he wishes to recall for further cross-examination any of the witnesses who have already given evidence for the prosecution. This was not done, but we do not think that the Appellant was in any way affected thereby because, at the close of the case for the prosecution, the trial Judge amended the charge and immediately acted under section 39 of Chapter 36, whereupon the Accused's advocate submitted that there was no case

to answer. Immediately this submission was overruled the Accused's advocate informed the Court that he was calling no evidence. The Court then adjourned to consider its judgment. We do not think that there was any serious irregularity of procedure. We would, however, observe that the trial Judge intimated that he was convicting the Accused and thereupon did convict and did sentence him, the Judge saying that he would deliver a reasoned judgment on the following day, which he did.

While this may be a desirable practice in some cases where the Court acquits and desires at once to set at liberty an accused person who is in custody, we think that it is thoroughly undesirable in a case where the Court intends to convict. If a judge intends to convict but feels that he has had no time to deliver a reasoned judgment, he should adjourn the case to enable him to do so. Indeed we think that there is no other procedure allowable, having regard to the combined effect of sections 47 and 51, Criminal Procedure (Trial Upon Information) Ordinance. We do not, however, consider that this irregularity in any way detrimentally affected the Appellant.

The facts, shortly stated, are that on the 25th October, 1944, a Mr. Preis was robbed of jewels on returning home from his shop in Haifa. There is nothing to connect the Appellant with these jewels until the 15th December, 1944, when he is alleged to have brought those jewels to a Dr. Abraham offering them in payment of an outstanding fee for medical services. Dr. Abraham, who was a witness for the Crown, was believed by the trial Judge. The advocate for the Appellant has argued that we must either regard the doctor as an accomplice or, at any rate, regard his story as being so palpably untrue as not to be worthy of credence. (C. A. 93/42, Annotated Supreme Court Judgments (1942) p. 908). We are not prepared to hold that the trial Judge should have disbelieved the doctor's evidence.

A Mr. Shapiro gave evidence which the Assistant Government Advocate admits was hearsay. We are, however, satisfied that this evidence did not affect the mind of the trial Judge or the result.

The next ground of appeal is that the evidence given by Constable Bodinger was inadmissible in that he had made up his mind to charge the Accused before he questioned him. It seems that Dr. Abraham had told Constable Bodinger and other policemen that the Accused was expected to call on the afternoon of the 18th December. Constable Bodinger, who was in the doctor's room when the Accused arrived, pretended that he was interested in the purchase of jewels, and asked the Accused for what sum he was willing to sell them, to which the Accused

replied "LP. 150". Some conversation then ensued. In examination-in-chief the witness said:—

> "I then called in the two British police. I said 'Turki admits these are his and wants to sell them for LP. 150.' I then told him we were police and asked him where he got the jewels from".

The constable then gave evidence of the Accused's replies, and it is argued that this evidence was inadmissible. In our view it is implicit from the fact that Bodinger had told the two British police that the Accused had admitted that the jewels were his that the police must by then have decided to charge the Appellant. Nevertheless, Bodinger went on to question him as to where he had obtained the jewels.

Issa Eff. Akel, for the Crown, who contends that there was nothing wrong, relies on Rule 1 of the Judges Rules, Archbold (31st Edition) page 371. We think, however, that Rule 2 applies to the facts of this case and we uphold the contention of the Appellant's advocate that the evidence of the Accused's answers was inadmissible. Nevertheless we do not think that this evidence affected the mind of the trial Judge.

The next question is whether, on the assumption that the Court of trial was entitled to accept Dr. Abraham's evidence there was sufficient evidence of recent possession. As Dr. Abraham's evidence was accepted it is clear that the Appellant did have the jewels in his possession on 15th December. Having regard to the exceptional nature and value of these jewels, we think that the possession was recent.

We have had regard to the passage in Hailsham, Vol. 9, page 555, paragraphs 944 and 945, and the case of Rex *v.* Abramovitch, Vol. 11 Criminal Appeal Reports, pages 45 to 49. Nevertheless we think that as the possession was recent, and in view of the nature and amount of the jewellery the Accused was rightly regarded as being in possession having reason to believe that these jewels were stolen. As the trial Court held (and we see no reason to disagree) that his explanation was incredible, we think that he was rightly convicted; but we agree with the Appellant's advocate that the conviction under section 309 cannot stand.

We accordingly alter the conviction to one under section 310, and we reduce the sentence to one year's imprisonment to date from date of conviction, namely 10th October, 1945.

Delivered this 20th day of November, 1945.

British Puisne Judge.

CIVIL APPEAL No. 192/45.

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

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

IN THE APPEAL OF:—

Keren Kayemeth Leisrael Ltd. & an. — APPELLANTS.

v.

The Government of Palestine. — RESPONDENT.

Antiquities — Rights of Government in settlement proceedings — Antiquities Ord., sec. 19.

Appeal from the decision of the Settlement Officer, Safad Settlement Area, dated 2.2.45, in case No. 3/Jubb Yusuf, allowed:—

The rights of Government over an antiquity site are safeguarded by sec. 19 of the Antiquities Ordinance. The Settlement Officer should not, therefore, register such land as *miri* in the name of Government.

(*A. M. A.*)

FOR APPELLANTS: Eliash.

FOR RESPONDENT: Assistant Government Advocate — (Touqan).

JUDGMENT.

This is an appeal by leave from the decision of the Settlement Officer regarding the lands of Jubb Yusuf. It must be emphasized that the appeal is by Keren Kayemeth Leisrael Ltd. and Talib Nayif Talib Subh against the Government of Palestine. They appeal only in respect of parcel 5. Dealing with this area the learned Settlement Officer recorded the finding that parcel 5 should be registered in the name of the Government as an antiquity site, *miri*. Mr. Eliash has argued that the fact that the site is an antiquity site is not a sufficient reason for registering it in the name of the Government in land settlement proceedings as the only rights accorded to Government in regard to the antiquity sites are those set out in section 19 of the Antiquities Ordinance. In regard to this we agree with Mr. Eliash.

It remains for us therefore to consider whether this is the only reason why the Settlement Officer ordered the plot to be registered in the name of Government. Naim Bey Touqan has argued that in regard to this plot there was no finding of fact and that even if we agree with Mr. Eliash the plot is still *in vacuo* and that at least we should send the case back to the Settlement Officer to record a finding on the issue. At this stage I might mention that leave to appeal was granted by the Settlement Officer and in granting this leave he said:—

> "Parcel 5 is another matter. It is true that in deciding this claim I overlooked the point that, being outside the Government claim, it should have been considered as part of the area of the village".

This wording in which the view of the Settlement Officer is conveyed is possibly ambiguous and it might have been advisable had the Settlement Officer gone on to state in categorical terms that even if he was wrong in law in regard to the antiquity issue, he would still have registered the land as he registered the other areas. But on reading the judgment as a whole we are unable to agree with Naim Bey that there has been no definite finding one way or the other. The Settlement Officer in his judgment state "I found in the other cases of Jubb Yusuf that the whole village must be considered to be registered in the *Tabu*". He then proceeds to examine which parts of the village can be as it were substracted from "the whole" and he gives his reasons for the substraction in each case. For instance he deducts plot 17 from "the whole" because it is a camp and should be registered in the name of the Government. That is quite correct. He deducts plot 18 because he says it is a pond and equally he was justified. He takes 15 because he said it was a road; here again his argument was correct. He takes parcel 5 from "the whole" for the sole reason that it was an antiquity site. It appears to us to follow clearly from this judgment that if his reasons for deducting plots 17, 18 and 15 failed he would have registered those plots as he registered the other plots. It seems to us that the same argument applies to parcel 5. If the reason which he gave for not associating it with the whole of the rest of the village of Jubb Yusuf fails, it follows that he must register it as he registered the rest of the village. Having come to the conclusion as we do that the reason which he did give, *i. e.* that it was an antiquity site, was wrong in law, it follows that parcel 5 falls into the same category as the rest of the village of Jubb Yusuf and the parcel must be registered as the rest of the village of Jubb Yusuf was registered. Costs of this appeal to be on the lower scale and to include LP. 10 advocate's attendance fee.

Delivered this 5th day of February, 1946.

Chief Justice.

CIVIL APPEAL No. 214/45.

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

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPEAL OF:—

Yehiel Meyer Mandelzis & an. APPELLANTS.

v.

1. Musbah Muhammed Shiqifi,
2. The Attorney General on behalf of the Government of Palestine. RESPONDENTS.

Res judicata — L. S. O. bound by judgment of Land Court — Pleadings — Construction of judgment.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated 2.5.1945 in Case No. 91/Haifa Lands, allowed and case remitted:—

A judgment of a Land Court on the ownership of land is binding in Settlement as *res judicata* unless the land claimed in the Land Court is not identical with that claimed in Settlement.

(*A. M. A.*)

ANNOTATIONS:

1. The previous appeal judgment referred to (C. A. 251/41) is reported in 9, P. L. R. 56 & 1942, S. C. J. 39.

2. *Cf.* C. A. 448/44 (12, P. L. R. 116; 1945, A. L. R. 97) and C. A. 465/44 (1945, A. L. R. 524).

(*H. K.*)

FOR APPELLANTS: A. Levin.

FOR RESPONDENTS: No. 1 — Cattan.
No. 2 — 'Akel.

JUDGMENT.

This is an appeal from a decision of the Land Settlement Officer, Haifa, ordering registration of certain parcels of land in the name of the first Respondent (hereinafter referred to as "the Respondent") and dismissing the claim of the present Appellants. The parcel of land is designated as 1D and forms part of block 11188, Haifa lands. The first Appellant is the registered owner of a parcel of land which he alleges is the land in dispute; he has borrowed money on mortgage from the second Appellants on the strength of his registered title. At the commencement of the hearing before the Land Settlement Officer the advocate for the present Respondent submitted that, as his client was in possession, he should be Defendant. The Land Settlement Officer, however, ordered that, as there was a dispute as to possession and as both parties claimed to be registered owners, the present Respondent should be Plaintiff because he was claiming more than one parcel. The then advocate for the present Respondent thereupon proceeded to lead evidence, namely, that of his own client and then said that he had no further witnesses. He relied on a judgment of the Land Court of Haifa in Land Case No. 71/33 given on 16th May, 1940, from which an

appeal was taken to this Court and dismissed on 5th February, 1942. (See C. A. 251/41). The Land Settlement Officer upheld the contention of the then advocate for the present Respondent that the matter was *res judicata* in favour of the present Respondent and refused the request of the then advocate for the present Appellant to be allowed to make his defence or call witnesses.

Mr. Cattan, for the Respondent, has argued that, as the matter was *res judicata,* the Land Settlement Officer had no option but to refuse to go on with the case and to refuse to listen to the case for the Defendants (now Appellants). Because of the view which we take of this matter it is (for obvious reasons) undesirable that we should give expression to any lengthy opinion. Suffice it to say that the one question which does not seem clear and which does not seem to have been really considered by the Settlement Officer is whether the Land claimed by the present first Appellant in the Haifa Land Court Case No. 71/33 was identical with the land which he claimed at land settlement. If it was the same land then, clearly, the case of the present Appellant must fail because we do not agree with the argument submitted on his behalf that the decision in Land Case No. 71/33 was that the Land Court were not satisfied that the present Appellants had proved their claim to the land in dispute and that the question of ownership had been left open. Whatever the wording of the judgment of the Land Court may have been, the result of the present Appellants laying claim to a particular piece of land in 1933 and failing in that claim was to bar them from claiming that plot again. We do not intend to deal with the question whether a Land Settlement Officer is bound by the strict rules of procedure which bind ordinary civil courts with regard to pleadings when the plea of *res judicata* is raised. All we say in this case is that we think that the Land Settlement Officer ought to have heard the Defendants (present Appellants) with a view to deciding whether the land they claimed at settlement was identical with the land which they claimed in 1933 before the Land Court of Haifa. We accordingly remit the case for him to hear the defence and if he is satisfied that the land is identical, he will, of course, dismiss the present Appellants' claim. If he is not satisfied that it was the same he will decide the ownership of the plot in dispute before him in the usual way. The costs of this appeal will abide the event, but, in order to facilitate final arrangements, we award an advocate's attendance fee at the hearing of this appeal of LP. 10 to the ultimately successful party.

Delivered this 26th day of February, 1946.

British Puisne Judge.

HIGH COURT No. 76/45.

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

BEFORE: Edwards, A/C. J.

IN THE APPLICATION OF :—

Itzhak Trachtingott. PETITIONER.

v.

Acting District Commissioner, Lydda District. RESPONDENT.

Party to H. C. proceedings — Requisition of vacant rooms after end of war.

1. If High Court directed that a copy of petition and supporting affidavit be served on a third person, latter, if he filed an affidavit, is entitled to be heard in opposition notwithstanding fact that he had not formally applied to be made additional respondent to the petition.

2. A notice of requisition of vacant rooms under Reg. 48, Defence Regulations, 1939, "in the interests of the prosecution of the war and for maintaining supplies and services essential to the life of the community" — ineffectual, once war is over.

(*M. L.*)

DISTINGUISHED: H. C. 5/42 (9, P. L. R. 191; 11, Ct. L. R. 65; 1942, S. C. J. 161).

FOLLOWED: Jansen *v.* Driefonteim Consolidated Mines Ltd. (1902) A. C. 484; 87, L. T. R. 372; 18, T. L. R. 796; *Re* Cooper deceased, Bendall *v.* Cooper (unreported); H. C. 73/44 (11, P. L. R. 426; 1944, A. L. R. 519).

REFERRED TO: H. C. 56/33 (2, P. L. R. 151; 2, C. of J. 761); Leachinsky *v.* Christie (1945) 2 All E. R. 405.

ANNOTATIONS:

1. As to first point see H. C. 5/42 (*supra*) with annotations thereto.

2. As to interference of H. C. in matters of requisition see H. C. 137/44 (1945, A. L. R. 654) with annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: Goitein.

FOR RESPONDENT: Crown Counsel — (Rigby).

FOR JEWISH SOLDIERS WELFARE COMMITTEE: Eliash.

ORDER.

This is the return to an order *nisi* directed to the Respondent calling upon him to show cause why he should not be ordered to cancel a notice of requisition which was originally undated. According, however, to

the affidavit of Mr. Epstein, District Officer, Tel-Aviv, after the notice of requisition had been despatched, an express letter dated the 3rd September, 1945, was sent to the Petitioner informing him that the notice of requisition served on him on the 26th August, 1945, should be dated 24th August, 1945. I accordingly accept the 24th August, 1945, as the proper date of the notice, which was signed by the Acting District Commissioner, Lydda District, as the competent authority. The relative part of the notice is in the following terms:—

> "Whereas it appears to me, R. C. H. Greig, Acting District Commissioner, Lydda District, a Competent Authority, to be necessary and expedient in the interests of the prosecution of the war and for maintaining supplies and services essential to the life of the community to take possession of three vacant rooms in your house situated at 13 Zevouloun Street, Tel-Aviv, I notify you that I am taking possession of the same as from the date of this notice in pursuance of regulation 48 of the Defence Regulations, 1939".

When Mr. Goitein applied for an order *nisi* he very properly drew my attention to the fact that the Jewish Soldiers Welfare Committee, Tel-Aviv, might be interested in the matter and anxious to defend the requisition order. This Court accordingly directed that a copy of the petition and supporting affidavit be served on that association in accordance with Rule 5, High Court Rules, 1937. This was done and the secretary of the Committee swore and filed an affidavit in reply on the 16th October, 1945. On the return day, (8th November, 1945), Mr. Goitein, for the Petitioner, objected to my hearing Dr. Eliash on behalf of the Soldiers Welfare Committee on the ground that they had not asked to be made Respondents and in support thereof he cited H. C. No. 5/42 (Apelbom's Annotated Supreme Court Judgments (1942) p. 161). I think, however, that that case can be distinguished from the present one. Having regard to the wording of the last sentence of Rule 6 High Court Rules, 1937, I consider that as the Jewish Soldiers Welfare Committee had filed an affidavit they were entitled to be heard in opposition to the petition, notwithstanding the fact that they had not formally applied to be made additional Respondents to the petition.

I accordingly heard not only learned Crown Counsel on behalf of the Acting District Commissioner, but also Dr. Eliash on behalf of the Jewish Soldiers Welfare Committee. I would at the outset deal with a rather ingenious argument of Dr. Eliash, namely, that under Regulation 48 there is no need for the competent authority to give notice and that all that he had to do was to take possession of the land which, of course, includes the house.

Dr. Eliash's argument, as I understand it, is that what the competent

authority did was to take possession and that possession has already been taken and it is, therefore, now too late to apply to this Court (See H. C. No. 56/33, Vol. 2, P. L. R. p. 15). The argument proceeds that this type of legislation does not contemplate two stages, namely the giving notice and then the taking of possession. In my view, however, this is a specious argument because the Respondent has, in fact, sent a notice of requisition and it is not suggested that he has completed taking possession. I am, therefore, of opinion that it is not too late for the Petitioner to apply to this Court. This Court can interfere in exceptional circumstances, one of them being that the order of the competent authority does not exactly fall within the four walls of the regulation. (See H. C. No. 73/44, Vol. 11, P. L. R. p. 426).

Mr. Goitein argues that it could not possibly have been necessary in the interests of the prosecution of the war as it is a public fact that the wars with the Axis (Germany and Italy) powers and with Japan were both at an end by the 16th August, 1945. This is true and Mr. Goitein's argument is, I think, sound; notwithstanding the fact that a peace treaty may not yet have been concluded with the enemy. I entirely agree that the mere fact that military operations are at an end and the fact that His Majesty the King may have, in a broadcast speech to his peoples on 16th August, 1945, said that the war is over, do not mean that from a strictly legal point of view we are again at peace with the enemy. In other words a state of war may still exist. Mr. Goitein has cited the remarks made by Lord Justice Scott in Leachinsky *v.* Christie, All England Law Reports (1945) Vol. 2, page 405 as to the need of intervention of the Court to curb the Executive. I would quote Lord Macnaghten's words in Jansan *v.* Driefonteim Consolidated Mines Ltd., (1902) A. C. 484 at page 497 — "The law recognises a state of peace and a state of war but it knows nothing of an intermediate state". In *in re* Cooper deceased Bendall *v.* Cooper ("Times" Newspaper of 10th November, 1945) Mr. Justice Cohen came to the conclusion that the words "during the present war" meant "during the continuance of hostilities with Germany for, at the date of the codicil, Japan was still neutral". It would appear that this *dictum* of Mr. Justice Cohen supports my own view. Even so once it is admitted that the war is over, I do not understand how it can be said that the requisition of this house was necessary for the efficient prosecution of the war. I agree that at the date of the requisition, regulation 48 was still in force. It cannot be said that the requisitioning of this house was necessary or expedient for maintaining supplies and services essential for the life of the community. This aspect has al-

ready been considered by this Court in H. C. No. 73/44 and the matter is, therefore, concluded by authority. From paragraph 7 of Mr. Epstein's affidavit it seems that there is an acute housing shortage in Tel-Aviv and that accommodation at the time of the requisition was urgently required for the families of Jewish soldiers who were then serving with His Majesty's Forces. It is, no doubt, desirable that those families should be housed; but I fail to see how the order in this case falls within the four walls of the regulation in question.

In my view, the petition succeeds; but I would remark that the matter may now (in the event of a new order of requisitioning issuing) be covered by the words "maintenance of public order" in regulation 114(1), Defence (Emergency) Regulations, 1945, which came into force on the 27th September, 1945. As to this, however, I express no opinion. The order *nisi* is made absolute.

Given this 29th day of November, 1945.

Chief Justice.

CIVIL APPEAL No. 338/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Haim Jakubovicz. APPELLANT.

v.

Ernst Handler. RESPONDENT.

Amendment of S/C — C. P. R. 125 — Time and circumstances in which it may be granted — C. A. 222/42, C. A. 61/41, C. A. 160/43, C. A. 375/44, C. A. 115/40, Copthall Stores Ltd. v. Willoughby's.

Appeal from the order of the District Court of Tel-Aviv, dated 15th July, 1945, in Civil Case No. 214/44, dismissed:—

As long as the basis of the claim remains the same, an amendment of the statement of claim may be allowed.

(A. M. A.)

REFERRED TO: C. A. 115/40 (7, P. L. R. 414; 1940, S. C. J. 246; 8, Ct. L. R. 39); C. A. 61/41 (1941, S. C. J. 176; 9, Ct. L. R. 172); C. A. 222/42 (9, P. L. R. 766; 1942, S. C. J. 853); C. A. 160/43 (1943, A. L. R. 188); C. A. 375/44 (11, P. L. R. 560; 1944, A. L. R. 630); Copthall Stores, Ltd. *v.* Willoughby's

Consolidated Co., Ltd., 1916, 1 A. C. 167, 85 L. J. (P. C.) 92, 113 L. T. 1169; Tildesley *v.* Harper, 1878, 10 Ch. D. 393, 48 L. J. (Ch.) 495, 39 L. T. 552.

ANNOTATIONS: See the cases cited and the notes thereto in S. C. J. and A. L. R.; see also C. A. 428/44 (12, P. L. R. 75; 1945, A. L. R. 54) and annotations.

(*H. K.*)

FOR APPELLANT: Zakheim and Waldman.

FOR RESPONDENT: Perles.

JUDGMENT.

This is an appeal by leave from an order of the District Court, Tel-Aviv, allowing the Respondent who was Plaintiff in the Court below to amend his statement of claim.

In the original statement of claim the Plaintiff alleged that he had given the Appellant LP. 300 on the 9th May, 1944, both parties having agreed to take on lease a grove for the purpose of erecting a slaughter-house. The statement of claim, however, stated that on 19th May, 1944, the parties agreed to dissolve the partnership having arranged that the Defendant should repay the Plaintiff the LP. 300 by the 1st June, 1944. Issues were framed on 15th October, 1944, the first being whether a partnership existed between the parties and the sixth being whether the sum of LP. 300 constituted a part of the Plaintiff's investment in the partnership or whether it was a debt for pigs sold by Defendant to the Plaintiff.

When the case came on for hearing on 24th June, 1945, after the Plaintiff had given evidence, and when his advocate asked the Court to hear his witnesses, the Defendant's advocate submitted that by reason of Article 80 of the Ottoman Code of Civil Procedure the dissolution of the partnership had to be proved by a written document a contention which the learned judge of the District Court upheld. Soon thereafter the present Respondent filed an application for permission to amend the statement of claim which application was granted. The present Appellant then applied to the learned Judge for leave to appeal to this Court from that order and leave to appeal was accordingly granted on 2nd October, 1945.

Many grounds of appeal have been taken before us such as that the cause of action had been changed and an entirely new case introduced, and new issues of fact raised, and that an alternative was introduced which has made the claim inconsistent with the original claim. It is also said that there has been undue delay.

Mr. Waldman, for the Appellant, cited many cases from the English

and Empire Digest, Volume on Pleading and Practice at pages 99 to 211. He also cited the following cases of this Court, namely, C. A. 222/42, P. L. R. Vol. 9, p. 766; C. A. 61/41, Annotated Supreme Court Judgments (1941) p. 176; C. A. 160/43 Annotated Supreme Court Judgments (1943), p. 188.

Dr. Perles, for the Respondent, also cited from the English and Empire Digest the same volume, p. 109, and the case of Copthall Stores Ltd. *v.* Willoughby's (1916) 1 A. C. pp. 167, 173; and the case of Tildesley *v.* Harper (1878) 10 Ch. D. p. 393, and the following cases of this Court, namely, C. A. 375/44, Vol. 11, P. L. R. p. 560, and C. A. 115/40, Supreme Court Judgments 1940, p. 246. He also referred us to the words of Rule 125 Civil Procedure Rules, 1938. Dr. Perles further relies on the written statement of defence filed on 30th June, 1944, in which the present Appellant admitted that negotiations had proceeded for the parties forming a partnership upon certain conditions and in which he also admitted having received from the Respondent the sum of LP. 300 in connection with the sale of pigs by the Defendant to the Plaintiff. As the whole case seems to revolve round the circumstances under which the LP. 300 was given, we do not think that the learned judge erred when he held that the Plaintiff was entitled to demand an amendment of the statement of claim on the strength of the alternative saying that the Defendant had denied the existence of a partnership but admitted that there had been negotiations for a partnership and had also admitted having received the sum of LP. 300.—.

In the circumstances we do not think that the trial judge has exercised his discretion wrongly. The appeal is accordingly dismissed. Costs of the appeal will be costs in the cause to include an advocate's attendance fee at the hearing of LP. 5.— to the ultimately successful party.

Delivered this 12th day of February, 1946.

British Puisne Judge.

CIVIL APPEAL No. 300/45.

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

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

IN THE APPEAL OF:—

Abdul Karim Yousef el-Yasin in his personal

capacity and on behalf of his sister, Shafa Yousef el-Yasin. APPELLANT.

v.

Asa'ad Omar Khalil el-Samara. RESPONDENT.

Possession by co-heirs — Land Law (Amend.) Ord., sec. 2 — Appeal from Magistrate's Court — M. C. P. R. 163, C. P. R. 321.

Appeal from the judgment of the Magistrate's Court, Jenin, sitting as a Land Court, dated 29.7.45, Land Case No. 10/44, partly allowed:—

1. The remedy provided in R. 163 of the M. C. P. R. does not exclude an appeal.

2. The period of appeal begins to run from notification of judgment and not from an informal intimation to the Appellant that he has lost his case.

3. Once it is shown that a person occupies land as a co-heir, the presumption shifts to him to show that he does not occupy as agent for his co-heirs.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* C. A. D. C. Ja. 138/44 (1946, S. C. D. C. 48) and note 2, and C. A. D. C. T. A. 17/45 (*ibid.*, p. 52).

2. On the last point see note 1 in A. L. R. to C. A. 288/44 (11, P. L. R. 615; 1944, A. L. R. 805); *cf.* C. A. 172/45 (12, P. L. R. 349; 1945, A. L. R. 754).

(*H. K.*)

FOR APPELLANT: G. Salah.

FOR RESPONDENT: Farajalla.

JUDGMENT.

A preliminary objection has been taken in this appeal by counsel for the Respondent. In our opinion this objection which falls under two heads must be overruled. The first is that Rule 163 of the Magistrates' Courts Procedure Rules, 1940, deals with the case of a person against whom judgment was given in default of appearance, and as such the only remedy open is for the opposer to apply to set aside the *ex-parte* judgment, but in our opinion the rule does not preclude that person from exercising his right of appeal if such rights are given.

The second point is that the appeal was out of time in that the second Appellant had appeared in Court to hear judgment on an occasion when she was told that her claim was dismissed. Appeals are governed by Rule 321 of the Civil Procedure Rules, 1938. The circumstances in which the Appellant has heard that her claim was dismissed cannot be considered a delivery of judgment within the meaning of Rule 321(a). There has been no service on the second Appellant as is provided for in the form in the schedule, therefore we are of opinion

that she was entitled to lodge this appeal within the proviso to paragraph 3 of Rule 321 of the Civil Procedure Rules, 1938.

This is an appeal from the Magistrate's Court at Jenin in which he dismissed the claim of the Appellants to certain lands. For the convenient consideration of this case, the nine plots must be divided into two parts. The first two plots can be clearly defined as the lands of Maress el Shalabi and el-Mawasit. In the course of our judgment we can refer to the other plots as the plots other than those included in the two mentioned plots. Now the Appellants claim those plots as their inherited shares — they were, they say, derived from a common ancestor.

The legal proposition in section 2 of the Land Law (Amend.) Ordinance is that the occupation of land by one or more co-heirs shall raise a presumption to the effect that the occupant holds the land on behalf of or as agent for the co-heirs not in occupation, but such presumption may be rebutted. This clearly throws the onus on the Respondent that he did not hold the land on their behalf. It emerges that the common ancestor through whom this land is claimed, died in 1351, and that Saadeh's second husband died very soon after, if not in the same year as her father. The evidence which was accepted by the learned Magistrate goes to prove that on the death of her second husband Saadeh returned to the house of her father, which had now passed to the Respondent. It is clear that if the Respondent were to succeed in his claim, which as we have stated was founded on his alleged adverse possession against the Appellants, he would have to satisfy us that there was a lapse of the prescriptive period, which in this case is ten years from the date it could arise, *i. e.* from the date of the return. That clearly he has not done. It follows that in regard to these plots of land the Appellants derive such title as they are entitled to by succession as co-heirs within the meaning of section 2(1) of the Land Law (Amendment) Ordinance.

Coming now to the plots other than those included in the two mentioned plots, the learned Magistrate found as a fact that the boundaries of the old *kushans* and the names of the plots of land had in the course of time been changed, and we find no reason to doubt the justification of that finding. Here the Appellants' claim rested entirely on their ability to prove that this land covered by those plots was also included in the land which was derived from the common ancestor. We are of opinion that the learned Magistrate was quite right when he came to the conclusion that they did not produce evidence which would justify him in finding that this land was included in the land derived from the common ancestor.

In the result we hold that the Appellants' claim to Maress el Shalabi and el-Mawasit lands succeeds to the extent that they are entitled to their shares as co-heirs. Their appeal in regard to the other plots of land must fail. The Magistrate's judgment is amended accordingly. On the whole we feel that we should award no costs.

Delivered this 7th day of January, 1946.

Chief Justice.

CIVIL APPEAL No. 183/45.

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

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

IN THE APPEAL OF:—

Hanna Menahem Messa. APPELLANT.

v.

Moses Benin Menahem Messa & an. RESPONDENTS.

C. P. R. 333 — Preliminary objections — Notice should in all cases be given.

Appeal from the judgment of the District Court, Jaffa, dated 4th of May, 1945, in Estate Case No. 45/32 (Application No. Z/47/44); preliminary objection dismissed:—

Whether or not the defect may be cured by the Appellant, the Respondent will not be allowed to raise it unless he has given notice to the Appellant under Rule 333.

(*A. M. A.*)

FOR APPELLANT: Goitein & Stoyanovsky.

FOR RESPONDENTS: Eliash.

RULING.

The issue immediately before the Court is in the nature of a preliminary objection to a preliminary objection. Dr. Eliash has objected that as the matter appealed from is not a final order exclusively determining the issues between the parties within the meaning of Rule 2 of the Civil Procedure Rules, 1938, that the appeal can only be by leave. Mr. Goitein has opposed the hearing to the objection on the ground that Rule 333 has not been complied with.

Rule 333 reads as follows:—

> "333. (1) No objection shall be raised on appeal on the ground of an alleged defect in form of the notice of appeal or the non-fulfilment of any condition precedent to the hearing of the appeal, unless written notice thereof shall have been served on the Appellant through the Registry of the Court at least seven days prior to the hearing of the appeal and the Appellant has not remedied or fulfilled the same.
> (2) Where notice has been served as prescribed in the preceding sub-rule and the Appellant has failed to remedy such defect or has not fulfilled such condition, the Court may, on good cause shown, allow the same to be remedied or fulfilled before the hearing of the appeal on such terms as to payment of costs or otherwise as it may deem just".

It is admitted by Dr. Eliash that he has not given the written notice provided for in the rule but he submits that no such notice was necessary because the defect of which he complains could not be remedied by the Appellant. It appears to us that to read this rule as Dr. Eliash has argued would be stretching words beyond their clear meaning. The rule was promulgated for the purpose of disposing of preliminary objections before the hearing. The question as to whether the defect can be remedied is one for the side against whom it is made to decide. It follows that Dr. Eliash is precluded from making the objection now.

Given this 6th day of February, 1946.

Chief Justice.

CIVIL APPEAL No. 85/45.

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

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

IN THE APPEAL OF:—

Ahmad Ali el Milhem. APPELLANT.

v.

Nazli Hussein Ali Murad & 3 ors. RESPONDENTS.

Service of parties on appeal — C. P. R. 313 as amended, C. A. 203/42 — Court may direct service on a party directly affected — Discretion.

Appeal from the Decision of the Land Settlement Officer, Safad, dated 26th of January, 1945, in Case No. 12/Jubb Yusuf; order for additional service made:—

Under Rule 313, as amended, if a party directly affected has not been served, the Court may either dismiss the appeal or order service.

(*A. M. A.*)

REFERRED TO: C. A. 203/42 (10, P. L. R. 17; 1943, A. L. R. 259).

ANNOTATIONS:

1. *Quaere* whether the objection could be raised without previous notice under R. 333 as amended in 1945; *cf.* C. A. 183/45 (*supra*).

2. See C. A. 202/45 (1945, A. L. R. 481) on the effect of the amendment to R. 313.

(*H. K.*)

FOR APPELLANT: A. Shukairy.

FOR RESPONDENTS: Nos. 1 & 4 — Absent — served.
No. 2 — Eliash and Feiglin.
No. 3 — Represented by No. 2.

RULING.

A preliminary point has been taken by Mr. Eliash, for the second Respondent, who submits that Rule 313 of the Civil Procedure Rules has not been complied with in that a party directly affected by the appeal has not been served. That party is Taleb Subh, who is the purchaser referred to in paragraph 3 of the notice and grounds of appeal. Mr. Eliash submits that the failure to serve that party is a fatal omission which must result in the dismissal of the appeal.

Rule 313 was amended in 1945. Before its amendment it read as follows:—

> "An appeal shall be lodged by filing a notice of appeal in the Registry of the Court to which the appeal lies, and all parties to the original action, other than the Appellant, shall be made Respondents to the appeal".

It is true that this Court has held that failure to comply with the old rule can be a fatal omission. That decision was followed in Civil Appeal No. 203/42 (10, P. L. R. 17) and in other cases.

We have not been referred to any case dealing with the amended rule, so we have to decide whether upon a proper construction of it this appeal should be dismissed. The relevant part of the new rule reads as follows:—

> "313 — (b) The notice of appeal shall be served upon all parties directly affected by the appeal and it shall not be necessary to serve parties not so affected; but the appellate Court may direct notice of appeal to be served on all or any parties to the action or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just,

and may give judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the appellate Court may think fit".

It will be observed that the Court may direct service "on all or any parties to the action". That in our opinion includes a party "directly affected by the appeal" if such party has not been served. If follows that the Court has a discretion and is not bound to dismiss the appeal by reason of non-service of a directly affected party. We do not wish it to be understood that the Court would easily be persuaded to exercise its discretion in favour of an appellant who is unable to show good cause for the omission, but we bear in mind that the main object of the rules is to provide for the efficient dispensation of justice and not to afford one party an opportunity of evading a hearing on the merits by taking refuge behind a technicality.

In the present instance we find that there is sufficient reason for not dismissing the appeal, especially as on referring to the heading of the decision dated 26.1.45 of the Settlement Officer, we do not find the name of Taleb Subh among the names of the parties, although admittedly he did appear before the Settlement Officer.

We would therefore order that notice of the appeal be served upon Taleb Subh, and that the hearing be adjourned for this purpose to a date to be fixed by the Chief Registrar. The question who is to pay the costs of this adjournment (which we fix in the sum of LP. 10) will be decided later when it can be seen whether it was really necessary for Taleb Subh to be served.

Delivered this 25th day of February, 1946, in presence of G. Beirouti for Appellant and Mrs. Rubinstein for Respondents.

Chief Justice.

CRIMINAL APPEAL No. 171/45.

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

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

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Naim Hussein el Bahnasawi. RESPONDENT.

Information — Clerical error — Point taken by trial Court — CR. A. 18/45, T. U. I. Ord. sec. 72(1)(c)(e).

Appeal from the judgment of the District Court of Jaffa in Criminal Case No. 205/45 dated 22.9.45, whereby the Respondent was acquitted on a charge of Perjury contrary to section 117 of the Criminal Code Ordinance, 1936; appeal allowed and case remitted:—

Case sent back for trial, the trial Court having acquitted the Accused on the ground, taken by the Court *suo proprio*, that there was a mistake in the information, the mistake being held on appeal to have been a clerical error.

(*A. M. A.*)

FOLLOWED: CR. A. 18/45 (12, P. L. R. 158; 1945, A. L. R. 395).

ANNOTATIONS: See the case followed and note 2 thereto in A. L. R.; on clerical errors in a charge sheet see also CR. A. D. C. Jm. 142/45 (1946, S. C. D. C. 101).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Moghannam.

JUDGMENT.

This is an appeal from a judgment of the District Court, Jaffa, acquitting Respondent of perjury contrary to section 117, Criminal Code Ordinance.

The trial in the Court below proceeded up to judgment. After having heard final addresses of Crown Counsel and the advocate for the Accused respectively, the learned Judges retired to deliberate. They then returned to Court and delivered judgment, acquitting the Accused on the ground that the information alleged that the perjury was committed on 11th January, whereas the alleged perjury took place in judicial proceedings held on 11th February, 1945. At no time during the trial did the Accused's advocate ever raise this point and it was apparently not realised by anyone that there was a clerical error in the information.

Although we have listened to an interesting argument by Mr. Moghannam, advocate for the Respondent, we think that we ought to follow Criminal Appeal No. 18/45 Vol. 12, P. L. R. p. 158. Sufficient facts have not been found by the trial Court to enable us to convict the Respondent under section 72(1)(e), Criminal Procedure (Trial Upon Information) Ordinance. We accordingly set aside the order of acquittal and remit the case to the District Court, Jaffa, for a new trial under section 72(1)(c) with directions that they allow the information to be amended so that it will read that the alleged perjury took place on the 11th February, 1945. The District Court will keep in view the provisions of section 72(1)(c).

Delivered this 7th day of November, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 148/45.

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

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

IN THE APPEAL OF:—

Leib (Eliezer) Brzozow. — APPELLANT.

v.

Jeshaia Leib Halperin & an. — RESPONDENTS.

Partnerships — Originating summons, C. P. R. 260 — Partnership Ord., secs. 38, 39, 41(f) — Breach of Partnership Articles — Bankruptcy of partner.

Appeal from the judgment of the District Court of Tel Aviv, dated 26th March, 1945, in O. S. File No. 417/44, dismissed:—

On the construction of the partnership articles, the Court refused to declare that a partnership was automatically dissolved.

(*A. M. A.*)

ANNOTATIONS: On Rule 260 of the C. P. R. *cf.* C. A. 61/42 (9, P. L. R. 428; 1942, S. C. J. 437; 12, Ct. L. R. 185), C. A. 157/42 (1942, S. C. J. 747), C. D. C. Ha. 57/44 (1944, S. C. D. C. 516) and C. D. C. T. A. 49/45 (1945, S. C. D. C. 483).

(*H. K.*)

FOR APPELLANT: Rotenstreich.

FOR RESPONDENTS: S. Zackheim & Waldman.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel-Aviv, dismissing an originating summons under Rule 260, Civil Procedure Rules, whereby the present Appellant asked for an order that a certain partnership be dissolved. The Appellant was the second party, and the first Respondent the first party, and the second Respondent the third party to a contract of partnership, dated 9th April, 1944, by Clause 22 of which the duration of the partnership was to be of three years from that date. The purpose of the partnership was to manufacture and sell scales or balances. By Clause 20 of the deed each of the three parties undertook to do all in their power to obtain all the licences required by law before the business of the partnership commenced.

The District Court found that the Respondents had done all in their power to obtain licences, but that the sole reason why these licences were not obtained was the unreasonable refusal of the Appellant to

hand over scales in his possession, the authorities very naturally requiring in advance to see these scales which would be a pattern or sample of the type of articles to be manufactured. With this finding of fact we are unable to interfere.

Mr. Rotenstreich, for the Appellant, relies on Clause 21 of the agreement, the English translation of which is in the following terms:—

> "In the event that notwithstanding the endeavours to obtain the required licences as aforesaid, the said licences should not be obtained until the expiration of four months from the date of signing this agreement by the parties, all expenses made by the first party as aforesaid shall be borne by him only and all the materials bought, and the tools made with the said money will become his property and this agreement will be void".

Mr. Rotenstreich contends that, by reason of the fact that the licences were not obtained by the expiration of four months from 9th July, 1944, the partnership was automatically dissolved, and that the District Court should therefore have made a declaration under section 38, Partnership Ordinance. We think, however, that, if one is to rely on section 38, one must refer to Clause 22 of the deed which provided for the duration of the partnership being three years. The words which we have quoted from Clause 21 must clearly be read together with Clause 20, and the words "notwithstanding the endeavours to obtain the required licences" clearly presuppose that all parties had done everything in their power to obtain the licences. In view of the finding that the Appellant had done everything in his power and in fact had been obstructed, we think that the words which we have quoted from Clause 21 never came into operation.

It is next argued that the first Respondent failed to produce a bank guarantee as required by Clause 4, but the reply of the Respondent is that no time limit was fixed in the agreement for the production of a bank guarantee, and the argument proceeds that a reasonable time would be at or about the commencement of production of the articles, that is, at or about the time of obtaining the licences. We think that there is force in this contention, and we are not prepared to hold that the District Court erred in refusing to hold that the agreement became void under Clause 21.

The last substantial ground of appeal is that the Court below should have decreed a dissolution of the partnership under section 41(f). Apart from the fact that the Appellant's advocate does not seem to have relied on section 41(f), the Court below gave reasons why they did not consider it just and equitable that the partnership be dissolved, and we are not prepared to hold that their reasons were unsound. The

appeal accordingly fails and is dismissed with costs on the lower scale to include one set of advocate's attendance fee of LP. 15.—.

We would add that it seems that, since the date of the judgment of the District Court, the first Respondent has been adjudicated bankrupt (Palestine *Gazette* No. 1415 of 8th November, 1945). Mr. Waldman has argued the appeal on behalf of the first Respondent, holding a power-of-attorney from the trustee in the bankruptcy. We make no comment on the present position other than to refer to the terms of section 39(1) Partnership Ordinance.

Delivered this 18th day of December, 1945, in the presence of Mr. M. Caspi for the Appellant, and in the absence of the Respondents.

British Puisne Judge.

CIVIL APPEAL No. 125/45.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Yehuda Agam Lavan. APPELLANT.

v.

Leopold Fisher. RESPONDENT.

Leases — Mejelle Arts. 907, 1194, *Art.* 14 *Law of Disposition — Form of judgment, C. P. R.* 203.

Appeal from the judgment of the District Court, Haifa, dated 23rd February, 1945, in Civil Case No. 244/43, dismissed:—

1. In default of agreement, the owner of *mulk* land can claim something brought on his land, by virtue of Art. 1194 of the *Mejelle*. Art. 14 of the Law of Disposition may be invoked in the case of *miri*.

2. The proper form of setting out separate judgments by the same Court explained.

(*A. M. A.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: Eisenberg.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Haifa whereby the Appellant's action for LP. 280, being the value

of seventy tons of chemical waste products alleged to have been his property and unlawfully appropriated by the Respondent, was dismissed.

The Appellant's case was that the Respondent, together with a Mr. Csengeri and Mr. Bershansky, in September, 1941, by verbal agreement jointly leased a store at Bat Galim, Haifa, belonging to him (the Appellant), together with one or two adjoining strips of land. The Respondent and his partners were engaged in the manufacture and sale of hydrochloric acid. In November, 1941, some of the refuse from the manufactured chemicals was heaped near the store, but owing to its being a noxious substance it could not with safety be allowed to remain there, nor could any carrier be found to remove it, as damage (presumably by corrosion) would ensue to the vehicle. Paras. 7 and 8 of the amended statement of claim are in the following terms:—

> "7. The said lessees explained to the Plaintiff that the said refuse may turn in time to valuable material and offered it to the Plaintiff gratuitously in consideration of his consent to allow them to place this refuse on his grounds near the store let to them and/or in pits prepared for this purpose on his grounds near the store let to them.
>
> 8. The Plaintiff accepted the offer. Some pits were prepared on the grounds of the Plaintiff near the store, and the refuse was put there and in heaps near the pits for about 1½ years. The Plaintiff covered from time to time the said refuse with soil to preserve it".

It was incumbent upon the Appellant to prove those allegations to the satisfaction of the trial Court. This he attempted to do almost entirely by the oral evidence of himself and his erstwhile partners, Messrs. Csengeri and Bershansky. It is implicit from the judgment of Judge Shems that he was not convinced by the evidence of the three gentlemen. Mr. Goitein, with his customary vigour, has attacked the judgment of Judge Shems. It is first complained that both the learned trial Judges (Judges Shems and Nasr) were influenced by a faulty translation in English of a document in Hebrew, Exh. D/4, which was produced by the Defendant. There is, however, nothing to show that this is so. Judge Shems knows Hebrew, and we assume that he perused the original exhibit. Moreover, the document was quite fairly put to Mr. Csengeri and Mr. Bershansky in cross-examination. The Appellant was represented in the Court below by a Hebrew-speaking advocate, who did not choose to re-examine either of the two witnesses. In any event, the advocate for the Plaintiff could have studied the Hebrew original before he re-examined. There can be no question of the document being inadmissible. It is true that the Plaintiff did not rely on Exh. D/4. Judge Shems in his judgment said "Exh. D/4 did not add weight to the credibility of the witnesses, Csengeri and Bershansky,

who signed it. It was made in October, or November, 1943, although it related to a transaction allegedly made in November, 1941. It is in the handwriting of the present Plaintiff who asked Csengeri to sign it". It is implicit from both judgments (namely, of Judges Shems and Nasr, the later of whom wrote a separate judgment) that the trial Judges were not convinced of the truth of the story told by the Plaintiff and Csengeri and Bershansky, and their scepticism seems to have been increased when Exh. D/4 was produced. It is therefore not altogether correct, as Mr. Goitein suggested in argument, that the judges did not say that they disbelieved the Plaintiff's story. It is doubtless true that they did not say so in terms, but it is implicit that they were not convinced by it.

Mr. Goitein next complains that the trial Court were influenced by a document, Exhibit D/7, which, being merely the copy of an account, was wrongly admitted in evidence. Even although Judge Shems did refer to Exhibit D/7 in his judgment, Judge Nasr did not, and in any event I am not satisfied that, but for Exhibit D/7, Judge Shems would have arrived at a different conclusion.

It is finally said that the Appellant set up a lease not in writing. I find it difficult to understand how the mere fact that the defence may have been unwise enough to rely on a lease not in writing could have helped the Plaintiff's case, because it is clear that the learned trial judges did not base their refusal to accept the Plaintiff's version of the affair on any verbal lease set up by the Defendant.

Our attention was also directed to Article 1194 *Mejelle*. We do not doubt that that Article is still good law in Palestine, but what the Plaintiff sought to do was to claim that something brought on to his land was his. He failed to prove the agreement which he had set up. In default of an agreement, the owner of *miri* land in such circumstances could claim equivalent rent by virtue of the provisions of Article 14 of the Law regulating the Disposition of Immovable Property, of 30th March, 1329 (*i. e. A. D.* 1912), and the owner of *mulk* land could sue for wrongful appropriation (assuming such to be alleged and proved) under Article 907 *Mejelle*.

But the Plaintiff made no such claims. He had to stand or fall by the allegation he made in his amended statement of claim. As we have said, he failed to prove that claim to the satisfaction of the trial Court, and I do not see how we can now help him.

Mr. Goitein also said that there should have been only one judgment as is provided for by Civil Procedure Rules, 1938, Rule 203. This is true. We think that, in the circumstances, to have been strictly correct,

there should have been only one judgment, and if Judge Nasr had wished to add words of his own, Judge Shems should have added to the judgment of the Court — "Judge Nasr agrees with the conclusion at which I have arrived, but asks me to add that, *etc.*" In these circumstances, however, we do not think that the fact that Judge Nasr wrote a separate concurring judgment can affect the result of this appeal, which should be dismissed. I think, however, that the costs awarded in the Court below were excessive. The action should have been dismissed with costs to be taxed on the lower scale to include an advocate's instruction fee of LP. 10, and attendance fee of LP. 30.

Subject to that variation, the appeal will be dismissed with costs to be taxed on the lower scale, to include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 7th day of February, 1946.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

CRIMINAL APPEAL No. 142/45.

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

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

IN THE APPEAL OF:—

Simha Witman. APPELLANT.

v.

The Attorney General. RESPONDENT.

Private prosecutions — Complainant need not be personally injured — M. C. J. O., sec. 17, 28(2), *Magistrates' Law, Arts.* 57—8.

Appeal from the judgment of the District Court of Tel-Aviv in its appellate capacity in Criminal Appeal No. 37/45, dated the 1st of June, 1945, whereby an appeal by the Attorney General has been allowed against a judgment of the Magistrate's Court of Tel-Aviv in Criminal Case No. 9733/44, whereby the Appellant was discharged; appeal dismissed:—

A private complainant may prosecute in respect of an offence which caused him no injury, provided that the police refuse to prosecute.

(*A. M. A.*)

ANNOTATIONS: For another instance of sec. 28(2) of the Magistrates' Courts Jurisdiction Ord. being invoked see C. A. D. C. Ja. 89/44 (1946, S. C. D. C. 87).

(*H. K.*)

FOR APPELLANT: Hake.

FOR RESPONDENT: Podhorzer.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, which, sitting in its appellate capacity, set aside the judgment of the Magistrate's Court of Tel-Aviv.

The proceedings originally started in a complaint by Moshe Alter against the present Appellant for an alleged contravention of section 99 of the Municipal Corporations Ordinance. As the Police were satisfied that no public interest was involved, the Complainant purporting to act under section 17 of the Magistrates' Courts Jurisdiction Ordinance, applied for and succeeded in obtaining from the Magistrate a summons to prosecute the complaint. The learned Magistrate dismissed the summons on the ground that where a complaint was taken by a private person, that person must have been personally injured apart from the injury to a class in general. The District Court did not agree with this view. The issue has been appealed to this Court.

It has been argued by Mr. Hake that section 17 of the Magistrates' Courts Jurisdiction Ordinance cannot be applied by itself — that we have got to turn back to Articles 57 and 58 of the Ottoman Magistrates' Law, and the effect of those articles, he says, is to restrict the interpretation of "the complainant" to a person who himself has suffered injury.

Mr. Podhorzer, who has appeared on behalf of the Attorney General, has argued that in fact, if properly interpreted, there is no essential difference between section 17 of the Magistrates' Courts Jurisdiction Ordinance and Articles 57 and 58 of the Ottoman Magistrates' Law. We find it unnecessary to examine at any great length the very interesting argument advanced by Mr. Podhorzer, because it appears to us to be immaterial whether, in fact, there is any difference between the articles of the Ottoman Law and section 17, because under the provisions of section 28(2) of the Magistrates' Courts Jurisdiction Ordinance it is clear that any inconsistency in the Ottoman Magistrates' Law, if there be one, would have to give way to the provisions of section 17. It only remains for us, therefore, to interpret section 17 untrammelled by any provisions of the Ottoman Law. Whatever may be the inconveniences which may flow, we cannot but come to the conclusion that there is

no ambiguity about the wording of section 17. It provides that any complainant in any case may lay his complaint before a Magistrate provided, always, of course, that the condition precedent that the Police have certified that no public interest is involved has been satisfied. The section places no limitation on the word "complainant" which must be interpreted in the ordinary meaning as he who lays a complaint.

For these reasons we are of opinion that the appeal must be dismissed.

Delivered this 23rd day of November, 1945.

Chief Justice.

CIVIL APPEAL No. 143/45.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Muhammad As'ad en-Nis & 11 ors. APPELLANTS.

v.

Keren Kayemeth Leisrael Ltd. RESPONDENT.

Cultivators — No claim to land in Settlement — L. S. Ord., sec. 33(4) *— Government appearing in settlement proceedings — Land Transfers Regulations — C. A.* 274/42.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, in Case 11/Daliyat er Rauha, delivered on 8.2.45, by leave granted by the said Settlement Officer, on the 12.3.45, dismissed:—

1. Cultivators have no *locus standi* in land settlement proceedings dealing with title to land.

2. If the Settlement Officer considers the effect of the Land Transfers Regulations his decision is binding whether or not the Government was represented in the proceedings.

(*A. M. A.*)

REFERRED TO: C. A. 274/42 (10, P. L. R. 105; 1943, A. L. R. 133).

ANNOTATIONS:

1. On the meaning of "right to land" under the Land (S. of T.) Ord. see P. C. 19/35 (3, P. L. R. 135; 8, C. of J. 531), C. A. 173/40 (7, P. L. R. 471; 1940, S. C. J. 311; 8, Ct. L. R. 74) and C. A. 21/41 (1941, S. C. J. 135; 9, Ct. L. R. 107) which last mentioned case was partly disapproved of in C. A. 338/44 (12, P. L. R. 57; 1945, A. L. R. 8).

2. On the second point see C. A. 274/42 (*supra*).

(*H. K.*)

FOR APPELLANTS: S. Khadra.

FOR RESPONDENT: A. Levin.

JUDGMENT.

Edwards, J.: This is an appeal from a decision of the Land Settlement Officer, Haifa, in case No. 11/Daliyat er-Rauha. It is admitted that the Appellants are merely cultivators and their rights, if any, must flow from the Cultivators (Protection) Ordinance.

The first question is whether they have any legal standing as Appellants. Having regard to the terms of section 33(4), Land (Settlement of Title) Ordinance, as amended, we do not think that they can be regarded as persons claiming a right to land. We, therefore, hold that they have no claim to be heard as parties and that they have no standing in this appeal.

In his decision the Land Settlement Officer said:—

> "The gist of the application is that certain shares of all the Daliya lands, namely 5924/100,000 were originally registered in the names of two ladies, Faiza and Freihan, the daughters of Fauzi Bey Sadeq. It is alleged that during settlement of Daliyet er-Rauha these two ladies transferred the land to the Keren Kayemeth Ltd. under an irrevocable power of attorney No. 216/42 dated 21.2.1942, while the Settlement Officer accepted from them a written renunciation on 8.5.1942 and scheduled these shares in the ownership of the Keren Kayemeth, the Respondents.
>
> Daliyat er-Rauha village falling within Zone A. such a transfer of land is null and void by the provisions of section 5 of the Land Transfers Regulations, 1940. The Settlement Officer is now petitioned to revise his decision and restore the ownership of the shares in the Schedules of Rights to the names of the original registered owners. It is to be observed that the Attorney General was notified of the application by Subhi Bey Khadra but has not seen fit to intervene ..... I think it but fair to record that the Settlement Officer's decision to record the 5924 shares in the name of the Keren Kayemeth Leisrael Ltd. was not based on the power of attorney of 21.2.42, nor on the written renunciation of 8.5.42. These were in confirmation of the uncontested facts as presented to him and investigated. The Settlement Officer who accepted the written renunciation had not overlooked the terms of the Land Transfers Regulations".

We were informed at the Bar by Subhi Bey Khadra, for the Appellants that during the settlement proceedings he had received a letter from Crown Counsel from which it would appear that the Attorney-General did not intend to be represented before the Settlement Officer with a view to arguing that Article 5 of the Land Transfers Regulations,

1940, applies, Crown Counsel being satisfied that the matter would be safe in the hands of the Settlement Officer who would doubtless direct his mind to the relevant considerations. We think that, as the Attorney General could claim to appear and be heard in the proceedings and as he was served with notice, it would be wrong for us now to enter into the question of the Land Transfers Regulations. We refer to C. A. No. 274/42, P. L. R. Vol. 10, p. 105 at p. 108. As we are satisfied that the Settlement Officer did consider the effect of the Land Transfers Regulations, we see no reason for interfering with his decision. The appeal is accordingly dismissed with costs to be fixed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.—.

Delivered this 18th day of February, 1946.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

HIGH COURT No. 18/46.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPLICATION OF —

Ruth (Bracha) Lubicz. PETITIONER.

v.

1. Yitzhaq Chizik, district officer, in his capacity of a Returning Officer for the conduct of the elections of the Local Council of Rishon-le-Zion,
2. The Chairman and Members of the Electoral Committee of the Local Council of Rishon-le-Zion & an. RESPONDENTS.

Elections — Local Councils — Registers — Objection to Register — Alternative remedy.

Return to an order *nisi* issued on 7th February, 1946, directed to the 1st Respondent calling upon him to show cause why his decision to strike off the name of the Applicant as candidate from the party list of the Communist Party of Palestine where she was nominated as a candidate for the Membership of the Local Council of Rishon-Le-Zion, should not be set aside; order *nisi* discharged:—

Before taking the matter to the High Court, an objection should be lodged with the Electoral Committee if there is no indication in the Statutory Register that a person is entitled to be elected as a councillor.

(A. M. A.)

ANNOTATIONS: *Cf.* H. C. 57/45 (12, P. L. R. 397; 1945, A. L. R. 722) and annotations.

(H. K.)

FOR PETITIONER: Goitein.

FOR RESPONDENTS: No. 1 — Pinhassowitz.
No. 2 — Harari.

ORDER.

This is the return to an order *nisi* calling upon the first Respondent as Returning Officer for the elections to the Local Council of Rishon-Le-Zion to show cause why his decision to strike the name of the Petitioner off the Party List of the Communist Party of Palestine should not be set aside.

Affidavits in reply have been filed on behalf of the first Respondent and also on behalf of the Chairman and members of the Electoral Committee of the Local Council. The relevant provisions of the law are to be found in the Local Council (Rishon-Le-Zion) Order, 1942, Laws of Palestine, 1942, Vol. 2, p. 87, and also in the Schedules at pp. 105—118. The register of voters contemplated by para. 5(1) of the Order was published in accordance with para. 5(2) on 28th November, 1945. Para. 5(1) prescribes that there be an indication on the List of which voters are eligible for the purpose of voting and also an indication as to whether that particular voter is eligible to be elected as a councillor.

In the register with which we are concerned this was done by the letter "P" or (Hebrew) "Pey" appearing opposite the name to show that the voter had the passive right, that is the right of being elected. This seems to have been known to everybody. The Petitioner's name however appeared without this letter and it must have been abundantly clear to her that she was not indicated on the list as being a person qualified to be elected as a councillor.

Mr. Goitein, for the Petitioner, contends that his client could not have given notice in writing to the Electoral Committee under para. 5(3)(a) for the simple reason that her name did, in fact, appear on the register. In our view, this argument is unsound. It is implicit from para. 5(1) and especially from the word "indicate" of that sub-paragraph in line 7 that when a person's name is on the register that

person's name appears in two capacities: namely (1) that of a voter and (2) that of a person qualified to be elected as a councillor. We accordingly think that she could have lodged an objection with the Electoral Committee claiming that her name was not on the register as a person qualified to be elected as a councillor.

From the affidavit of Mr. Abramovitch, the Chairman of the Electoral Committee, it seems that six voters did, in fact, take advantage of para. 5(3)(a) and objected on the ground that there was no indication that they were eligible to be elected as councillors, and it also seems that the Electoral Committee made the necessary corrections in the register.

Taking, as we do, this view of para. 5(3)(a) we think that the Petitioner had an alternative remedy which was that of following the procedure laid down in para. 5(3)(a) with a further right of appeal to a Magistrate under para. 5(7). We deem it unnecessary to deal with the argument of Mr. Goitein relating to para. 2(6) of the fifth Schedule at p. 107.

For these reasons the order *nisi* is discharged with fixed (inclusive) costs of LP. 5.

Given this 11th day of February, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 86/45.

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

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

IN THE APPEAL OF :—

Frieda Borko. — APPELLANT.

v.

Attorney General. — RESPONDENT.

Criminal Procedure — Irresistible conclusion of guilt — Election under Judicial Regulations (No. 2) 1942 — Adjournments exceeding 15 days — M. C. P. R. 270(1) — Findings to support charge of theft — C. C. O., secs. 270 and 273(b).

Appeal from the judgment of the District Court of Tel-Aviv in CR. A. 8/45 (Judge Mani & Judge Cheshin) allowed:—

Unless sufficient evidence is brought before the trial Court to lead to an irresistible conclusion of guilt, an accused is entitled to an acquittal.

(*A. M. A.*)

ANNOTATIONS :

1. The judgment of the District Court was as follows (translated from the Hebrew) :—

"This is an appeal from the judgment of the Magistrate's Court Tel Aviv in Criminal File No. 7907/44 dated 19.12.44, whereby Appellant was convicted of theft contrary to sec. 270 of the Criminal Code Ordinance 1936 and ordered to pay a fine of LP. 10 or 2 months imprisonment in default, and to return to the complainant LP. 4 of the money stolen.

The charge was theft of money from a dwelling house contrary to section 273(b) of the Criminal Code Ordinance, 1936. The learned Magistrate, having heard the witnesses for the prosecution and the evidence of the Appellant herself, found that the Appellant saw the complainant enter the bathroom and at that moment stole the LP. 8 which the complainant had placed on a chair in his room. The Magistrate, therefore, convicted her of an offence under section 270 of the Criminal Code Ordinance. Hence the present appeal.

Mr. Kolodny for the Appellant, points out several technical defects in the proceedings in the Court below. The first one is that the learned Magistrate did not follow the procedure laid down in section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1939, as amended by the Defence (Judicial) Regulations (No. 2) 1942. This section prescribes that a Magistrate, who is not a British Magistrate, ought to inform the Accused of his right to be tried by a British Magistrate. — The file contains a printed form with the necessary particulars, such as: the name of the Accused, the section under which the charge was brought, *etc.*, and there appear, *inter alia*, the following words: — "Accused given to understand that he is entitled to be tried by a British Magistrate or by the District Court". Mr. Kolodny does not contend that the Accused was not given the right of election to be tried by a British Magistrate, and the point at issue is whether the addition of the words "or by the District Court" invalidates the judgment. It is clear that the Accused was not entitled to be tried by the District Court and it is difficult to conceive that the learned Magistrate did inform her of a non-existent right. By some inadvertance the said words were not deleted from the printed form which had apparently been drafted at a time when accused persons did have such a right, and we do not see any reason to quash the judgment on the ground of the addition of words which make no difference as far as the proceedings on the charge are concerned.

The second irregularity of procedure which Mr. Kolodny alleges is that the case was adjourned from time to time for a period exceeding 15 days, contrary to Rule 266 of the Magistrates' Courts Procedure Rules, 1940. It turns out that due to the non appearance of witnesses the proceedings were adjourned several times, but we see no miscarriage of justice involved therein which would justify us in quashing the judgment.

The third flaw is that the learned Magistrate did not ask the Appellant whether she wished to give evidence or whether she desired to call witnesses in her defence, contrary to the provision of Rule 270(1) of the Rules. The record of the Magistrate is silent on this point and Mr. Kolodny, who appears before us and makes this submission, was not present at the proceedings in the Court below. His allegation is therefore pure conjecture and he obviously cannot get around the point that the Appellant did in fact give evidence before the learned Magistrate and that from her evidence it appears that when the act was committed nobody

was present on the spot save the complainant and she herself; the allegation is ill-founded and the matter need not be further elaborated.

The fourth irregularity and the most important one is that the Appellant was convicted of an offence under section 270, while the charge, as laid in the charge sheet, was for an offence under section 273(b) of the Criminal Code Ordinance 1936. The learned Magistrate did not amend the charge under section 20 of the Magistrates' Courts Jurisdiction Ordinance, 1939, and Rule 273 of the Magistrates' Courts Procedure Rules, 1940. Mr. Kolodny places reliance on Cr. Appeal 71/41 (Apelbom, 1941, p. 209), where the conviction was quashed because the information had not been amended by the trial Court. But on considering the said judgment it appears to us that it cannot serve as an authority on the question before us, and this for two reasons: a) the charge in the case was filed on an Information under the Criminal Procedure (Trial Upon Information) Ordinance. Section 31(3) of that Ordinance provides that when an amendment is made a special note with regard thereto should be endorsed *on* the Information. The Magistrates' Courts Jurisdiction Ordinance and the Magistrates' Courts Procedure Rules do not prescribe a specific place for marking the amendment, and the amendment may be made in the judgment itself; b) It seems from the authority quoted that not only was the Information not amended but the District Court before which the case was heard, had held earlier that there was no evidence to substantiate the charge as laid in the Information and therefore *acquitted* the Accused of that charge; and notwithstanding that ruling the Accused was called upon to answer another charge and the Supreme Court sitting as a Court of Criminal Appeal held that after an acquittal, an accused person cannot be called upon to answer a charge. In the present case the learned Magistrate does not say that there is no evidence to substantiate a charge under sec. 273(b) and that therefore he convicts the Appellant of an offence under section 270. On the contrary, from his judgment it appears that he held that all the elements requisite for a conviction under section 273(b) were present, *viz.* theft from within a dwelling house. The only explanation which may be given for his mistake is that when coming to quote the section number he overlooked the fact that a theft of this nature is contemplated by section 273(b) and not by section 270.

Furthermore, it seems to us that CR. A. 71/41 also distinguishable from the present case as far as the merits of the case are concerned. In that case, not only the section of the law, but also the nature of the offence was changed. In the Information the *felony* of manslaughter was contained and the Accused was convicted of causing death by negligence, which is a *misdemeanour* only. While in the case before us the Appellant was charged with theft and was convicted of theft except that the charge was for theft in aggravating circumstances while the conviction was for theft without aggravating circumstances. No miscarriage of justice was done here and relying on the proviso to section 11(2) of the Magistrates' Courts Jurisdiction Ordinance we reject this contention.

As to the merits of the case, it is urged by Mr. Kolodny that the learned Magistrate heard inadmissible evidence and that the evidence adduced was insufficient to sustain conviction at all.

Undoubtedly the judgment lacks in completeness and it is unfortunate that the learned Magistrate did not analyse, at least briefly, the evidence and the circumstances of the case. — On perusal of his record it appears that none of the witnesses actually saw the commission of the offence, and that all the evidence is circumstantial. What were these circumstances? The Appellant stayed as a guest

at her aunt's house. To gain access to the lavatory she had to pass through the complainant's room. On 29.6.44 the complainant entered the bathroom, leaving behind, on a chair in his room, the contents of his pockets including LP. 8. While in the bathroom he heard a rustle in his room and upon opening the door a few minutes later he found the Appellant stand by the window of his room. — He presently realized that his money had disappeared and he suspected the Appellant as there was nobody else in the flat. He started interrogating her and also seized her hand; hearing her shouts the neighbours gathered and over-heard her say that if he, the complainant, let go of her, she would return the money. The Appellant herself says in evidence that one of the neighbours suggested a search of her clothes, but that she objected thereto and refused to accede to the request that the neighbour's wife search her. No reasonable explanation was offered as to that refusal and under the circumstances special attention should have been given to this fact. Moreover, one of the witnesses bears out the complainant's statement that the Appellant asked to be left alone and she would then return the money. — That, therefore, is not a confession as a result of duress and undue influence but is one link in the chain of circumstantial evidence. — As we stated above there was no eye-witness to the commission of the offence, but in view of all the circumstantial evidence the inference could be drawn that the Appellant, and she only, took the money. The learned Magistrate found this as a fact, and his conclusion was well-founded on the evidence adduced; we see no reason to interfere with his judgment.

We therefore dismiss the appeal.

Given in open Court in presence of parties' attorneys this 28.2.45."

2. On Rule 270 of the M. C. P. R. *cf.* CR. A. D. C. Ja. 135/45 (1946, S. C. D. C. 74) and note; see also CR. A. D. C. Jm. 126/45 (*ibid.*, p. 119).

(*H. K.*)

FOR APPELLANT: Kolodny.

FOR RESPONDENT: Legal Assistant — (Macfee).

JUDGMENT.

This is an appeal from the District Court of Tel-Aviv which, sitting in its appellate capacity, confirmed the conviction of theft imposed by the Magistrate's Court.

Several technical objections to the conviction were taken in connection with irregularity in procedure. We are in entire agreement with the learned Judges of the District Court and with the reasons given by them that there was no substance in those objections, and indeed we find it difficult to appreciate how they could have been persued up to this Court. But the matter does not end there. We have examined the evidence for the prosecution before the Magistrate's Court, and we have come to the conclusion that it was inadequate. It is not a question of this Court coming to the conclusion that we ourselves would not have convicted on that evidence. That factor alone would not have

induced us to interfere with the conviction. But we are forced to the conclusion that there was no sufficient evidence on which the Court could have come to an irresistible conclusion of guilt.

For these reasons the appeal must be upheld, the conviction be quashed, and the Accused be discharged unless she is detained on some other offence. The fine paid will be refunded to her.

Delivered this 30th day of May, 1945.

British Puisne Judge.

CIVIL APPEAL No. 330/45.

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

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

IN THE APPEAL OF:—

Malakeh Sama'an el Bouri. APPELLANT.

v.

Huda Hussein Usrof. RESPONDENT.

Letter by landlord indicating that he wishes to terminate lease — Action for eviction — Failure to tender rent put forward by landlord as additional ground for dispossession.

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity, dated 29.7.45, in Civil Appeal No. 74/45, from the judgment of the Magistrate, Jaffa, dated 14.5.45, in Civil Case No. 252/45, dismissed:—

1. Appellate Court will not interfere with discretion of lower Court unless satisfied that the manner in which the discretion was exercised was not justified by the evidence adduced.

2. No obligation on landlord to demand the rent.

3. Where circumstances, as *e. g.* lessor's written demand to vacate, clearly indicate that he wishes to terminate the lease and that he would not have accepted any rent tendered, lessee's failure to offer rent cannot be a ground for eviction.

(*M. L.*)

ANNOTATIONS:

1. On the first point see C. A. 71/45 (12, P. L. R. 363; 1945, A. L. R. 705).

2. As to demand of rent see C. A. 139/43 (1943, A. L. R. 386).

3. As to tender of rent see C. A. 86/43 (10, P. L. R. 204; 1943, A. L. R. 106) and note 1 thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Salameh.

FOR RESPONDENT: D. Dajani.

JUDGMENT.

This is an appeal by leave from the judgment of the District Court of Jaffa, in its appellate capacity, on appeal from the Magistrate's Court, Jaffa.

This case arises out of the Rent Restrictions (Dwelling Houses) Ordinance, 1940. The Magistrate gave an order for eviction which was reversed on appeal, by the District Court. The facts which emerge are that the lessor, like many lessors of the present day, desired to get possession of the house. She, therefore, caused a lawyer to send a letter to the lessee setting out two grounds upon which she claimed possession under the provisions of the Ordinance — (1) that the lessee had taken in a tenant contrary to the terms of the agreement, (2) that she required the premises for herself and she offered alternative accommodation. If she could have established those grounds she would be entitled to possession. I emphasize that there was no mention in this letter of any non-payment of the rent. The dispute as to whether the rent was or was not offered, arose after this letter and it was taken as a convenient opportunity by the lessor to submit yet another ground on which she could get an order for dispossession, that is the non-payment of rent.

Mr. Salameh has argued that the District Court unduly interfered with the discretion of the Magistrate. It is quite true as Mr. Salameh has submitted, that this Court will not interfere with a discretion exercised by the lower Court unless it is satisfied that the manner in which the discretion was exercised was not justified by the evidence adduced. He has further quoted several cases to the effect that there is no obligation on the landlord to demand the rent. With this submission we also agree. It seems to us however that the District Court in reversing the Magistrate's judgment in no way interfered with any discretion which he exercised. It is clear that their judgment was based on a different appreciation of the law from that held by the Magistrate, and we agree with the District Court.

Now, the letter written by the lessor was a clear indication that the lessor wished to terminate this lease. It was also a very clear indication that the lessor would not have accepted any rent that was tendered after that date, and we see no reason why the lessee should then have gone through the empty gesture of offering rent, which it must have been abundantly plain to the lessor that she can always be prepared to offer, after receipt of the letter which made it obvious that the rent would have been refused.

We have come to the conclusion that in these circumstances there

was no failure on the part of the lessee to tender the rent due. For the rest, as the learned Judges of the District Court remarked, it may well be that the lessor will be able to establish the two grounds upon which she sought to evict this lessee, but she has so far not established them before any Court.

For these reasons the appeal must be dismissed with inclusive costs of LP. 10.—.

Delivered this 12th day of February, 1946.

Chief Justice.

CRIMINAL APPEAL No. 174/45.

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

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

IN THE APPEAL OF:—

Mohammad Suleiman Rashid. APPELLANT.

v.

The Attorney General. RESPONDENT.

Identification — Identification in the dock insufficient — Identification parade — Attendance of officer who conducted parade.

Appeal from the judgment of the District Court of Jaffa in Criminal Case No. 157/44 dated 4th October, 1945, whereby Appellant was convicted on a charge of Robbery contrary to sections 287 and 288(1) of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, dismissed:—

The prosecution should adduce as witness the officer who conducted an identification parade.

(*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 147/45 (1945, A. L. R. 781) and CR. A. 205/45 (*ante*, p. 5).

(*H. K.*)

FOR APPELLANT: H. Budeiry.

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

JUDGMENT.

This is an appeal by the second Accused in Criminal Case No. 157/44, District Court, Jaffa, from a judgment whereby he was convicted of

robbery of sheep and goats contrary to sections 287 and 288(1), Criminal Code Ordinance and sentenced to three years' imprisonment, the other Accused being acquitted owing to lack of evidence of identity.

It was admitted by the defence that both Appellants were found in possession of the stolen sheep and goats soon after the theft. The evidence believed by the District Court connecting the present Appellant with the offence was that of one Jaber Deeb Oudeh who swore that he identified the Appellant. This identification in the dock, would not of course in itself have been sufficient; but the witness also gave evidence, which was not contradicted, that he had recognised him at an identification parade. It seems implicit, therefore that the identification parade was properly held by the Police. This witness was not cross-examined with a view to showing that the identification parade was not properly held or that the identification was in any way defective or unsatisfactory. We would, however, again observe that it is most desirable that the police officer who conducted the identification parade should always be adduced as a witness for the prosecution. The very definite evidence of identity coupled with the admission of the Appellant that he was in possession of the stolen animals soon after the theft (although he gave an explanation which was not believed by the Court below) were in our view sufficient material to justify the conviction. The Appellant admitted one previous conviction. The evidence of Jaber was that the Appellant and another man pointed rifles at him and then took the sheep and goats from him and his companion.

In the circumstances, therefore, it cannot be said that the sentence of three years' imprisonment was in any way excessive. The appeal is dismissed.

Delivered this 7th day of November, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 231/45.

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

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

IN THE APPEAL OF :—

Ahmad Jibril Hammad Gheith. APPELLANT.

v.

1. 'Abdul Wahhab Salem Ahmed Abu 'Asqul,
2. Shihada Salama Hammad Gheith & 5 ors. RESPONDENTS.

Prescription — Land Code, Art. 20 — Absence on a journey, when an excuse — Admission regarding arbitrarily taking possession.

Appeal from the decision of the Assistant Settlement Officer, Ramle Settlement Area, dated 12.5.45, in Case No. 1/39/Bashshit, dismissed:—

1. The instances of absence on a journey set out in Art. 20 of the Land Code are not exhaustive; but absence on a journey does not conclusively provide an excuse interrupting the period of prescription and the Court should, in each case, examine the circumstances to decide whether the absence constitutes an excuse.

2. "Arbitrary" within the meaning of Art. 20 means "in the defiance or usurption of the rights of the person".

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* C. A. 179/42 (9, P. L. R. 798; 1942, S. C. J. 926) and note 2 in S. C. J.; see also C. A. 329/43 (11, P. L. R. 414; 1944, A. L. R. 809).

2. See, on the second point, C. A. 288/42 (10, P. L. R. 317; 1943, A. L. R. 477), C. A. 220/44 (1945, A. L. R. 133) and C. A. 336/44 (*ibid.*, p. 353).

(*H. K.*)

FOR APPELLANT: Scharf.

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

JUDGMENT.

This is an appeal by leave from the Land Settlement Officer of the Ramle Settlement Area. The whole issue revolves round the question of prescription and the rights acquired under Article 20 of the Ottoman Land Code. The Settlement Officer found as a fact that the Respondent was in possession of this land at least since the year 1902.

Cousnel for the Appellant, while querying the exact dates, admitted that they were in possession for the prescriptive period but, he said, owing to certain circumstances that prescription should not run against the Appellants so as to give the Respondent a claim under Article 20.

Briefly the circumstance was that the Appellant was in Military Service and, as such, absent on a journey. It is not denied that the Appellant was in Military Service for a considerable number of years, at least from 1908 to 1919. There was evidence that he had returned to Palestine for certain periods during this time. There is also evidence that most of his Military Service was passed in countries adjacent to Palestine.

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".

In this case the Settlement Officer enquired into the circumstances and came to the conclusion that although the Appellant was on Military Service he had ample opportunity for taking such legal steps as would be necessary to counteract the legal effects of prescription. All we need say on that is that there was ample evidence on which the Settlement Officer could have come to such a conclusion and the appeal must fail on this ground.

Another point was raised by Mr. Scharf, that the Defendant made an admission which, argues the advocate, constitutes an arbitrary taking of possession within the meaning of Article 20, and that in itself, if accepted, would preclude the plea of prescription. Now, in the first place we have to remark that this point never appears to have been raised or argued before the Settlement Officer. In any case we are of opinion that "arbitrary", within the meaning of that Article, must be interpreted as meaning "in the defiance or usurption of the rights of the person". In this case the Respondents never admitted that the Appellant had any rights whatsoever in this land. In taking it, therefore, it cannot be said that he could have taken it in defiance of his rights. There is, moreover, clear evidence that even if the Appellant had any rights in this land he had abandoned them when he left the village with the clear intention of permanently living in another village, and there is no doubt that the Government had acquiesced in the possession of the Respondent.

We therefore come to the conclusion that the admission by the Defendant that "he took hold of these shares" does not constitute an admission of arbitrarily taking possession within the meaning of Article 20.

For these reasons we are of opinion that the appeal must fail and the judgment of the Settlement Officer is confirmed with LP. 2.— costs.

Delivered this 8th day of January, 1946.

Chief Justice.

CIVIL APPEAL No. 44/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Baruch Jacob Segal. APPELLANT.

v.

Azriel Teichman. RESPONDENT.

Tenant disregarding conditions of lease — Applicability of principles of equity in Magistrate's Court — Clause of forfeiture in contract of lease — Circumstances justifying order of eviction.

Appeal from the judgment of the District Court of Tel-Aviv (R/P Judge Windham), in its appellate capacity dated 20th November, 1944, in Civil Appeal No. 28/44, dismissed:—

1. Failure to mention, when opening case for eviction a certain breach of contract set out in statement of claim does not in itself amount to abandonment or waiver of that breach.

2. A Magistrate's Court, being a civil Court, can apply equitable principles within limits set out in Art. 46, Palestine Order-in-Council.

3. Court can exercise same discretion and has same jurisdiction to apply equitable principles in refusing or in granting an order of eviction under sec. 4, Rent Restrictions (Business Premises) Ord.

4. a) Equity leans against forfeiture.
b) A slight deviation from a condition which is not of essence of the contract of lease does not necessarily cause lease to be cancelled.

5. Where a contract of lease provides *inter alia* that lessee should keep a carpet on the stairway and also provides that if lessee fails to fulfil any condition stipulated in the lease, lease shall be cancelled and lessee shall leave the premises immediately lessee's continuous breach of this condition may in certain circumstances warrant an order of eviction.

(*M. L.*)

REFERRED TO: P. C. A. 1/35 (2, P. L. R. 390).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1944, S. C. D. C. 336.

2. As to the second point see in addition to case referred to also C. A. 139/43 (1943, A. L. R. 386) with annotations thereto and C. A. 303/43 (1944, A. L. R. at p. 488).

3. As to point 3 compare C. A. 186/42 (Gorali, p. 149; 9, P. L. R. 665; 12, Ct. L. R. 149; 1942, S. C. J. 68) — (note that the wording of sec. 4 of the Landlords and Tenants (Ejection and Rent Restriction) Ordinance is similar to that in section 4 of the R. R. (B. P.) Ordinance. See cases cited in C. A. 186/42.

4. As to the fourth point see note 1 above, C. A. 121/42 (Gorali, p. 136; 9, P. L. R. 531; 12, Ct. L. R. 81; 1942, S. C. J. 521) and 194/42 (Gorali, p. 151; 12, Ct. L. R. 162; 1942, S. C. J. 779).

(*A. G.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Goitein.

JUDGMENT.

This is an appeal from the judgment dated 20.11.44 of the learned R/President of the District Court of Tel-Aviv, in Civil Appeal No. 28/44, setting aside a judgment dated 26.11.43 of the learned Magistrate, Tel-Aviv, in C. C. No. 2123/43. In the case before the Magistrate the Respondent sued for the eviction of the Appellant who was his tenant in house No. 88A Hayarkon Street, Tel-Aviv.

The lease was for a period of one year from *Muharram*, 1943, that is to say, from 7.1.43 to 28.12.43. It is therefore apparent that when the action was filed on 8.6.43 the lease had not expired; nor had it expired on 26.11.43 when the Magistrate gave his judgment. By 20.11.44, when the District Court judgment was given, the lease had of course expired. Mr. Eliash for the Appellant has submitted that the learned R/President was in error when he applied the Rent Restrictions (Business Premises) Ordinance (No. 6/1941) to these proceedings. Section 4(1) of that Ordinance provides that no Court or Judge or Execution Officer shall give any judgment or make any order for the eviction of any tenant of any premises, notwithstanding that such tenant's contract or tenancy has expired, unless certain conditions which are set out in the section are fulfilled. The Magistrate had refused to order eviction. The District Court did order eviction. I find therefore that the learned R/President was right in his view that the Rent Restrictions (Business Premises) Ordinance applied.

In his statement of claim the Respondent (original Plaintiff) averred that the Appellant (original Defendant) had committed a breach of the lease by letting and/or delivering the premises or part thereof, and allowing others to use the premises or part thereof without having first obtained the Plaintiff's consent. The Respondent also charged certain other breaches of the lease, *inter alia*, that the Appellant had failed to keep a carpet spread on the stairs as required by clause 10 of the lease.

Mr. Eliash, for the Appellant, has submitted that when the advocate for the Respondent opened his case before the Magistrate he made no mention of the latter breach, and that he must therefore be taken as

having abandoned it. Although it is clear that the Respondent's principal averment was that the Appellant had delivered the user of the premises or part thereof, or had assigned his rights under the contract, to other persons without the consent of the Respondent, I am unable to find that the Respondent had waived the other breaches referred to in his statement of claim. Particularly so in view of the fact that the learned Magistrate dealt with them in his judgment, and did not treat them as having been dropped.

The Magistrate found that there was no sufficient evidence that the Appellant had admitted certain persons as partners in the running of the hotel, and this finding was confirmed by the District Court. Having considered the submissions which have been made on this issue I find myself in agreement with the R/President who held that no partnership had been proved. I also agree with the R/President that there was no evidence to support a finding that there had been a breach of clause 1(d) of the agreement.

That leaves certain other alleged breaches which include the failure to keep a carpet on the stairs, the failure to repair one or two sinks which had been broken, the removal of one or two doors and windows, and certain other very minor breaches which both the Magistrate and the District Court found had been insufficiently proved.

I shall deal first of all with the question of the failure to keep a carpet on the staircase as required by section 10 of the contract. It is agreed by both parties that the staircase has a mosaic surface, and it seems to me perfectly reasonable that the Respondent as owner of the premises should wish to ensure that the staircase should not get damaged.

The case was filed in the Magistrate's Court on 8.6.43. On 13.9.43 when the Appellant gave evidence he stated — "The carpet is with me. I removed it because if it is stolen, it is impossible to obtain another. My military guests might fall at night because of the carpet". So it appears that the Appellant gave two reasons for not keeping the carpet on the stairs. One reason was that it might be stolen, and the other was that his soldier guests might trip on it.

Clause 4(c) of the lease provides that if the lessee shall fail to fulfil any condition stipulated in the lease, the lease shall be cancelled and the lessee shall leave the premises immediately. Clause 15 provides that the further conditions and the printed conditions constitute an inseparable part of the agreement of lease. Clause 14 provides that if the lessor does not exercise his right to demand that the leased premises be vacated in the event of a breach of any condition of the agreement

that shall not be considered to be a waiver on his part of the breach, and he may rely on that breach at some other time even if he has received rent after the breach.

It is clear therefore that the agreement between the parties was that if the lessee failed to keep a carpet on the stairs that would be a breach which would have the effect of cancelling the lease.

When referring to the provisions of the Rent Restrictions (Business Premises) Ordinance, the learned R/President asks the question whether section 4(1)(b) of that Ordinance allows the Court any discretion to refuse an order for eviction on a proved breach. He remarks that this question is ripe for determination since there appears to be no direct authority on the point in this country.

Before stating my views on this point I must deal with Mr. Goitein's submission that Magistrates in this country are not empowered to apply equitable principles. Section 46 of the Palestine Order-in-Council, 1922, states the law which is to be applied in this country by the Civil Courts. The Order-in-Council provides that in the absence of any local law the jurisdiction of the Civil Courts shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England. A Magistrate's Court, being a civil Court, can clearly apply equitable principle within the limits set out in section 46 of the Order-in-Council.

I would also quote from the judgment of the Privy Council, in Privy Council 1/35 (2, P. L. R. 394) where the following passage appears:—

> "...Their Lordships think that there can be no doubt that the provisions of the Order-in-Council do enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity".

With regard to the point raised by the learned Judge of the District Court, I would say therefore that the Court can exercise the same discretion in a case where section 4 of the Rent Restrictions (Business Premises) Ordinance is applicable as it can in a case where that section does not apply. That is to say, the jurisdiction of the Court to apply equitable principles is the same in both instances. Of course a condition in a lease for, say, one year might become of much greater importance when such lease has become, by virtue of the Rent Restrictions Ordinance, a lease for an indeterminate period, and that is a circumstance which the Court could take into consideration when it is called upon to decide whether equity should give relief in respect of a breach

of that condition. It is impossible to lay down any fixed rule. Each case must be decided on its merits.

I now come to the most important point in this appeal, and that is whether the failure to keep a carpet on the stairs is a breach in respect of which the Appellant can call in equity to relieve him. As I have already observed it was a condition of the lease that it should be cancelled in the event of the Appellant failing to keep a carpet on the stairs. That particular condition in the lease was not apostrophized by being placed in a separate clause, and it has been submitted by Dr. Eliash that it was not a condition going to the root of the contract.

I agree with Dr. Eliash in thinking that it was not a condition which had been made so much of the essence of the contract that the slightest deviation from it would necessarily cause the lease to be cancelled. That is to say it was, in my judgment, a condition in respect of which equity could give relief in certain circumstances. It has been said with truth that equity leans against a forfeiture. But equity is not designed to enable a party to break his contract when he feels inclined to do so. That would not be equity. Equity always takes into consideration the rights of both parties. So the question I have to answer is whether, in this particular case, equity should intervene for the purpose of saving the Appellants from the consequence of this breach.

As I have already observed this action was filed on 8.6.43, and the statement of claim specified that one of the breaches which the Appellant had committed was that he had failed to keep a carpet on the stairs. By 13.9.43, that is to say over three months later, there was still no carpet on the stairs. Clearly this cannot be described as a trifling failure to observe this condition of the lease. Indeed I would say that it is a very clear indication that the Appellant was prepared to take little notice of what was regarded, at any rate by the Respondent, as being an important condition. At the final hearing of this appeal, on 16.11.45, Mr. Eliash stated that the carpet had once more been put on the stairs. This is in the nature of a deathbed repentance, and it does not absolve the Appellant from the consequence of his earlier and wilful disregard of this condition of the lease.

Mr. Eliash has also averred that no actual damage has been proved. If the circumstances had been that the Appellant had, for instance, removed the carpet for a day or two in order to have it cleaned, taking suitable precautions for protecting the surface of the stairs in the meantime, I would have had no hesitation in holding that equity could give relief from forfeiture. But that is not the case here. Here the Appellant has shown a deliberate intention not to observe this condition

of the lease because it suited him not to observe it. This lease is no longer, necessarily, a lease for one year. By virtue of the Rent Restrictions (Business Premises) Ordinance this lease has become of indeterminate length. It might be extended until the Ordinance is repealed. If the Appellant is prepared to leave the stairs unprotected for over three months on one occasion the Respondent may reasonably apprehend that he will remove the carpet again.

When he gave his evidence the Appellant stated:—

> "After the action had been instituted I refused to admit Plaintiff to the hotel to inspect. I removed just one door and one window, and I arranged it in such a way that the wind should not blow ... The panes were removed from two or three doors. I do not know if eighteen were removed. I do not know how many".

It was a condition of the lease that the lessee should at his own expense repair all breakages or damage to any part of the building, and another condition was that he should keep the leased premises and all parts thereof such as a wash-basins, windows, window-panes, *etc.*, in good condition and repair. The Respondent when he gave evidence stated that the Appellant had removed doors and windows. He stated that the Appellant had removed four wings of the windows and five of the doors, and that there were about ten broken sinks.

So far as the doors, windows, and sinks are concerned, I would not have been inclined to hold that a failure to repair was a sufficient ground for cancelling the lease, unless there was evidence that the Appellant had failed to carry out repairs after having been given reasonable notice. But his conduct in refusing to allow the Respondent to inspect the premises was in my judgment most unsatisfactory, and this conduct affords a further ground for refusing equitable relief. Clause 1(j) of the lease provides that the lessee shall permit the lessor or his representative to enter the leased premises at any reasonable time, with or without workmen to examine their condition, and that the lessee shall, at the demand of the lessor, carry out the necessary repairs.

One of the grounds of appeal was that the subsequent conduct of the Respondent constituted a waiver of any breaches that might have been committed. The learned R/President found that "there was no evidence of any positive act, such as receipt of rent after knowledge of the breaches, so as to constitute waiver or acquiescence". I am unable to interfere with that finding.

In the result I agree with the finding of the learned Judge that the Magistrate erred in not ordering the eviction of the Respondent. I

therefore dismiss this appeal with costs on the lower scale to include a sum of LP. 20 for attendance at the hearing.

Delivered this 28th day of November, 1945, in the presence of Mr. Levontin for Appellant and in the presence of Mr. Goldberg for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 18/46.

IN THE SUPREME COURT OF PALESTINE.

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

IN THE APPLICATION OF :—

Mordechai Bourstein. APPLICANT.

v.

Bonim Zevulun Tatarko & an. RESPONDENTS.

Question of granting or refusing leave to appeal — Binding force of decisions of Court of Appeal — Protection of Rent Restrictions Ordinance with regard to tenant's family or relatives.

Application for leave to appeal from the judgment of the District Court, Haifa, (A/R/P. Judge Ross), in its appellate capacity dated 21.12.45, in C.A. No. 91/45, from the judgment of the Magistrate, Haifa, dated 6.7.45, in Civil Case No. 2374/44, dismissed:—

1. a) While discretion given to Chief Justice under sec. 12, Magistrates' Courts Jurisdiction Ordinance is not subject to the limitation imposed upon presiding judge when he grants leave to appeal, Chief Justice will not (save in exceptional cases to avoid an obvious miscarriage of justice) grant leave unless satisfied that a point of law of novelty, complexity or general importance arises.

b) Chief Justice will not necessarily grant leave merely because he is of opinion that the decision was wrong as between the parties; he will need to be convinced that the Judge committed himself to an interpretation of the law which it would be advisable to have tested in Court of Appeal.

2. A case decided by Court of Appeal must always be binding on lower Courts.

3. a) The family of a tenant cannot in all cases keep the tenancy alive after original tenant has left.

b) While wife and immediate family or father, mother and even more distant relations who normally lived with the tenant are protected by Rent Restrictions Ordinance, yet when a tenant left a tenancy for good and separated his life from these relations, latter cannot keep alive the tenancy.

(*M. L.*)

REFERRED TO: C. A. 40/43 (10, P. L. R. 170; 1943, A. L. R. 39); Chiverton *v.* Ede, 1921, 2 K. B. 39 & 45; 37 T. L. R. 242.

ANNOTATIONS:

1. On first point see C. A. 204/45 (1945, A. L. R. 772).

2. On binding force of decisions of Supreme Court see C. A. 72/44 (10, P. L. R. 325; 1944, A. L. R. 373) with note 1 thereto in A. L. R.

3. On third point see cases referred to and C. A. 466/44 (12, P. L. R. 187; 1945, A. L. R. 423) with note 3 thereto in A. L. R. See especially C. A. 319/43 (11, P. L. R. 270; 1944, A. L. R. 453) and also the recent case of C. A. 103/45 District Court Haifa Selected Cases of 1946, p. 26.

4. The judgment of the District Court is reported in 1945, S. C. D. C. 650.

(*A. G.*)

FOR APPLICANT: Eliash.

FOR RESPONDENTS: Geiger.

ORDER.

This is an application under section 12 of the Magistrates' Courts Jurisdiction Ordinance, for leave to appeal. Although I am fully aware that the discretion given to me under this section is not subject to the limitation imposed upon the presiding judge when he grants leave, I emphasize, that save in exceptional cases to avoid an obvious miscarriage of justice, I will not grant leave unless I am satisfied that a point of law of novelty, complexity or general importance arises. It follows that I will not necessarily grant leave merely because I am of opinion that the decision was wrong as between the parties. I would need be convinced that in the course of his judgment the Judge committed himself to an interpretation of the law which it would be advisable to have tested in the Court of Appeal.

In this case the only question that arises is whether Judge Ross was justified in distinguishing the present case from the case of Hauser *v.* Schwartz. I may say that for the purposes of this application the question whether he rightly or wrongly distinguished this case from the case of Hauser *v.* Schwartz is not really of great importance. That case was decided in the Court of Appeal and must always be the binding decision whatever the judgment of the District Court. Nor could it be said that he impugned the legal principles enunciated in the case, because, as he emphasised, he distinguished on the facts between them. On this he may have been wrong as between the parties, but he did not call in question the legal principles already established. It is possible that some confusion may have arisen because of the headnote in the report of the case of Hauser *v.* Schwartz. If the headnote could be interpreted as an authority for the proposition that the family of a tenant can in all cases keep the tenancy alive after the original tenant has left, then I think it is going beyond what the learned C. J. Mr. Gordon-Smith conveyed in his judgment, and in my opinion it would

be going beyond the principles established in all the leading cases. The facts have to be examined. The gist of the judgment in Civil Appeal No. 40/43, Vol. 10, P. L. R. p. 170 (Hauser *v.* Schwartz) is to be found in this extract in the judgment of Mr. Gordon-Smith:—

> "The tenant himself was not in personal occupation when he made the agreement and consequently had neither renounced occupation nor given up possession, nor was it a case of sub-letting to the second and third respondents".

The tenant had, in fact, originally taken the flat for the purpose of accommodating his own relations. This, in my opinion, was following McCardie, J., in Chiverton *v.* Ede. In that case the Judge was considering the question of alternative accommodation and he decided that certain persons other than the tenant could be taken into consideration. I would emphasize the words used by him "persons who lived with him". The principle goes no farther than to lay it down that certain persons, among whom obviously would be a wife and immediate family, who normally reside with the tenant are afforded the protection of the Acts. Those persons might even include the mother and more distant relations. But this, in my opinion, is no authority for the proposition which Mr. Eliash appeared to contend for that when a tenant left a tenancy for good and separated his life from those relations, they can still keep alive the tenancy. Such a principle carried to extreme could mean that when a tenant was contemplating giving up a tenancy all that was necessary for him to do would be to get some relation, put him in the flat and say he was dependent on him. It is, as I have said, a question of fact. If the circumstances are such as they were in Chiverton *v.* Ede and Hauser *v.* Schwartz, the relations may be protected. For instance the Government official, illustrated by Mr. Gordon-Smith, C. J., in his judgment and referred to by Mr. Eliash, who is transferred and who left his family behind pending the securing of accommodation in his new abode might be protected, but again I emphasize that the protection could only cover his family who normally live with him. It does not mean all and sundry relations whom he may desire to support. It seems to me that this is what Judge Ross had in mind, and consequently he was justified in drawing a distinction between the facts as established in the Chiverton *v.* Ede and Hauser *v.* Schwartz cases, and the facts of the present case. This being so, he did no violence to the principle of law established by those cases, and for the purpose of this application that is sufficient for me.

On these facts I am not prepared to allow this application for leave to appeal.

Given this 14th day of February, 1946.

Chief Justice.

CIVIL APPEAL No. 341/45.

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

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

IN THE APPEAL OF:—

Mary el Najjar. APPELLANT.

v.

Saad Ed-Din el Shihabi. RESPONDENT.

Claim of eviction under sec. 8(1)(*c*), *Rent Restrictions* (*Dwelling Houses*) *Ord. — Imposition of terms not amounting to contracting out of Ordinance — Relationship in regard to tenancy with new landlord.*

Appeal from the judgment of the District Court of Jerusalem in its appellate capacity in Civil Appeal No. 35/45, dated 11th of September, 1945, from the judgment of the Magistrate's Court of Jericho in Civil Case No. 46/45, dated 26th of May, 1945, dismissed:—

1. The only restriction imposed on lessor by Rent Restrictions Ordinance is that he cannot impose conditions which would in fact amount to a contracting out of the Ordinance.

2. Imposing legitimate terms which only effect the contractual relationship between lessor and lessee is no contracting out of Rent Restrictions Ordinance.

3. Tenant making no contract with new landlord is entitled to fall back on protection afforded by Rent Restrictions Ordinance and in such case his future relationship in regard to the tenancy is governed by the Ordinance.

(*M. L.*)

ANNOTATIONS:

1. On contracting out Rent Restrictions Ordinance, see H. C. 97/43 (10, P. L. R. 569; 1944, A. L. R. 41) with note 6 thereto in A. L. R.

2. On statutory tenancy see — C. A. 59/45 (12, P. L. R. 459; 1945, A. L. R. 624) and note 2 thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Moghannam.

JUDGMENT.

This is an appeal by leave from the District Court of Jerusalem sitting as an appellate Court from the decision of the Magistrate of Jericho in C. C. 46/45 dated 26th May, 1945, under the Dwelling Houses Ordinance, 1940.

The grounds of appeal submitted by Mr. Elia, for the Appellant,

emerge under 3 heads. In the first place he criticised certain findings of fact by the Court. In this Appeal Court we do not expect to be furnished with precise details of the grounds on which findings of fact have been arrived at provided we are satisfied that there were grounds upon which those facts could have been established. It is contended that the person seeking the eviction in this case was not, in fact, a landlord, and consequently he had no *locus standi.* But, as Mr. Mogannam has pointed out, the fact that he was the landlord was not seriously contradicted in either of the lower Courts, furthermore in the course of its judgment the District Court refers at times to the "original" landlord and at times to the 'new' landlord which satisfies us that they came to the conclusion that the person seeking the eviction was the landlord. We see no reason to interfere with the finding on this ground.

It was then argued that the conditions precedent for an order of eviction were not satisfied. Those are the conditions required in section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940. In our view there was evidence which, if accepted, established the existence of those conditions. The learned Judges of the District Court in the course of their judgment stated that they were satisfied that the Respondent was in need of the premises for his own dwelling by virtue of section 8(1)(c) of the said Ordinance. The only inference we can draw from that is that they were satisfied that the conditions precedent to make an order under section 8(1)(c) did, in fact, exist.

The second ground of appeal was the effect of the endorsement on the contract on the contractual relationship between the parties. The only reasonable interpretation we can put upon the wording is the interpretation argued for by Mr. Mogannam, that is, that on the happening of a certain event the lease would not run for three years as originally intended, but would immediately terminate. The only restriction imposed on the lessor by the ordinance is that he could not impose conditions which would in fact amount to a contracting out of the ordinance. This brings us to the third point argued by Mr. Elia, *i. e.* that even if we accept Mr. Mogannam's interpretation, which we do, it amounts to a contracting out of the Ordinance. I confess that at first sight I considered that there was substance in this argument, but on examining the surrounding circumstances I have come to the conclusion that there was no contracting out. The terms imposed were legitimate terms. They only effected the contractual relationship between the parties. The result was that the contractual relationship ended, but there was nothing to prevent the statutory relationship created by

the Ordinance from immediately coming into effect. That statutory relationship was in fact created by section 2 of the ordinance which provides that landlord and tenant include any person from time to time deriving title under the original landlord and tenant. It was open to the tenant to make a new contract with the new landlord if he was able to do so, in which case his future relationship would be regulated by the contract; but if he did not do so he was entitled to fall back on the protection afforded by the Ordinance in which case his future relationship in regard to the tenancy of this house would be governed not by the original contract which terminated, but by the provisions of the Rent Restrictions (Dwelling Houses) Ordinance. It follows that the District Court rightly came to the conclusion that this tenancy was governed by the Ordinance. They examined the evidence and they came to the conclusion which in our opinion was warranted that the Magistrate was justified in recording an order for ejectment under section 8(1)(c) of the Ordinance.

For these reasons the appeal must be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 11th day of December, 1945.

Chief Justice.

HIGH COURT No. 67/45.

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

BEFORE: Curry, A/J.

IN THE APPLICATION OF:—

Max Oppenheimer. PETITIONER.

v.

The Magistrate, Magistrate's Court, Jerusalem & 2 ors. RESPONDENTS.

Jurisdiction of High Court — Unsuccessful motions by appointed custodian for approval of his accounts — Resignation of custodian — Court refusing to entertain custodian's application.

Return to an order *nisi* issued on the 23rd day of August, 1945, directed to the first Respondent calling upon him to show cause why his order, dated 5th August, 1945, given on the application of the Applicant dated 20th July, 1945, submitted in respect of Jerusalem Magistrate's Court, Civil Case No. 642/43 should not be

set aside, and why he should not proceed to issue a certificate as prayed for by Applicant, and generally to deal with the said application on its merits, order *nisi* made absolute:—

1. Jurisdiction of High Court — not restricted to matters mentioned in sec. 7, Courts Ordinance.

2. Court should not refuse to entertain resignation of person whom it appointed custodian or receiver and/or his application for approval of his accounts, though it may rule, stating the reasons therefor, that Applicant is not entitled to any remuneration or may refuse to order payment until he has paid costs in previous motions.

(*M. L.*)

FOLLOWED: H. C. 78/39 (7, P. L. R. 35; 7, Ct. L. R. 45; 1940, S. C. J. 25).

ANNOTATIONS: On the jurisdiction point see H. C. 57/45 (12, P. L. R. 397; 1945, A. L. R. 722) and note 1 thereto in A. L. R. and case followed.

(*A. G.*)

FOR PETITIONER: Weyl.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Krongold.
No. 3 — Mizrahi.

ORDER.

This is a return to an order *nisi* directed to the Magistrate, Magistrate's Court, Jerusalem, calling upon him to show cause why his order dated the 5th of August, 1945, should not be set aside and why he should not proceed to issue a certificate as prayed for by Petitioner and generally to deal with the said application on its merits.

This is a complicated matter and I will first set out the facts which appear to me relevant in Magistrate's Court Case No. 642/43.

The second Respondent sued the third Respondent claiming the delivery of one cow and two calves and the payment of a sum of money. In the said action the second Respondent submitted an application for a provisional attachment of one cow and two calves and prayed that the present Petitioner be appointed as receiver (third party) and that the calves remain with the present Petitioner who undertook to keep them.

Upon that application of 16.6.43, the Magistrate made an order of provisional attachment dated 16.6.43 stating that the cows were to be kept in the custody of the Petitioner and on 20.6.43, the protocol was drawn up.

On 27.7.44, the Petitioner applied by way of motion (Motion No. 271/44) in the Magistrate's Case 642/43 asking for his accounts as trustee to be approved, and the Court to order payment.

By an order dated the 11.12.44, the Magistrate dismissed the motion apparently on the ground that the application should not have been made by motion, but by an action.

On 13.12.44, the Petitioner filed a further motion (Motion No. 385/44) in the same case, again asking for his accounts to be approved and for remuneration. The Magistrate by an order dated 14th January, 1945, again dismissed the motion.

The Petitioner then appealed to the District Court, Jerusalem, Civil Appeal No. 5/45 against the order of 14.1.45.

The District Court by a judgment dated 27th February, 1945, dismissed the appeal on the ground that there was no right of appeal.

By a further motion No. 65/45, the Petitioner applied for leave to appeal to the Supreme Court and leave was granted on 2.3.45. In Supreme Court Civil Appeal No. 105/45, the appeal was dismissed on the ground that as the Appellant was not a party to the Magistrate's Court case, he had no right of appeal.

The Petitioner then on the 20th July, 1945, wrote a letter to the Magistrate tendering his resignation as custodian or receiver, and asking that the Magistrate should give him a certificate as to the amount due to him in respect of his receivership.

On 5.8.45, the Magistrate refused his application on the ground that the costs involved in the previous motions had not been paid. It is in respect of this last order that the order *nisi* was made.

The Respondent has raised the preliminary objection that this Court has no jurisdiction and refers to section 7 of the Courts Ordinance.

In my opinion there is no other Court that has jurisdiction to deal with this application. It must be realised that the Order made by the Magistrate was not in regard to a party to the action, and as was pointed out in High Court No. 78/39 the jurisdiction of the High Court is not restricted to the matters mentioned in section 7 of the Courts Ordinance, this Court even exercising a wider jurisdiction than that of the Supreme Court of England. I, therefore, overrule that objection.

In the first place it is to be noted that this last application was the first application in which Petitioner tendered his resignation, and I think the Magistrate was wrong in not entertaining that application. It would hardly appear equitable to appoint a person custodian and then at a future date to refuse even to entertain his resignation. As regards the taking of the accounts and the issuing of a certificate, I do not think that the previous motions can be said to be of such a vexatious nature as to preclude the Magistrate from entertaining this

application. After all, the present Petitioner merely erred in the form of his applications. It may well be that the Petitioner is not entitled to any remuneration in respect of his receivership, and the Magistrate may in any event refuse to order payment even after an account is made until Petitioner has paid the costs in the other motions, but in my opinion the Magistrate must entertain the application and make an order stating whether he accepts the resignation, and, if not, his reasons for refusal. Likewise he must entertain the application for an account to be taken and if Petitioner is a custodian but not entitled to any payment, state the reasons therefor.

It must be clearly understood that I am not giving the Magistrate any directions to accept the resignation or to order payment of costs or remuneration, but merely holding that in my opinion his refusal to consider or entertain the application on the ground that the costs of the other motions had not as yet been paid was in all the circumstances of this case not justified.

For the foregoing reasons the order *nisi* is made absolute with inclusive costs fixed at LP. 10 (LP. 5 by each of Respondent 2 & 3).

Given this 15th day of November, 1945, in the presence of Dr. Weyl for Petitioner, and in the presence of Krongold & Mizrahi for Respondents.

A/British Puisne Judge.

HIGH COURT No. 100/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE PETITION OF:—

Elias Totah. PETITIONER.

v.

1. The District Commissioner, Jerusalem District,
2. The Chairman of the District Housing Committee, Jerusalem. RESPONDENTS.

Requisition of a house — Respondent failing to file affidavit in reply.

Return to an order *nisi* issued on the 23rd of November, 1945, directed to the

first Respondent calling upon him to show cause why his notice of requisition, dated 6th June, 1944, should not be set aside and why the house of the Petitioner should not be delivered back to him;' rule *nisi* made absolute:—

1. High Court — bound by previous decisions in similar cases.
2. Where High Court finds that Respondent has not shown good cause for failing to file affidavit in reply, they will not hear him and make order absolute.

(*M. L.*)

FOLLOWED: H. C. 13/44 (11, P. L. R. 83; 1944, A. L. R. 155).

ANNOTATIONS:

1. On first point see C. A. 18/46 (*ante*, p. 104).
2. For authorities on affidavits in H. C. see, in addition to case followed, also H. C. 25/45 (12, P. L. R. 257; 1945, A. L. R. 595) with annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: Germanus.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

This is the return to an order *nisi* granted by this Court on 23rd November, 1945, calling upon the first Respondent to show cause why a notice of requisition dated 6th June, 1944, should not be set aside and why Petitioner should not have his house returned to him.

On the return day learned Crown Counsel, (Mr. Clayton Rigby), informed the Court that the reason why an affidavit in reply had not been filed as required by Rule 6 of the High Court Rules, 1937, was that he has written to the Petitioner's advocate on the 11th December, informing him that the District Commissioner had withdrawn the notice of requisition and asking whether in the circumstances the Petitioner still wished to continue with these proceedings, and if not what amount of costs he required. To this letter no reply was received. The affidavit in reply should have been filed by the 16th December. We think that once Crown Counsel realised that no answer to this letter was forthcoming, an affidavit in reply should have been filed by 16th December.

Mr. Germanus, for the Petitioner, who objects strongly to our hearing Mr. Rigby at all, contends that good cause has not been shown for the failure to file an affidavit in reply within the time required by the Rules. We think that there is force in this contention and we are bound by High Court No. 13/44 P. L. R. Vol. 11, p. 83.

In spite of what Mr. Rigby says we have no option but to make absolute the rule *nisi*. We order accordingly. No costs.

Given this 21st day of December, 1945.

British Puisne Judge.

HIGH COURT No. 69/45.

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

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

IN THE APPLICATION OF:—

Hussein Hassan Mahmoud Tannira & an. PETITIONERS.

v.

The Chief Execution Officer, District Court, Tel-Aviv & an. RESPONDENTS.

Claim of awlawiyeh — Judgment for claimant without specification of time for payment — Payment made within reasonable time.

Return to a rule *nisi* issued on the 18th of August, 1945, directed to the 1st Respondent calling upon him to show cause, if any, why his order of the 12th July, 1945, and of 27th July, 1945, should not be set aside, and why the right to transfer by *Awlawiyeh* in the judgment of the Land Court of Tel-Aviv in Case No. 12/43 (Execution File No. 252/45) should not be considered ceased and determined, discharged:—

Where Land Court has allowed claim of *awlawiyeh* on claimant paying a specified sum but has not fixed any time for payment, Chief Execution Officer is in no way extending elaborating or amending Court's decision when he accepts payment within time which in the circumstances he considers reasonable.

(*M. L.*)

ANNOTATIONS:

1. Authorities on *Awlawiyeh* are collated in C. A. 15/44 (11, P. L. R. 489; 1944, A. L. R. 788).

2. As to powers of C. E. O. see H. C. 97/43 (10, P. L. R. 569; 1944, A. L. R. 41) with note 4 thereto in A. L. R.

(*A. G.*)

FOR PETITIONERS: Elia.

FOR RESPONDENTS: No. 1 — No appearance.
No. 2 — Minkowitch.

ORDER.

The first point to be emphasized is that this is an application to a Court sitting in its capacity as a High Court of Justice and not as a Court of Appeal.

The subject-matter of these proceedings is a claim of *awlawiyeh* under Article 41 of the Ottoman Land Code. The claim was preferred

in the Land Court and the learned Relieving President allowed it. The following is the relative part of the judgment:—

> "I therefore order the Registrar of Land, Gaza, (the third Defendant) to register the said 4850 shares in parcel 17, block 1228, in the Land Registry, Gaza, in the name of the Plaintiff upon payment by the Plaintiff to the first and second Defendants of the sum of LP. 630.500 and upon his paying the land transfer and other fees payable, and I order the first and second Defendants to pay to the Plaintiff the costs of this action, to include an advocate's attendance fee of LP. 12".

It will be observed that the learned Relieving President placed no time limit as to when this payment should be made. It is not denied that the Respondent is in a position to make the payment and, in fact, the money has now been lodged with the Chief Execution Officer.

After the judgment of the Land Court it appears that certain negotiations took place between the contesting parties and for this reason, so the Respondent alleges, there was a delay in the payment of the money. The Chief Execution Officer was satisfied with the reasons and he issued an order in the following terms:—

> "As there is no specified time for payment, as said in the judgment, and as payment was made within a reasonable time to the Execution Officer, I decide to dismiss the application of the Applicant and to execute the judgment".

Mr. Elia referred us to various cases to the effect that the Chief Execution Officer should not amend the judgment of the Court. With respect to those authorities we agree that the Chief Execution Officer should not extend, limit or indeed elaborate the judgment of the Court. But an examination of the judgment and the order of the Chief Execution Officer precludes us from inferring that he has done so. The learned President was silent as to the time within which the money should be paid. That being the case, the only course open to the Chief Execution Officer was to decide whether, taking all the circumstances into consideration, the money was paid within the time contemplated by the judgment.

In this case we are of opinion that in acquiescing to this delay, if indeed it could be called delay, the Chief Execution Officer was in no way extending, elaborating or limiting the decision of the Court.

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

Given this 4th day of December, 1945.

Chief Justice.

HIGH COURT No. 90/45.

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

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

IN THE APPLICATION OF :—

Jawdat Badawi Sha'ban. PETITIONER.

v.

Commissioner for Migration and Statistics. RESPONDENT.

Palestinian citizen obtaining a Trans-Jordan Naturalization Certificate — Loss of Palestinian citizenship — Averments not contained in petition or elsewhere.

Return to an order *nisi* directed to the Respondent calling upon him to show cause why his decision dated 10th October, 1945, cancelling the Palestinian citizenship of Petitioner and refusing to issue to him Palestinian passport should not be set aside and why the criminal investigation against the Petitioner should not be cancelled and why the Petitioner should not be granted a Palestinian passport being a Palestinian citizen under Article 1 of the Palestine Citizenship Orders in Council; order *nisi* discharged:—

1. High Court will not take into consideration Petitioner's allegation that Public Officer had no evidence as to certain facts, if nowhere in Petitioner's affidavit or elsewhere is there a denial thereof.

2. Trans-Jordan must be regarded as foreign state in relation to Palestine and comes within meaning of "state" in Art. 15, Palestine Citizenship Order-in-Council.

(*M. L.*)

ANNOTATIONS:

1. On first point see H. C. 100/45 (*ante*, p. 112).

2. *Cf.* relevant Articles of the Mandate for Palestine.

(*A. G.*)

FOR PETITIONER: Yifrach.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

This is a return to an order *nisi* calling upon the Commissioner for Migration to show cause why his decision dated 10th October, 1945, cancelling the Palestinian citizenship of Petitioner and refusing to issue to him a Palestinian passport should not be set aside, and why the Criminal investigation against the Petitioner should not be cancelled and why the Petitioner should not be granted a Palestinian passport

being a Palestinian citizen under Article 1 of the Palestine Citizenship Orders-in-Council, 1925.

The facts are as follows:—

The Petitioner was granted a Palestinian passport on the 19th day of October, 1931, subsequently the Commissioner for Migration received a letter dated the 26th June, 1932, from the Officer Commanding the Arab Legion, Amman, to the effect that the Petitioner had recently obtained a Trans-Jordan Naturalisation Certificate No. 222. On the 26th June, 1945, the Petitioner applied to the department of Migration for a Palestine passport under Article 1 of the Palestine Citizenship Order-in-Council. By a letter dated 10th October, 1945, the Respondent informed the Petitioner that as the Petitioner had received a certificate of naturalisation in Trans-Jordan he ceased to be a Palestinian citizen by virtue of Article 15 of the Palestine Citizenship Orders.

The first point raised by the Petitioner was that the Respondent had no evidence that he had obtained a Trans-Jordan Naturalisation Certificate and he questioned the authority of the Officer Commanding the Arab Legion to make the statement he did in this matter. There appears to us no merit in this objection. It is clear that the Commissioner received information that the Petitioner had received a Naturalisation Certificate No. 222. If the Petitioner desired to contradict that allegation of fact he could have done so; but nowhere in his affidavit or elsewhere is there a denial thereof. Article 15 of the Palestine Citizenship Order under which the Commissioner for Migration has acted reads as follows:—

> "A Palestinian citizen who when in any foreign state and not under disability by obtaining a Certificate of Naturalisation or by any other voluntary and formal act, becomes naturalised therein shall thenceforth be deemed to cease to be a Palestinian citizen".

The argument of the Petitioner is that Trans-Jordan is a territory and not a state, and "in any case it is not a foreign state". Of course the interpretation to be placed upon the words "state" and "foreign" vary somewhat according to the nature of the legislation in which they appear.

Now, Trans-Jordan has a government entirely independent of Palestine — the laws of Palestine are not applicable in Trans-Jordan nor are their laws applicable here. Moreover, although the High Commissioner of Palestine is also High Commissioner for Trans-Jordan, Trans-Jordan has an entirely independent government under the rule of an Amir and apart from certain reserved matters the High Commissioner cannot interfere with the government of Trans-Jordan — at the most he can advise from time to time. His Britannic Majesty has entered into agreements

with His Highness the Amir of Trans-Jordan in which the existence of an independent government in Trans-Jordan under the rule of the Amir has been specifically recognised (see Agreement dated 20.2.28). It is clear therefrom that Trans-Jordan exercises its powers of legislation and administration through its own constitutional government which is entirely separate and independent from that of Palestine. In our opinion it must follow therefrom that in so far as the legislation under review is concerned Trans-Jordan comes within the meaning of the word "state" as used in Article 15.

It is to be further noted from the aforesaid agreement that a Trans-Jordan nationality is recognised and we know that Trans-Jordan can, as in this case, grant a person naturalisation, *i. e.* grant an alien or foreigner Trans-Jordan nationality which is a separate nationality and distinct from that of Palestine citizenship.

It follows from this that at least in matters of citizenship — Palestinians and Trans-Jordanians are foreigners and therefore Trans-Jordan must be regarded as a foreign state in relation to Palestine.

The Petitioner raised a further objection to the fact that the Respondent had not proved that Petitioner was not under disability. Here again we see no merit in this argument as the Petitioner nowhere alleges that he was, in fact, under disability.

For the above reasons we hold that the order *nisi* must be discharged with costs fixed at LP. 10.

Delivered this 14th day of December, 1945.

A/British Puisne Judge.

HIGH COURT No. 81/45.

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

BEFORE: Edwards, Shaw and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Rashid Ali Faraj Almaari. PETITIONER.

v.

The Chief Execution Officer, Magistrate's Court, Jaffa, & 6 ors. RESPONDENTS.

Legal effect of prescriptive possession of land — Particulars to be stated in notice of sale.

Return to an order *nisi* issued on 2.10.45, directed to the first Respondent calling upon him to show cause why his orders dated 29.7.45 and 5.9.45 in Execution File No. 180/45, Jaffa, should not be set aside, or, alternatively, why he should not comply with the request of Petitioner for placing a note in the notice of sale to the effect that he cannot deliver or guarantee vacant possession of the property in question; order *nisi* made absolute:—

1. In Palestine a person in possession of land relying on prescription alone cannot be a plaintiff in respect of the title to that land.

2. Notice of sale should, in every case, state whether vacant possession of the property will be given or not; in latter case particulars should be given of all rights of occupation to which the sale is subject.

(*M. L.*)

REEFRRED TO: H. C. 19/36 (3, P. L. R. 231; 1937, S. C. J. (N. S.) 322); H. C. 91/36 (3, P. L. R. 208; 1937, S. C. J. (N. S.) 8; 1, Ct. L. R. 130); H. C. 56/38 (5, P. L. R. 443; 4, Ct. L. R. 130; 1938, S. C. J. 2, 53); H. C. 41/43 (1943, A. L. R. 196).

FOLLOWED: H. C. 16/35 (2, P. L. R. 335; 8, C. of J. 859).

ANNOTATIONS:

1. On the first point see H. C. 41/43 (*supra*) with note 3 thereto in A. L. R. and cases referred to.

2. On the second point see in addition to case followed also H. C. 95/44 (1944, A. L. R. 698).

(*A. G.*)

FOR PETITIONER: Germanus.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Elia.
Nos. 3—7 — Hammoudeh (but affidavit filed by No. 3 only).

ORDER.

This is the return to an order *nisi* directed to the first Respondent calling upon him to show cause why his order requiring the present Petitioner to become a plaintiff in a competent Court should not be set aside.

The facts, shortly stated, are that the Petitioner and his wife live in a two-roomed house which has a yard. They claim that they have been in uninterrupted possession of the house for over forty years, and the Execution Officer seems to have been satisfied that they had, in fact, occupied the house for that period. 50 out of 480 shares of the house are registered in the name of one Fatmeh Mohammad Bayyoud who is the testatrix of Respondents 3 to 7. The second Respondent is the judgment-creditor of Respondents 3 to 7 and the property is now in process of being sold by virtue of a judgment given in favour of the

second Respondent as judgment-creditor in Magistrate's Court, Jaffa, Civil Case No. 1392/44. The second Respondent and the third Respondent respectively have filed affidavits in which they have sworn that they, Petitioner and Respondents Nos. 3 to 7, are joint owners together with others. It is denied that there is collusion between the second Respondent on the one hand and the other Respondents on the other hand with a view to defrauding the Petitioner's title. The second Respondent swears that he is truly a creditor of Respondents 3 to 7 and he asserts that he is merely trying to collect his just dues.

The Petitioner relies on uninterrupted possession of *miri* land for over ten years. In Sir R. Tute's book on the "Ottoman Land Code" p. 26 there appears the following statement:—

> "It has been repeatedly ruled by the Turkish Court of Cassation that a party relying on prescription cannot come into Court as a plaintiff for the purpose of claiming the land. The prohibition, of course, disappears as soon as he has been granted a title deed".

The Courts of Palestine have, since the Occupation, followed the practice of the Turkish Court of Cassation, and we understand that in Palestine to-day even a successful Defendant who has relied on prescription cannot obtain a title deed on application to the Land Registry. We have seen no case in which a successful Defendant has sued for a correction of the registration, although Tute expresses the view that such successful claimant is entitled to receive a title deed (see page 26).

The following passage appears in Messrs. Goadby and Doukhan's "Land Law of Palestine" (p. 263), where the authors sum up the effect of the judgment in a Cyprus case:—

> "1. Art. 20 of the Land Code and Art. 1660 of the *Mejelle* which fix a limit of time within which the owner of real (*i. e.* immovable) property of the kinds mentioned therein must sue for its recovery confer upon a person who has been in possession for that time a statutory title to the land, and a right to be registered for it.
>
> 2. By virtue of Art. 1 of the Regulations as to *Tabu Sanads* and the Law of *Rejeb A. H.* 1291, the statutory title so acquired until perfected by registration does not confer any right which can be enforced in a Court of Law except the right to claim a declaration of right to registration as against another and to have any existing registration set aside and an injunction to take effect upon registration. In this case the early Cypriot decisions were reviewed and their effect considered. It was explicitly stated as having been firmly established since 1895 that length of possession was no defence to an action by the registered owner unless there was a cross action to set aside the registration. This was clearly laid down in Piei *v.* Philippou in which the Court stated that it considered itself bound by the registration until set aside but gave a stay of execution to enable the Defendant to bring a cross-action.

> It appears, however, that such a cross-action to vacate an existing registration may succeed upon proof of adverse possession by the claimant for the required period".

Whatever may be the law in Cyprus, it has been consistently held in Palestine that a person relying on prescription alone cannot be a plaintiff. For this reason, therefore, we hold that the Execution Officer erred in requiring the Petitioner to go to an appropriate Court. It would obviously be unreasonable to require the Petitioner to become a plaintiff in the present state of the law.

Mr. Germanus has referred to H. C. 19/36 P. L. R. Vol. 3, p. 231; H. C. 91/36, P. L. R. Vol. 3, p. 208; H. C. 56/38, and H. C. 41/43, Annotated Law Reports (1943) p. 197.

We think that the Execution Officer erred also in not stating in the notice of sale the facts with regard to the Petitioner's possession. In this connection we refer to H. C. 16/35, P. L. R. Vol. 2, p. 335:—

> "The notice of sale contained no statement either that vacant possession would or would not be given upon completion. This was in our opinion unfortunate. We hold that the notice of sale should, in every case, state whether vacant possession of the property will be given or not; and in the latter case particulars should be given of all rights of occupation to which the sale is subject".

For these reasons the order *nisi* is made absolute with fixed costs of LP. 10 against Respondents Nos. 2 to 7 jointly and severally.

Given this 20th day of December, 1945.

British Puisne Judge.

HIGH COURT No. 95/45.

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

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

IN THE APPLICATION OF :—

Abraham Shara'bi. PETITIONER.

v.

The Chief Execution Officer, District Court, Tel-Aviv & an. RESPONDENTS.

Alimony and maintenance — Alimony pendente lite.

Return to a rule *nisi* issued on the 13th November, 1945, directed to the first

Respondent calling upon him to show cause why his order, dated 1st November, 1945, in Execution File District Court Tel-Aviv, No. 386/45, should not be set aside, and why he should not refrain from executing the judgment of the Chief Rabbinate of Jaffa and Tel-Aviv District, No. 5/705, dated 12th September, 1945, 5th *Tishrei*, 5706, discharged:—

Rabbinical Court has jurisdiction to make an order for payment of alimony *pendente lite*.

(*M. L.*)

FOR PETITIONER: Megory & Kitzinger.

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

ORDER.

The only issue which arises in this case is whether a payment of LP. 20 ordered by the Rabbinical Court was alimony or maintenance. It has been admitted that if it were alimony it would be a matter within the exclusive jurisdiction of the Rabbinical Court, in accordance with the provisions of Article 53 of the Palestine Order-in-Council. From the statement of claim, and from the written judgment of the Rabbinical Court it is quite clear to us that in this case the order for payment of LP. 20 was alimony *pendente lite*. It follows that the rule must be discharged, with LP. 10 inclusive costs.

Given this 10th day of December, 1945.

Chief Justice.

HIGH COURT No. 104/45.

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

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

IN THE APPLICATION OF:—

"Shemen Yehuda" Partnership Menashe Duenias & Sons, Oil Factory. PETITIONER.

v.

1. Inspector General of Police and Prisons,
2. Superintendent of Police, Lydda District. RESPONDENTS.

Licencing authority endorsing restriction on licence granted by them — Non interference of High Court.

Petition for an order *nisi* to issue directed to the Respondents calling upon them to show cause, if any, why the words "Premises to be closed between 10 *p. m.* and 5 *a. m.* daily", endorsed on the 12th June, 1945, by the second Respondent on the licence issued to Petitioner under the Trades and Industries (Regulation) Ordinance, No. 239775, should not be removed and struck out from the said licence, refused:—

Fact that several other trades are being or may be carried on without the restriction attached to Petitioner's licence — not sufficient to induce High Court to hold that licencing authority exercised discretion arbitrarily.

ANNOTATIONS: See H. C. 68/45 (12, P. L. R. 471; 1945, A. L. R. 824) and note 2 thereto.

FOR PETITIONER: Elkayam.

FOR RESPONDENTS: *Ex parte.*

ORDER.

In this case it is quite clear to us that in making the endorsement the second Respondent was acting within the authority given to him under the Trades and Industries (Regulation) Ordinance. The fact that several other trades are being or may be, carried on without the restriction imposed by the endorsement as is alleged by the Petitioner, would not induce us to come to the conclusion that the Inspector General of Police and Prisons in making this endorsement was exercising the discretion which is undoubtedly vested in him in an arbitrary manner.

The application for a rule *nisi* is refused.

Given this 10th day of December, 1945.

Chief Justice.

HIGH COURT No. 110/45.

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

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

IN THE APPLICATION OF:—

Raphael Habib Ben Shalom. PETITIONER.

v.

The Chief Execution Officer, Tulkarm & 3 ors. RESPONDENTS.

Application to C. E. O. for stay of execution after refusal by C. A. — Question of jurisdiction of C. E. O. not raised in due time.

Application for an order to issue directed to the 1st Respondent calling upon him to show cause why he should not set aside all proceedings in Execution File No. 234/45 and/or stay execution therein, and to second Respondent to show cause why he should not refrain from acting on the orders of first Respondent why first Respondent should not stay all execution proceedings in his said file No. 234/45 pending the determination of Petitioner's appeal in His Majesty's Privy Council for a period of six months, refused:—

1. If Court of Appeal refused stay of execution pending appeal to Privy Council, Chief Execution is right in refusing application for stay.
2. While questions of jurisdiction may be taken before High Court, yet if High Court finds that question is only an afterthought they will not consider it at this late stage.

(*M. L.*)

ANNOTATIONS:

1. On grant of stay of execution by Court of appeal see C. A. 226/45 (12, P. L. R. 473; 1945, A. L. R. 703).

2. On H. C. not dealing with point not raised in application see H. C. 22/42 (1942, S. C. J. 282).

(*A. G.*)

FOR PETITIONER: Beirouti.

FOR RESPONDENTS: *Ex parte.*

ORDER.

This application concerns a case pending before the Privy Council on appeal from the decision of the Court of Appeal in Palestine. The Court of Appeal refused a stay of execution. It is, of course, now open to the Applicant to go to the Privy Council and Their Lordships may well hold that the Court of Appeal were wrong and they may grant a stay. The Applicant comes here to-day because he says he will be embarrassed by the delay before he can get his application to the Privy Council. This, however, is a fact which must have been well-known to the Court of Appeal when it decided not to grant a stay of execution. We cannot avoid the conclusion that the Applicant is seeking means other than those open to him to avoid the decision of the Court of Appeal. He applied first to the Chief Execution Officer under Art. 7 of the Ottoman Execution Law. Now, it is clear that in certain circumstances Art. 7 vests a discretion in the Execution Officer to postpone the execution, but in this case he refused to postpone and the reason which he gave for this refusal was the fact that the issue had been before the Court of Appeal and they had not granted a stay. Apart altogether from the question as to whether Art. 7 applies in a case such as this, the reasons he gave for the exercise of his discretion as he did were eminently sound and we would not interfere with his decision.

Another point raised by Mr. Berouti was that this matter was not within the Chief Execution Officer's discretion. He says that the Chief

Execution Officer has no jurisdiction and he quoted to us many cases which do indeed cast doubts on the jurisdiction of the Chief Execution Officers. We observe, however, that Mr. Berouti appealed from the Chief Execution Officer's order and in the course of that appeal he never questioned the jurisdiction. He argues that the question of jurisdiction can be taken at any time even before this appeal Court. We agree, but it is clear to us, and indeed as it was quite candidly conceded by Mr. Berouti, that in fact this question of jurisdiction is only an afterthought, and we are not prepared to consider it at this late stage.

The application must, therefore, be refused.

Given this 18th day of December, 1945.

Chief Justice.

CIVIL APPEAL No. 62/45.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Israel Malka. — APPELLANT.

v.

Haj Yousef El Abed El Ali. — RESPONDENT.

Action for eviction and recovery of possession — Agreement as to monthly payments described as "rent" yet not amounting to a tenancy.

Appeal from the judgment of the District Court of Haifa, sitting in its appellate capacity dated 31.1.45 in C. A. 151/44, dismissed:—

1. Mere fact that "rent" is mentioned in connection with monthly sum payable by vendor to purchaser on failing to deliver sold house within fixed period — not enough to constitute a tenancy for purposes of Rent Restrictions Ordinance; Court must ascertain parties' intention.

2. Inference sought to be drawn that Plaintiff himself regarded Defendant as his tenant from prayer for eviction and recovery of possession in statement of claim is of a highly technical nature and carries no weight, if it is found that Defendant had not been misled or in any way prejudiced.

(*M. L.*)

REFERRED TO: Dunthorne & Shore *v.* Wiggins (1943) 113 L. J. Ch. 85 and (1943) 2 A. E. R. p. 678; Francis Jackson Developments Ltd. *v.* Stemp, (1943), 2 A. E. R. Vol. 2, pages 601 and 603.

ANNOTATIONS: See cases referred to and also C. A. 287/43 (10, P. L. R. 642; 1943, A. L. R. 786) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Wittkowski.

FOR RESPONDENT: W. Salah.

JUDGMENT.

We do not require to call upon you to reply, Walid Eff. Salah.

This is an appeal from a judgment of the District Court of Haifa in its appellate capacity dismissing an appeal from a judgment of one of the Magistrates of Haifa who had ordered the present Appellant to be ejected from certain premises. On 31st July, 1942, by a contract of sale, the Respondent bought from the Appellant a plot of land on which was a two-storied house, and the Appellant's advocate tells us that the Respondent allowed the Appellant to remain on in the said flat. The learned President of the District Court in his judgment said:—

> "The contract of sale had at the end of it what has been translated as a "rider". It reads as follows:—
> 'The first party (Appellant) undertakes to deliver this plot to the second party at the expiry of four months from the date of the agreement, and the second party allows the first party to stay in the upper flat during the said four months without consideration, and if he should be late in delivering the upper floor empty, the first party will be bound to pay to the second party a rent for this flat of LP. 8 *p. m.* he is late in its vacation after the said four months. But the ground floor's leases should be transferred by the first party to the second party as from the 1st August, 1942'.
> The Appellant did not vacate the flat at the end of the four months period but stayed on for some fourteen months, during which time he paid the LP. 8 rent until January and February, 1944, when Respondent refused the rent and sued for his eviction. The learned Magistrate held that there was no tenancy and therefore Appellant was not protected by the Rent Restrictions Ordinance, and ordered his eviction. This appeal is against that judgment".

The learned President went on to say that if the word "rent" had been omitted he thought that there could have been little substance in any argument that the relationship of landlord and tenant had been formed between the parties, and he then put to himself the question — "Does the mere mention of the word 'rent' establish that relationship?", a question which he answered in the negative. He also held that one must ascertain the intention of the parties from the agreement and the rider as a whole.

Mr. Wittkowski, for the Appellant, has strenuously argued that the question is "was there a tenancy at a rent?" We agree with the learned

President in thinking that the mere mention of the word "rent" was not in itself sufficient to establish the relationship of landlord and tenant. It is important to note that in section 3(1), Rent Restrictions (Dwelling Houses) Ordinance, 1940, it is laid down that the Ordinance applies only to a house or part of a house *let*.

The Magistrate in his judgment said:—

> "The Plaintiff used to accept the sum of eight pounds a month, but he never failed to press his claim and ask for eviction. The Defendant used to promise from one month to the other, sometimes alleging that he had already found a suitable place, and sometimes begging for another month or two. Having delayed his action for fourteen months, does not in my opinion in such circumstances, constitute a waiver".

Mr. Wittkowski referred to the cases of Dunthorne & Shore *v.* Wiggins (1943) 113 L. J. Ch. 85 and (1943) 2 A. E. R. p. 678, and Francis Jackson Developments Ltd. *v.* Stemp, (1943) 2 A. E. R. Vol. 2, pages 601 and 603. He contends that the question of whether there was or was not an admission of a tenancy at will is not the criterion but whether there was a tenancy at a rent. We agree with the learned President in thinking that the mere fact that the word "rent" appears is not enough to constitute a tenancy. The intention of parties must be ascertained. From the finding of the Magistrate, which we have cited, it is clear that the Respondent never accepted the Appellant as a tenant. The Appellant also complains that in the statement of claim the Respondent asked for eviction and the argument advanced by the Appellant's advocate is that by so doing he must be taken to have regarded the Appellant as his tenant.

The learned President in dealing with this in his judgment said:—

> "Admittedly the statement of claim might have been better worded".

The learned President, seems to have assumed that the document was not drawn up in the parties' own language; but in this he was mistaken as the document was drawn up in Arabic. We are informed that the words in Arabic in the statement of claim establish that the Respondent was seeking eviction and recovery of possession. The learned President considered the objection to be of a highly technical nature and held that the Appellant had not been misled or in any way prejudiced. We respectfully agree.

For the foregoing reasons the appeal is dismissed with fixed costs of LP. 10.—.

Delivered this 15th day of November, 1945.

British Puisne Judge.

HIGH COURT No. 88/45.

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

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

IN THE APPLICATION OF:—

Leib Karaphiol. PETITIONER.

v.

David Grienfeld. RESPONDENT.

Undue delay in applying for change of venue.

Return to a rule *nisi* issued on the 6th of November, 1945, directed to the Respondent calling upon him to show cause why Civil Case No. 76/45 of the District Court of Jaffa, with M. A. 303/45 attached to the said civil case, should not be removed for trial from the District Court of Jaffa to the District Court of Tel-Aviv, order *nisi* discharged:—

> Time elapsing till application for removal of case to another Court may be found by High Court, whose jurisdiction is discretionary, too long and therefore fatal to petition.
>
> (*M. L.*)

ANNOTATIONS: For other cases on change of venue see H. C. 52/45 (1945, A. L. R. 779) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Lin.

FOR RESPONDENT: Buchalter.

ORDER.

This is the return to an order *nisi* calling upon the Respondent to show cause why Civil Case No. 76/45, District Court, Jaffa, in which he is Plaintiff, should not be removed for trial to the District Court of Tel-Aviv. It is not denied that both parties who are Jews, reside in Tel-Aviv, nor can it be denied that the District Court of Jaffa has jurisdiction to try the action.

For reasons set out by the Respondent in paragraph 3 of his affidavit in reply, the action was filed in the District Court of Jaffa instead of in the District Court of Tel-Aviv. The Petitioner (Defendant in the action) was served with the summons, on the 30th July, 1945.

He entered appearance on the 13th August, 1945, and filed his defence on the 21st August, 1945, at the same time making an application to the District Court of Jaffa for the removal of the temporary *interim* receiver who had been appointed by that Court. He filed this petition

for change of venue presumably under section 7(c) Courts Ordinance, 1940, only on the 25th October, 1945, so that a period of almost three months elapsed between service upon him of the summons in the action and his taking steps to have the case removed to the District Court of Tel-Aviv.

In the circumstances we think that the delay was too long and, having regard to the fact that our jurisdiction is discretionary, we think that we should dismiss the petition without dealing with any of the other matters raised in argument.

For the foregoing reasons the order *nisi* is discharged with fixed costs to the Respondent of LP. 5.

Given this 6th day of December, 1945.

British Puisne Judge.

CIVIL APPEAL No. 244/45.

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

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

IN THE APPEAL OF:—

Esther Carmeli. APPELLANT.

v.

Abraham Kotzelov. RESPONDENT.

Prescription of settled land — Sec. 43 L. S. Ord. and Art. 20 Land Code — C. A. 37/45 — Arts. 20 and 78 compared — Jurisdiction of Magistrate's and Land Court.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated 1.6.45, in Civil Appeal No. 222/44, from the judgment of the Magistrate's Court, Petach Tiqva, dated 28.11.44, dismissed:—

1. Prescriptive title may be acquired over settled land, sec. 43 of the Land Settlement Ordinance notwithstanding, as it negatives such title only up to the time of settlement proceedings.

2. Prescription so arising can only be raised in defence and a Magistrate's Court has no jurisdiction to go into such a defence, but must refer the parties to the Land Court.

(*A. M. A.*)

REFERRED TO: C. A. 37/45 (12, P. L. R. 354; 1945, A. L. R. 678).

ANNOTATIONS:

1. See the case cited and the notes thereto in A. L. R.

It would seem that the passage towards the end of C. A. 37/45, beginning with "Until the register is rectified it seems to me that all other titles must fail" should now be considered as having been too broadly worded.

2. See note 1 in A. L. R. to C. A. 390/43 (11, P. L. R. 217; 1944, A. L. R. 415) for authorities on the point that prescription may be raised as a defence only; *cf.* also H. C. 81/45 (*ante*, p. 118).

(*H. K.*)

FOR APPELLANT: Caspi and Yagnes.

FOR RESPONDENT: Dickstein.

JUDGMENT.

FitzGerald, C. J.: This appeal raises a question of some interest in regard to the effect of Article 20 of the Ottoman Land Law. The facts are not in dispute. The land in question was registered at land settlement in the name of the mother of the Appellant. The Respondent is a brother of the Appellant. When the land came under land settlement operations, by an arrangement mutually made between the children it was agreed that it should be registered in the name of the mother. This was done. There was much argument as to the conditions which it was alleged, governed the arrangement. It was said that it was the intention that Jewish law should be applied, and that each of the children should have a share in the inheritance when the mother died. In my opinion, those arguments as to this intention are irrelevant. Once the land was registered in the name of the mother, all those claims by the children whatever their nature, were invalidated by virtue of the provisions of section 43 of the Land (Settlement of Title) Ordinance and in so far as this aspect of the case is concerned, Mr. Caspi for the Appellant, who derived title by transfer from the registered owner, was on sound ground. But there are elements in this case which precludes it from being determined solely by reference to section 43 of the Land (Settlement of Title) Ordinance. It is not denied that the son (that is the Respondent) continued to live on the land. He had built a kitchen and veranda on it in 1934 and he continued to occupy this kitchen and veranda without dispute for a period of 10 years. It remains therefore to consider the effect of Article 20 of the Ottoman Land Code. It is true that section 43 of the Land (Settlement of Title) Ordinance invalidates any other right or title conflicting with registration, and as this registration was a registration of full ownership, it follows that a right — I deliberately refrain from using the word title — acquired by virtue of Article 20 would conflict with such registration. It follows that if any such right was existing at the date of the registration it would be cancelled by the registration, but I see no

reason why after the registration, prescriptive rights should not be capable of being acquired unless their acquisition is specifically precluded by the provisions of the Land (Settlement of Title) Ordinance or any other Ordinance. I can find no such provision; on the contrary, Article 20 of the Land Code has not been repealed. It was established in Civil Appeal 37/45 that a mere allegation of ownership is not sufficient. In the case of registered land the Magistrate must presume that there is no dispute as to title, but this presumption can be rebutted by *prima facie* proof of the existence of conditions which could establish a title which would not be invalidated by section 43 of the Land (Settlement of Title) Ordinance. In Civil Appeal 37/45 the allegation as to title was based on prescription which, on the face of it was not maintainable and the Court of Appeal held that the person alleging it had failed to rebut the *prima facie* presumption.

The question arises as to how a person claiming under Article 20 can assert his claim. It seems to me that a misconception has arisen because of a misunderstanding of the legal effect of the Article. It does not give title. It is merely negative to destroy the power of the owner to oust the person in possession. In certain circumstances, for instance under section 78 of the Land Code, a title deed can be acquired in which case such title deed will supersede the title of the original owner. But what happens where as in this case, Article 78 does not apply? Here I must consider the capacity in which the Court sits. If it is constituted as a Magistrates' Court it is precluded from hearing the case as it involves a question of ownership in which event the proper course for the Court is to dismiss the case and leave the Plaintiff to seek his remedy in the Land Court which is the only Court that has jurisdiction to determine the validity of the Defendant's defence. The Defendant in this case established that he had been in possession for ten years since the date of registration at land settlement proceedings. He therefore succeeded in rebutting the presumption that there was no dispute as to title, and consequently the Magistrate was correct in referring the parties to the Land Court.

For these reasons I am of opinion that the appeal must be dismissed with costs on the lower scale to include a sum of LP. 15.— for advocate's attendance fee.

Delivered this 28th day of February, 1946, in the presence of Mr. Caspi for Appellant and in the presence of Mr. Dickstein for Respondent.

Chief Justice.

Frumkin, J.: This is an action for recovery of possession. The

extent of the jurisdiction of Magistrates' Courts dealing with cases of this nature was discussed in recent judgments and the situation has been summarised in C. A. 37/45; thus the jurisdiction is not limited to Article 24 of the Ottoman Magistrates' Law; in cases brought under section 3(c) of the Magistrates' Courts Jurisdiction Ordinance recent, or indeed previous, possession is not a necessary element. But wide as the jurisdiction of the Magistrates' Courts may have become, the nature of such actions has not changed. They can only concern possession, and once the Magistrate is faced with a dispute as to title or ownership of land his jurisdiction ceases and he has to refrain from further dealing with the matter, leaving the parties to fight out the case before a competent Court. Of course a dispute as to ownership must on the face of it be well founded and as stated in the case cited above a mere allegation is not enough. So that when on the one hand there is a registered title, and so much so a registered title based upon land settlement, and on the other side there is nothing but trespass, the Magistrate would order recovery of possession in favour of the registered owner. It will be different when the other side is not a mere trespasser but relied on some rights not based on a mere allegation.

The question now arises as to the prospective effect of section 43 of the Land (Settlement of Title) Ordinance which provides that:—

> "Save as provided in this Ordinance, the registration of land in the new register shall invalidate any right conflicting with such registration".

and has certainly a retrospective effect.

Much as I would have preferred to leave the decision as to the application of this Article to rights claimed to have been acquired after settlement to a land case proper, in the absence of a clear decision on this point as yet, it becomes inevitable to determine it now so as to have the law on this point quite clear.

The answer is in the negative. Article 20 of the Ottoman Land Code is, as more fully dealt with in the judgment of my learned brother, one instance where a right might be acquired subsequent to settlement and contrary to the registration in the new register. There might be other instances. A Land Court, competent to deal with questions of title may consider a claim for equitable right to specific performance acquired after settlement; when it comes, however, to Magistrates' Courts, it is a question of degree whether there is a dispute as to title strong enough to oust their jurisdiction. As to this particular case, without expressing any opinion as to the claims of the Respondent to title to the land, it seems that he has submitted a *prima facie* case disputing

the ownership of his sister, who stands in the shoes of their mother, arising out of conditions not prior to settlement but since settlement, and therefore the Magistrate and the District Court were right in holding that the case was not within the scope of the jurisdiction of the Magistrates' Court and in dismissing the claim of the Appellants.

I agree, therefore, that the appeal should be dismissed and the judgment of the lower Court confirmed with costs on the lower scale to include a sum of LP. 15.— for advocate's attendance fee.

Delivered this 28th day of February, 1946.

Puisne Judge.

CIVIL APPEAL No. 323/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Israel Brodi in his private capacity and/or as an heir of his deceased father Dr. Haim Brodi, and subject to his estate and/or as the administrator of his above-mentioned deceased father. APPELLANT.

v.

Ya'acov Halbreich & 3 ors. RESPONDENTS.

Action for eviction under sec. 8(1)(b), Rent Restrictions (Dwelling Houses) Ord. — Non-interference with Magistrate's discretion — Circumstances making tenant's profit unreasonable.

Appeal from the judgment of the District Court Jerusalem (Judge Curry) in its appellate capacity dated the 12th day of June, 1945, in Civil Appeal No. 15/45, from the judgment of the Magistrate's Court Jerusalem dated the 4th February, 1945, in Civil Case No. 2098/43, dismissed:—

While Court may hold a certain profit by sub-letting only one room out of 3 or 4 not unreasonable it may hold the opposite if tenant sublets, say, 4 out of 6 rooms.

(*M. L.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. 297.

2. See C. A. 305/44 (11, P. L. R. 613; 1945, A. L. R. 272) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Gorali.

FOR RESPONDENTS: Rabinovitz.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem in its appellate capacity dismissing an appeal from one of the Magistrates of Jerusalem who had ordered the eviction of the Appellant from certain premises on the ground that he, by taking in lodgers, was making an unreasonable profit within the meaning of section 8(1)(b) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940.

The learned President of the District Court in his judgment said that he himself would not have held the profit to be unreasonable, but, in the circumstances, felt that he was not justified in interfering with the discretion of the Magistrate.

Mr. Gorali, who argued the appeal with ability, invited us carefully to examine figures tending to show that, whatever rent the sub-tenant might have been paying to his client, the latter was supplying many commodities such as furniture, cleaning material, linen, *etc.* He also asked us to say that the Magistrate made a wrong calculation of the profit. The Magistrate seems to have been influenced by the fact that the Appellant himself was enjoying the use of two rooms and a store-room, the latter being vast and providing storage for a large library which would otherwise have had to be accommodated at considerable expense to the Appellant. It is not denied that the Appellant sublet four rooms.

The Magistrate valued the use of the two rooms (including library space) at LP. 150. He found that the Appellant made a net profit of LP. 46.200. The Appellant thus made a profit of LP. 196.200 which the Magistrate held was in the circumstances unreasonable. But how did the Magistrate arrive at the figure of LP. 150? If we accept the Magistrate's finding that the total cost to the tenant was LP. 207, then the four rooms would cost two-thirds of that figure *i. e.* about LP. 138. He received LP. 253 from his sub-tenants. If we deduct LP. 138 from LP. 253 we arrive at the figure of LP. 115. If we divide LP. 115 by four, we arrive at the figure of about LP. 29 for each room per year, *i. e.* about over LP. 2 per month per room. But as for these LP. 2 he provided furniture and cleaning and service, we do not think

that this would be an unreasonable profit if it were the ordinary case of a person letting only one room out of a house of 3 or 4 rooms. But the Appellant sublet four out of six rooms. In the result we are not prepared to dissent from the finding of the Magistrate that the amount received for sub-letting was, in the circumstances, unreasonable.

In the result, the appeal must be dismissed. We think that what the Appellant should have done was to reach an agreement with his landlord whereby he would have been allowed to retain only one flat for his own use and for storage of his father's library and have returned the other flat to the landlord. There is now some difficulty owing to the presence of three sub-tenants. We hope that parties may be able to reach an agreement on the lines which we have just indicated.

The appeal is dismissed with fixed (inclusive) costs of LP. 10.

Delivered this 27th day of February, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 162/45.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Max Silberman Caspi. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Animal diseases — Slaughter House Rules, rr. 2, 8, 21—2.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated 19th June, 1945, in Criminal Appeal No. 40/45, whereby the appeal was allowed and the case was remitted for trial, from the judgment of the British Magistrate, Tel-Aviv, in Criminal Case No. 7345/44, whereby the Appellant was acquitted of the offence under Rule of the Slaughter House Rules; appeal dismissed:—

It is an offence to expose swine meat for sale if it does not bear the official stamp of the municipal slaughter house.

(*A. M. A.*)

ANNOTATIONS: See CR. A. D. C. T. A. 41/45 (1945, S. C. D. C. 351) where the same ruling was given as in the judgment under appeal in this case.

(*H. K.*)

FOR APPELLANT: Levison.

FOR RESPONDENT: Olshansky and Handelsman.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, in its appellate capacity, setting aside an order of acquittal made by the learned Chief Magistrate of Tel-Aviv in a case in which the present Appellant had been charged with exposing for sale meat of swine which had not borne the official stamp of the slaughter-house of Tel-Aviv, contrary to Rule 8 of the Slaughter-House Rules, Laws of Palestine, Vol. 3, page 1646, as amended. The learned Chief Magistrate in effect held that because the animal in question had not been slaughtered in the public slaughter-house in which animals other than swine and camel are slaughtered, it was impossible for the carcase of a swine to bear the stamp of such slaughter-house. It is clear that, if Rule 8 stood alone and Rule 22 had not been enacted, it would have been an offence to expose for sale the meat of swine which did not bear the mark of the official stamp of the slaughter-house. (See Rule 2 for definition of the word "animal").

Rules 21 and 22 are in the following terms:—

> "21. The words "inspected and passed", or an authorised abbreviation thereof, shall be stamped upon all carcases slaughtered in a public slaughter-house and inspected and passed as fit for food by a veterinary surgeon or meat inspector.
>
> 22. (1) Any butcher or other person who intends to slaughter swine or camels within a municipal or local council area shall, prior to the slaughter of such animals, obtain the written permission of the municipal or local council, which shall state the place and the date and time at which the slaughtering may take place.
>
> (2) The carcases shall be subject to the same procedure of inspection and examination as the carcases of any other animals slaughtered in a public slaughter-house.
>
> This rule does not, as regards the slaughter of swine, apply to the municipal area of Jerusalem and all swine intended for food within that area shall be slaughtered at the public slaughter house of the Municipal Corporation of Jerusalem".

It has been forcibly contended by Mr. Levison for the Appellant that had the legislature intended that the carcases of swine slaughtered in a place approved by the municipal or local council under Rule 22(1) should bear the mark of the official stamp of the public slaughter-house, then the rule-making authority should have added the words "and stamping" after the words "inspection and examination" in Rule 22(2). In our view the stamping referred to in Rule 21 is part of the procedure of inspection and examination referred to in Rule 22(2). As we are of this opinion, it follows that swine slaughtered under Rule 22(1) cannot be exposed for sale unless they are stamped as required by Rules 8 and 21.

We accordingly think that the learned Relieving President came to a right conclusion, and the appeal is accordingly dismissed.

Given this 21st day of December, 1945.

British Puisne Judge.

CIVIL APPEALS Nos. 261, 264/44.

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

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

IN THE APPEAL OF:—

Mohammad Ali Qasem Asqul. APPELLANT.

v.

1. The Palestine Jewish Colonization Association, represented by Mr. Nahmani, Tiberias,
2. Mustafa Mohamad 'Abd Er Rahman Salim Ed Dilsi, land owner, Safad, on his behalf and as a member of Ad Dilsi family & 8 ors. RESPONDENTS.

Withdrawing appeal — C. P. R. 328, 337(c).

Appeal from the Decision of the Settlement Officer, Safad Settlement Area dated the 4th January, 1944 in Cases Nos. 13, 14/Birya; hearing adjourned:—

The respondent is entitled to be heard if the appellant withdraws his appeal.

(*A. M. A.*)

ANNOTATIONS: On the effect of an appeal being withdrawn *cf.* P. C. L. A. 9/38 (1938, 1 S. C. J. 410).

The decision on the adjourned hearing is reported on p. 162, *post.*

(*H. K.*)

FOR APPELLANT: Cattan and Khadra.

FOR RESPONDENTS: No. 1 — Eliash, Scharf and Feiglin.
Rest — Absent — served.

RULING.

Mr. Cattan informs the Court that he filed those appeals on instructions from the Appellant, Mohammad Ali Qasem Asqul, who never informed him that he had withdrawn. There is in Court a notarial notice

signed by the Appellant in these appeals to the effect that he has withdrawn the power of attorney and that he wished to withdraw the appeal.

Dr. Eliash contends that the appeals should not have been called on to-day, as the Appellant has withdrawn. We are however of the opinion, that as the Respondent was served with a notice of appeal under Rule 328, Civil Procedure Rules, the appeal cannot be withdrawn without the Court giving an opportunity to the Respondent to be heard.

Learned Crown Counsel (Mr. Clayton Rigby) has appeared to-day in both Civil Appeals Nos. 261 & 264 of 1944 by virtue of a written authority given in these appeals by the Attorney General himself, authorising him to appear and make a statement under section 6, Law of Procedure (Amendment) Ordinance, 1944.

Mr. Rigby has argued that, as these appeals have been called, he is entitled to make a statement now even although the Appellant is not here.

As we view the matter under Rule 337(c) unless the Appellant has been served with the notice of hearing, the appeal cannot proceed. It cannot be doubted that neither Mr. Cattan nor Subhi Eff. Khadra has any longer authority to appear for the Appellant. The hearing of these two appeals must be adjourned to enable notice of hearing to be served on the Appellant. As we are informed that the Appellant is likely to attend this Court in person to-morrow, we adjourn the hearing of these two appeals till to-morrow at 9 *a. m.*

Given this 10th day of December, 1945.

British Puisne Judge.

CIVIL APPEAL No. 255/45.

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

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

IN THE APPEAL OF:—

David Moyal. APPELLANT.

v.

Abdul Wahhab Salem Abu Asqul. RESPONDENT.

Advocates — Sec. 21 of Cap. 2 — Fair and reasonable agreement — Court to decide on fairness, C. A. 83/42, C. A. 201/42.

Appeal from the judgment of the District Court, Tel-Aviv, dated 6th July, 1945, in Civil Case No. 43/43, allowed and case remitted:—

The Supreme Court and the Settlement Officer having accepted the agreement as fair and reasonable, it was not open now to the Defendant to argue that the certification required by sec. 21 of the (repealed) Advocates Ord. (Cap. 2) had not been obtained.

(A. M. A.)

REFERRED TO: C. A. 83/42 (9, P. L. R. 415; 1942, S. C. J. 485; 12, Ct. L. R. 64); C. A. 201/42 (9, P. L. R. 696; 1942, S. C. J. 737).

ANNOTATIONS: See the previous proceedings in this case (*supra*) and *cf.* also C. A. 146/44 (12, P. L. R. 42; 1945, A. L. R. 43) and note 1 in A. L. R.

(H. K.)

FOR APPELLANT: Brenner-Rubinstein.

FOR RESPONDENT: Merguerian.

JUDGMENT.

This is an appeal from the decision of the District Court of Tel-Aviv which struck out a case because of want of jurisdiction. The lack of jurisdiction it was said, arose from the failure of an advocate to comply with section 21 of the Advocates Ordinance, Cap. 2. (This Ordinance has since been repealed but it is common ground that it applies to this case). It was alleged that an agreement tendered by the advocate was not certified to be fair and reasonable by the Court before which the action took place. The question whether this agreement was fair and reasonable was before the Courts in other cases. In Civil Appeal No. 83/42 the Court of Appeal remitted the case to the Settlement Officer to decide whether the agreement was fair and reasonable. The Settlement Officer decided that it was. The case came before the Supreme Court again in Civil Appeal No. 201/42 and the Appeal Court accepted the Settlement Officer's decision that the agreement was fair and reasonable. It is now alleged that for the purposes of this case the Settlement Officer was not the Court before which this action or proceeding took place. Seeing that the Court of Appeal had already held that the agreement was fair and reasonable and that the Court of Appeal controls all the civil Courts of this country, this objection seems to be a mere quibble. It follows that in my opinion the learned Relieving President can accept the agreement as sufficiently complying with the provisions of the Advocates Ordinance.

The case will, therefore, be remitted to him to deal with it on its merits.

Delivered this 28th day of February, 1946, in the presence of the Appellant, and in the presence of Mr. O. Merguerian for Respondent.

Chief Justice.

CRIMINAL APPEAL No. 190/45.

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

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

IN THE APPEAL OF:—

Mahmoud el-Haj Mohammad Ikeili & 3 ors. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Sentence — Aggravating circumstances — Maximum penalty — Increase of sentence on appeal.

Appeal from the judgment of the District Court, Jerusalem, dated 31.10.1945, in Criminal Case No. 97/45, whereby Appellants were convicted of robbery *contra* sections 287 and 288(1) of the Criminal Code Ordinance, 1936, and sentenced to eight years' imprisonment each; appeal dismissed and sentences increased:—

Circumstances in which maximum penalty may be imposed. Increase of sentence on appeal.

(*A. M. A.*)

ANNOTATIONS:

1. For conflicting authorities as regards interference in the matter of sentence *cf.* CR. A. 52/44 (11, P. L. R. 449; 1944, A. L. R. 816), CR. A. 120/44 (11, P. L. R. 507; 1945, A. L. R. 60), CR. A. 65/45 (1945, A. L. R. 501), CR. A. 140/44 (12, P. L. R. 22; 1945, A. L. R. 505), CR. A. 90/45 (1945, A. L. R. 551), CR. A. 46/45 (12, P. L. R. 263; 1945, A. L. R. 596) and CR. A. 205/45 (*ante*, p. 5).

2. The Court of Criminal Appeal in this case imposed a sentence of imprisonment "with hard labour"; see in this respect the observations at the end of CR. A. 153—155/45 (12, P. L. R. 447; 1945, A. L. R. 605).

(*H. K.*)

FOR APPELLANTS: No. 1 — In person.
Nos. 2 & 3 — F. Ghussein.

FOR RESPONDENT: Assistant Government Advocate — (Touqan).

JUDGMENT.

The conviction is confirmed. In regard to the sentences I have formed certain views but I desire to guard myself against prejudicing the Accused by a hasty consideration. I shall retire with my learned brother to consider the question.

(*The Court retired and afterwards gave judgment as follows*)

As we have said in this case we have no hesitation in confirming the conviction which is founded on evidence which is not open to criticism. There remains the question of sentence which has been raised in appeal

and which now imposes a duty upon the Court, a duty both to the State and to the individuals who appeal. We have read through all the evidence and have retired to take time for deliberation. We are unable to conceive of a more aggravated offence against the provisions of section 238 of the Criminal Code. Having arrived at that conclusion, it would be difficult for any Court to award less than the maximum sentence provided by the legislature for this offence. As, however, the two learned Judges were of the opinion that a sentence of eight years' imprisonment would suffice, we do not propose to impose the maximum, but we increase the sentence in each case to ten years' imprisonment with hard labour.

Delivered this 12th day of December, 1945.

Chief Justice.

CRIMINAL APPEAL No. 138/45.

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

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

IN THE APPEAL OF:—

Sliman Sha'ban. APPELLANT.

v.

The Attorney General. RESPONDENT.

Finance Regulations — Reg. 10(1)-(3) — Forfeiture — Jurisdiction of Magistrates Courts, M. C. J. O., sec. 3(a) — Construction.

Appeal by leave of his Lordship the Chief Justice, against the judgment of the District Court of Jaffa, in its appellate capacity, given on 18th December, 1944, in Criminal Appeal No. 82/44, whereby the appeal against the conviction and sentence contrary to the Defence (Finance) Regulations, 1941,' (Reg. 6(1) and 3(1)) given by the learned Chief Magistrate of Tel-Aviv on 24th May, 1944, in Criminal Case No. 3716/44, was dismissed, and forfeiture of the amount of 5000 U. S. A. dollars ordered; appeal dismissed:—

1. Construction of Reg. 10(3) regarding maximum and minimum penalties.

2. Irrespectively of the value of the subject matter and the material jurisdiction of the Court, where forfeiture or confiscation, by statute, follow a conviction, the Court has no alternative but to order forfeiture or confiscation.

(*A. M. A.*)

ANNOTATIONS: On the second point *cf.* the following authorities: CR. A. 47/39

(6, P. L. R. 521; 1939, S. C. J. 525) and Adm. 2/40 (7, P. L. R. 542; 1940, S. C. J. 562 & 8, P. L. R. 339; 1941, S. C. J. 503) — *Immigration Ord., sec.* 12; CR. A. 76/43 (10, P. L. R. 357; 1943, A. L. R. 460) and CR. A. 146/43 (11, P. L. R. 119; 1944, A. L. R. 315) — *Defence Reg.* 46; CR. A. 138/43 (10, P. L. R. 592; 1943, A. L. R. 764) — *Salt Ord., sec.* 9.

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Assistant Government Advocate — (Hazou).

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jaffa, in its appellate capacity, dismissing an appeal from a judgment of the Chief Magistrate, whereby the Appellant had been sentenced to pay a fine of LP. 25 and currency to the amount of 5000 dollars, ordered to be forfeited under Regulation 10(1) Defence (Finance) Regulations, 1941.

The main contention of the Appellant's advocate is that under Regulation 10(3) the matter was from the very outset beyond the jurisdiction of the British (Chief) Magistrate. Under section 3(a) Magistrates' Courts Jurisdiction Ordinance, a British Magistrate has power to impose a fine not exceeding LP. 200. As we have said, in this case the fine imposed was only LP. 25. It is however contended that, when one reads the words "whichever is the larger" in Regulation 10(3), one must conclude that there was an obligation on the Magistrate to impose a minimum penalty. This is clearly wrong, because the words in the fourth line of Regulation 10(3) are "the maximum fine", not "the minimum fine". What Regulation 10(3) therefore means is that in the present case the maximum fine that could have been imposed was a fine equal to three times the value, *i. e.* three times 5000 dollars.

The prosecutor, when he chose to bring the Appellant before a Magistrate, obviously showed that he would be content if a fine of not more than LP. 200 were imposed. In other words, by bringing him before a Magistrate the prosecutor waived his right to claim the penalty of three times 5000 dollars. Had the word "minimum" appeared in line 4 of Regulation 10(3), the Appellant's argument would have succeeded.

It has also been argued that 5000 dollars exceeds LP. 200, and that therefore the Magistrate had no power to order forfeiture of the currency. It has been consistently held by the Courts of Palestine that where, on conviction, certain consequences such as forefeiture or confiscation of goods or property follow, the Court which convicts *must* order forfeiture if the statute so directs, notwithstanding the fact that

the value of such goods may be greater than the maximum fine which the trial Court can impose. There is no difference between the facts of the present case and such cases as those to which we have referred. Regulation 10(4) is mandatory in its terms.

For these reasons we consider that the learned Relieving President of the District Court rightly dismissed the appeal from the Chief Magistrate. This appeal is therefore dismissed.

Delivered this 12th day of December, 1945, in the presence of Mr. Elia for the Appellant and Naim Bey Touqan for the Respondent.

Chief Justice.

CIVIL APPEAL No. 169/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Shabatai Abramov & 58 ors. APPELLANTS.

v.

1. Government of Palestine,
2. Feiga Reinin & 79 ors. RESPONDENTS.

Fraudulent correction of area — Correction made by Land Registry officials — Government Survey — Authority of Director of Land Registration — C. A. 160/43 — P. O.-in-C., 12—3, Forests Ord., sec. 4(2).

Appeal from the decision of the Settlement Officer, Haifa, Settlement Area, in Case No. 10/Um ez-Zeinat dated 20.3.46, dismissed:—

1. The Director of Land Registration is authorised to approve a correction of area, but not if it involves the making of a grant of State Lands.
2. As a result, a *bona fide* purchaser enjoys no protection as the new title is a nullity.

(*A. M. A.*)

REFERRED TO: C. A. 160/43 (11, P. L. R. 397; 1944, A. L. R. 651).

ANNOTATIONS :

1. See the case cited and the notes thereto in A. L. R.
2. On the position of *bona fide* purchasers of land generally *cf.* note 3 in A. L. R. to C. A. 355/44 (11, P. L. R. 642; 1944, A. L. R. 760).

(*H. K.*)

FOR APPELLANTS: Nos. 1—21 — Eliash.
Nos. 22—57 — Weinshall.
Nos. 58 & 59 — Kohan.

FOR RESPONDENTS: No. 1 — Asst. Govt. Adv. — (Hazou).
Nos. 2—81 — Not served.

JUDGMENT.

The Appellants in this appeal number 59 persons. Of these Nos. 1—21 have been represented by Dr. Eliash, Nos. 22—57 have been represented by Dr. Weinshall, and Nos. 58 and 59 have been represented by Mr. Kohan. The Respondents are 81 in number, but Nos. 2—81 inclusive have been cited merely as nominal parties, and they have not been served. Mr. Hazou has appeared on behalf of the first Respondent — the Government of Palestine.

The appeal is from a judgment dated 20.3.45 of the Land Settlement Officer, Haifa, in Case No. 10/Umm Ez-Zeinat. The facts as found by the Settlement Officer have not been disputed by the parties, except that Mr. Hazou has asked us to upset the finding that the Appellants were purchasers in good faith. We will say at once that having considered Mr. Hazou's submission on this point we are unable to find that the Settlement Officer erred when he held that the claim of the Appellants must be dealt with on the basis that they were purchasers in good faith.

The result of the Settlement Officer's judgment was to give the Appellants an area of 50 *dunums* in the land in claim. With regard to the balance, the Settlement Officer found it to be state land of the *mewat* category to which no claim had been proved, and he therefore ordered that it be recorded in the name of the High Commissioner in trust for the Government of Palestine, by virtue of section 29 of the Land (Settlement of Title) Ordinance.

The Settlement Officer in his very clear judgment has dealt fully with the facts, and for a better understanding of this case his judgment should be read. It is unnecessary for us to set out all the facts at length, but we shall refer to certain salient facts and findings of the Settlement Officer.

In the year 1318 *A. H.* a certain Michael Habayeb purchased at a public auction a number of properties registered in the names of persons indebted to the Turkish Treasury. These registered lands so purchased were of two categories — the lands in the plain near the present Haifa-Jenin road, and the *"Waar"* or hilly lands of Khirbet Mansura, a subdivision of the parent village of Daliyat El Carmel or Daliya as it is

usually called. It was stated in evidence, and borne out by investigations during settlement operations, that the original indebted owners were allowed to retain possession of the small and relatively insignificant plots in the *"Waar"*. In the present case we are concerned with one of those registered titles in Waret El Mansura, formerly belonging to Sliman Awad, which was auctioned to Michael Habayeb for 250 Turkish piastres. Michael Habayeb died in the year 1929, leaving his wife and one son Adeeb as sole heirs. By a power of attorney, from the widow the estate became virtually vested in the son. In 1934, when lands on the Carmel range began to have a speculative value, Adeeb Habayeb entered into a contract to sell to a Jew named David Shapiro some 2,000 *dunums** of land which he claimed to own. These lands were vaguely specified as to location and boundaries in the contract. In pursuance of this contract Habayeb filed a petition dated 6.3.38, in the Land Registry, for the correction of area, succession, and sale of this registered interest in Waret El Mansura inherited from his father. The petition specifically referred to a certificate of registration — No. 61 of Huzeiran 1318 — and to a plan. That plan was one prepared for Habayeb by a licensed surveyor on 10.12.34, and the boundaries of which enclosed a total area of 677.902 metric *dunums*. The Attorney General's representative drew attention to the significance of the fact that the only evidence of original registration now in the land Registry file is Folio 2 — a certified "Extract" of entry No. 61 of 1318 — which is dated 16.5.35, that is to say, more than two months after the date of the petition under which a certificate or evidence in support of the registration was stated to have been submitted . That extract refers to an area of 550 *dunums*. The disposition of "Correction of Area" to 677.902 for the total of the plan was eventually approved by the Director of Land Registration on 28.1.37. On the same day the Succession was recorded, and a direct sale of the corrected title was effected under deed No. 491 to 124 Jewish purchasers, the nominees of Shapiro.

This area of 677.902 *dunums*, according to the public survey of 1929—32 on which the Administration Divisions Proclamation 1939, under Article 11 of the Palestine Order-in-Council 1922 is based is, as to two-thirds, within the boundaries of Umm Ez Zeinat village and, as to one-third in Daliyat El Carmel. The public survey of 1929—32 shows 85% of the total area to be forest reserve, and the reminder to be patch cultivation. The Settlement Officer, on an inspection carried out recently by him, found that the category had not changed much from that described on the map. He found that the majority of the

area was rocky, scrub-covered and uncultivable. A very small part was under cultivation, while another small area showed signs of sporadic cultivation in the past which had been long since neglected.

The Appellants claimed to be the registered owners of the whole 677 *dunums*, and they supported their claim by modern registration in respect of undivided shares. The Appellants, or in some few cases their predecessors, acquired this title collectively as has already been stated by purchase from Adeeb Habayeb in 1937. Before the Settlement Officer the Attorney General's representative contested the disposition *ab initio*, alleging it to be based on a forgery of the registers, and fraudulent misrepresentation which induced the Director of Land Registration to grant a title to land which was previously unassigned State domain and much of it forest reserve.

The Settlement Officer in his judgment observed that it was not concealed that negligence, complicity, or both, on the part of responsible officials, was a contributory factor in putting the transaction through. The advocates for the Appellants do not dispute that the Settlement Officer was fully justified in finding that fraud had been committed by Adeeb Habayeb. But it is submitted that Government is now bound by the actions of its officers and must suffer any loss occasioned by their neglect.

The Turkish registers were produced in evidence, and the Government analyst satisfied the Settlement Officer that the figure of area in the relevant entries in two registers had been tampered with. The Settlement Officer was satisfied beyond a shadow of doubt that the original entry of area was 5 and not 550 *dunums*, and he came to the conclusion that Adeeb Habayeb had submitted a genuine *kushan* for 5 *dunums* with his original petition together with a plan in respect of 677 *dunums*, but that having been advised that with such a discrepancy of area the application would not be accepted, he took steps to present a more plausible case.

The Settlement Officer found that allegations of fraud made by the Government representative were only too well founded. He held that the forgery of the entries of area in the Turkish registers had been proved, and that there was no doubt that it had been effected for the purpose of this transaction. He found that the original entry for the plot of 5 *dunums* in "Waret El Mansura", Deed No. 61 of 1318 *A. H.*, did not relate to any part of the land now in suit but to a plot called "Shrubeita" some distance away. It may be observed that this finding is not disputed by the Appellants, that is to say they admit that the original *kushan* does not refer to any part of the land which is the

subject matter of this appeal. The Settlement Officer found that the plan for 677.902 *dunums*, submitted for the purpose of the transaction, did not give a true representation of the facts either as to the name of locality, possession of Applicant or of neighbouring owners, and that the only material signature and a thumbprint were forgeries. The *Mukhtar* Hassan Yousef Hassoun, who was responsible for the many *mazbatas* relating to the transaction, admitted in evidence before the Settlement Officer that the whole disposition was a fraud, and the Settlement Officer found the certificates to be gross misstatements of fact, most of them bearing forged signatures. The Settlement Officer found the whole transaction, as far as the correction of area and boundaries was concerned, to be a gross fraud and misrepresentation of fact to the Director of Land Registration who was induced thereby to approve a fresh registration. He observed that he entirely agreed with the Attorney General's representative that this could not have occurred if the proper precautions had been observed with honesty and ordinary diligence by the officials responsible.

The Settlement Officer states the case as he saw it in the following words:—

> "The Defendants contracted to buy from a fraudulent purchaser something which it is now proved he did not own and could not therefore convey. The sole issue to decide is whether the Defendants, having purchased in good faith, can be considered owners of the land by virtue of the title granted by the Director of Land Registration".

This case has been argued at great length and many authorities have been referred to. But in our judgment the only point to be decided is whether the Director of Land Registration had authority to make a grant of this land. For although he was under the impression that the transaction was one of correction of area, it is perfectly clear that it was nothing of the sort. It does not become a correction of area by virtue of his misconception, or because it was described as being a correction of area. The actual effect was to grant to the Appellants an area of land which was not connected in any way with the parcel in respect of which a correction of area was applied for. Civil Appeal No. 160/43 (11, P. L. R. 397), recognises the transaction called a correction of area, and there is no doubt that the Director of Land Registration is authorised to approve a correction of area. But that is a very different thing to making a grant of State land.

Article 13 of the Palestine Order-in-Council 1922 (see page 2573, Vol. 3, Laws of Palestine) provides that the High Commissioner may make grants or leases of any public lands or mines or minerals, or may

permit such lands to be temporarily occupied on such terms or conditions as he may think fit subject to the provisions of any Ordinance. Article 12 provides that all rights in or in relation to any public lands shall vest in and may be exercised by the High Commissioner for the time being in trust for the Government of Palestine. And so far as the area which is forest reserve is concerned there is this further provision — see section 4(2) of the Forests Ordinance (Cap. 61) — which lays down that no right in or over any forest reserve shall be alienated by way of grant, lease, mortgage or other disposition without the sanction of the High Commissioner.

It is true that a person who is induced by fraud to part with property may affirm or dis-affirm a contract at any time after it is made, but only subject to the rights of third parties acquired in the meanwhile. That principle is referred to in Chitty on the Law of Contracts, 18th Edition, at page 437. If the Director of Land Registration had been a person authorized to make a grant of public lands we think there is no doubt that the Appellants, having purchased in good faith, would be entitled to keep what they had bought, and Government's remedy would be to sue Adeeb Habayeb.

But the position here is that the Director of Land Registration had no authority to make such a grant, and the Appellants have not proved any grant by the High Commissioner. The grant, which was wrongly described as a correction of area, was in our judgment no grant at all, and the new title which was issued by the Director was a nullity. The Director of Land Registration is an officer who is authorised to approve a correction of area. He is not authorised to make a grant of public land.

In the result, we find that this appeal fails and we dismiss it with costs on the lower scale to include an advocate's attendance fee of LP. 40.

The facts stated in the judgment of the learned Settlement Officer disclose a very serious state of affairs and one which quite clearly calls for an enquiry. Copies of the judgment of the Settlement Officer and of our judgment will be forwarded to the Attorney General for such action as he may deem fit to take.

Delivered in open Court this 3rd day of December, 1945, in the presence of Mrs. Rubenstein for Appellants Nos. 1 to 21, Mrs. Ginsberg for Appellants Nos. 22 to 57 and Mr. Hazou for Respondent No. 1.

British Puisne Judge.

CRIMINAL APPEAL No. 183/45.

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

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

IN THE APPEAL OF:—

Muhammad Abdul Rahman Abdul Qader Abul Inein. APPELLANT.

v.

The Attorney General. RESPONDENT.

Statement made by deceased — Whether more than one statement admissible — Evidence Ord., sec. 8 — Corroboration.

Appeal from the judgment of the Court of Criminal Assize sitting at Jaffa, dated the 22nd October, 1945, in Criminal Assize Case No. 40/45, whereby the Appellant was convicted of manslaughter, contrary to section 212 of the Criminal Code Ordinance, 1936, and sentenced to fifteen years' imprisonment; appeal dismissed:—

1. More than one statement made by a deceased person are admissible if made shortly after an act of violence to which they relate.

2. But these statements do not corroborate one another.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* CR. A. 37/45 (12, P. L. R. 210; 1945, A. L. R. 533) and note 2 in A. L. R.; see also CR. A. D. C. T. A. 169/45 (1945, S. C. D. C. 472) which deals with the same point.

2. There is "no rule of law or of practice that requires the details of a dying declaration to be corroborated". — CR. A. 18/42 (9, P. L. R. 168; 1942, S. C. J. 171; 12, Ct. L. R. 69).

(*H. K.*)

FOR APPELLANT: F. Ghussein.

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

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Jaffa, whereby the Appellant was convicted of manslaughter and sentenced to fifteen years' imprisonment.

The Appellant's case was ably argued before us by Fawzi Bey Ghussein, who urged many matters, the main contention being that there was not sufficient admissible evidence to justify the conviction.

The facts, shortly stated, are that on 9th July, 1945, the Accused

and the deceased had attended the District Court, Jaffa, where the deceased, along with other persons, was charged with causing grievous harm to the Accused. Owing to no fault of the deceased the case had to be adjourned. At about 6.55 or 7 *p. m.* on 10th July, 1945, the deceased, who was a man of about 40 years of age, was fired at in a *wadi* near Bashit village, Lydda District, and received a wound in the abdomen from which he died at about 2 *p. m.* on the 11th of July, 1945.

The principal witness for the prosecution was a boy of about 13, called Yousef Muhammad Hussein Salem, who was riding on the same donkey as the deceased. This witness had noticed the deceased's assailant, who appears to have been going in the same direction as Yousef and the deceased, but about 30 or 40 metres ahead of them. The assailant stopped, turned towards Yousef and the deceased, and then started to fire. Yousef, in evidence, said that he could not recognise the assailant. The deceased, however, after he was shot, told the witness that Muhammad Abdul Rahman Abdul Qader (that is, the present Appellant) had shot him. The trial Court believed Yousef when he said that the deceased had mentioned the name of the Appellant as the assailant, and we see no reason why the trial Court should not have accepted this evidence, nor do we think that it was established, as Fawzi Bey Ghussein contends, that someone had suggested to Yousef the name of the Appellant, nor do we think that the ninth prosecution witness, Abdul Salem, had suggested the Appellant's name to the deceased. The trial Court further found that the deceased had also mentioned the Appellant as being his assailant to prosecution witnesses Nos. 7, 9 and 10, namely Ahmad Hussein Abu Hilal, Abdul Salem and Abdul Raouf Hassan Subush, and that these statements were all made within about forty minutes of each other, that is to say, the latest was made not more than 40 minutes after the shooting.

Fawzi Bey has contended that only the first statement made by the deceased after he was shot is admissible. In other words, he says that the only statement that is admissible was that made by the deceased to the boy, Yousef; and he further contends that the word "statement" in line 1 of section 8, Evidence Ordinance, means that the evidence of only one statement can be admitted. We do not think that this is a sound construction to place on section 8. We think that, provided the statements were made shortly after the act of violence, they are all admissible. The words "or so soon after as he had an opportunity of complaining of it" refer to the case where it is impossible for the victim to make the statement at the time or shortly after. To take

an example, if a man is wounded on a hillside and has to crawl for help to a house, a long way off, it may be many hours before he meets someone to whom he could complain. It would therefore be impossible to say that the statement was made shortly after the act of violence; but the statement would still be admissible because it was made at the earliest opportunity he had of complaining. We therefore think that the statements made by the deceased to the witnesses whose names we have mentioned, were admissible; but, of course, they are not corroborative evidence. They merely confirm the fact that the deceased did mention the Appellant as being his assailant.

If the matter were left here it would, of course, be impossible to support the conviction; but there was also the very important evidence of the seventh prosecution witness, Ahmad Hussein Abu Hilal, who was not related to the deceased but was a distant relative of the Appellant. On the evening in question, between 6.50 and 7. *p. m.*, Ahmad was proceeding on his bicycle from Bashit village to Gdera, when he met the Appellant who was proceeding towards Bashit village. About thirty metres after passing the Appellant the chain of Ahmad's bicycle came off the wheel. He dismounted and began to put on the chain, and while doing so the deceased passed along with Yousef. While the witness was putting the chain on to the wheel he heard sounds of a shot and of someone screaming, recognising the voice to be that of the deceased. On hearing the shot and the screams he turned towards Bashit village and then saw the deceased and Yousef. This witness stated that he actually saw the deceased in the *wadi,* with the Appellant standing on the slope of the *wadi* firing at the deceased.

Much was made of discrepancies as to distances mentioned by this witness in Court, and the distance at which the witness must have been from the place of shooting, as described by him to the third prosecution witness, British Constable James, who prepared a plan from which it would appear that the witness was about 450 metres from the place of shooting. The Court of trial found as a fact that Ahmad witnessed the shooting, although he must have been further from that place than the distance he gave in Court. The Court of trial also believed that this witness had seen the Accused a very short time before he saw the deceased and Yousef coming along the path. We are unable to hold that the Court of trial were not justified in reaching this conclusion.

The Appellant, in giving evidence before the trial Court, admitted that he went from Gdera to Bashit on the day in question, and that it might have been about 6.30 *p. m.* when he left a bus at Gdera. We think that the evidence of Ahmad Hussein Abu Hilal sufficiently cor-

roborated the statement made by the deceased to prosecution witnesses 7, 9 and 10, as well as to prosecution witness 6, Yousef. It is clear that the Court below believed the evidence of the seventh prosecution witness, Ahmad.

In these circumstances we think that there was sufficient evidence to justify the conviction, and it follows therefore that the appeal must be dismissed.

Delivered this 20th day of December, 1945.

British Puisne Judge.

CIVIL APPEAL No. 306/45.

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

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

IN THE APPEAL OF :—

1. Adolf Fuchs,
2. Pharmaceutical Laboratory "Sana". APPELLANTS.

v.

"Eagle" Pharmaceutical Co. RESPONDENTS.

Injunction — Agency agreement — Construction of contract.

Appeal from the judgment of the District Court, Tel-Aviv, dated 30th of July, 1945, in Civil Case No. 168/44, dismissed:—

On a contract appointing exclusive agents for sale, an injunction may be granted, on the agents' application, restraining the principals from selling otherwise than through the agents.

(*A. M. A.*)

REFERRED TO: W. T. Lamb & Sons *v.* Goring Brick Co., 1932, 1 K. B. 710, 101 L. J. (K. B.) 214, 146 L. T. 318, 48 T. L. R. 160.

ANNOTATIONS:

1. See Halsbury, Vol. 1, p. 194, second paragraph, for the proposition that the whole contract must be scrutinised to determine whether a person described as "agent" is in fact an agent in the legal sense of the term.

2. No mandatory injunction will be granted where the contract is one for personal services: Halsbury, Vol. 18, pp. 66—7, para. 89 and Vol. 22, pp. 169—170, para. 282; *cf.* Mot. D. C. Jm. 443/45 (1945, S. C. D. C. 617).

(*H. K.*)

FOR APPELLANTS: Hake.

FOR RESPONDENTS: Levison.

JUDGMENT.

This is an appeal from a judgment of the learned Relieving President of the District Court of Tel-Aviv, which granted an injunction against the Appellants, the effect of which was to restrain them from marketing a certain class of goods except through the Respondents' company.

Two issues arise for decision. The first is whether the contract between the parties would at all entitle the Respondents to the relief which they obtained in the lower Court. The second is whether even if the nature of the contract would justify an injunction, failure on the part of Respondents to perform certain terms of the contract preclude them from this relief.

I agree with Mr. Hake that in many contracts the word "agent" is used without any reference to its meaning in Law. The point is emphasized by Scrutton, L. J., in Smith & Son * *v.* Goring Brick Co. (L. T. R. 146) referred to by Mr. Hake. The mere fact, therefore, that the word "agent" or "sole agent" or similar terms had been used would not preclude me from examining the other clauses of the contract in order to determine its true nature. It is on this basis that I proceed to interpret the contract, which is Exh. A in this case.

As in most commercial contracts, there is room for some controversy as to its details, but on the whole it appears to me to be free from ambiguity, and I have no difficulty in arriving at a conclusion as to what the parties intended. Clause 1 is as follows:—

> "Sana Laboratories grant to the Eagle Company the exclusive representation and distribution for all Egypt of all their chemical and pharmaceutical products, manufactured or sold by them. The said representation extends to all transactions and dealings concerning the products of "SANA" in the Egyptian market, which products will in consequence have to be dealt with exclusively through the Eagle Company, the Sana Laboratories impose upon themselves formally a prohibition from dealing or selling directly or indirectly to all other persons or firms residing in Egypt or dealing on behalf of transactions of goods the final destination of which is Egypt. All requests for offers, orders or otherwise emanating from the territory covered by this agreement shall be referred to Eagle Company in their capacity as of exclusive agents".

Taken by itself this clause conveys, as clearly as words could convey, an undertaking to grant to the Eagle Pharmaceutical Company an exclusive agency in Egypt for the marketing of the Sana Laboratories' goods. Mr. Hake would apparently concede that he could not escape this interpretation of clause 1 if is taken by itself, but he says that clauses 3 and 7 must be read as modifying those general terms. To my mind Clause 3 is nothing more than the usual consideration clause

* Should be: "Lamb & Son". (*Ed.*)

to be found in most contracts. It so happens that in this case the consideration is not money but an undertaking to place with the Sana Company orders to the amount of LE. 3000 per year. Considering the nature of the undertaking by the Appellants there is nothing unusual about this arrangement, and I cannot interpret it as in any way modifying the clear provisions of Clause 1, to which it is, in my opinion, merely subsidiary.

Dealing now with clause 7 which provides that the selling price in Egypt is to be at the absolute discretion of the Company. It is true that this clause taken away from the context might be held to constitute an argument against the contention that this was a contract for exclusive agency; but the clause cannot be interpreted without reference to Clause 3 from which it is evident that the Sana Laboratories were not interested in the selling price in Egypt. They were only interested in getting orders from the Appellant for goods which amounted to the value of LE. 3000. The price at which the goods were sold in Egypt was a matter of indifference to them, and the fact that they left this to be fixed by the Appellants would not derogate from its nature as a contract of exclusive agency. I can find nothing in the other clauses of the contract which would enable me to modify the plain language of Clause 1. It cannot be contended that on this interpretation the Sana Laboratories did not break their agreement, because it is admitted that they sold goods in Egypt to firms other than the respondent firm. The question now arises whether the Respondents were entitled to an injunction.

Mr. Hake argues that there could be no injunction in the case of agency and he quoted the case of W. T. Smith & Son* *v.* Goring Brick Co. which was a case concerning a question of personal service. It is true that in cases of personal service the Court will not always decree specific performance. But the undertaking in this case was not one of personal service, it purported to confer an exclusive right to market certain goods within a defined area for a limited period of three years and it seems to me that no remedy other than one of specific performance would be sufficient to do justice to the Respondents for the contractual breach by the Appellants.

I turn now to the second contention that even interpreting the contract as I have interpreted it, the Respondents are precluded from this remedy by virtue of their own failure. Their failure it is alleged was a failure to order goods to the value LE. 3000. This involves a considera-

* Should be: "Lamb & Son".

(*Ed.*)

tion of the question of the date of the commencement of the contract which also determines the issue raised in counterclaim. I come to the same conclusion as the learned Relieving President did as to the date of commencement of the contract, but I do not find the same difficulty in arriving at that conclusion as he did. I fail to appreciate how it could be contested that the date of commencement contemplated in Clause 2 was the date of the receipt in Egypt of the first order. In my opinion there was no substance in the involved arguments by which Mr. Levy sought to maintain that the order that arrived in Egypt in February, 1943, was not an order under the contract. If it was as I hold it was, an order under the contract it determines the date of commencement of the contract. This being so the Eagle Pharmaceutical Company did place orders to the amount of LE. 3000 within the twelve months and consequently there was no breach of the contract on their part.

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

Delivered this 26th day of February, 1946, in the presence of Mr. Hake for Appellants and Mr. Levison for Respondents.

Chief Justice.

CIVIL APPEAL No. 254/45.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ahmad el Bastuni & 2 ors. APPELLANTS.

v.

Ayisha Ibrahim Khalil Hadida & 11 ors. RESPONDENTS.

Specific performance — Consideration by refraining from claiming past debt — Possession not necessary — Failure by all parties to sign.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, delivered on the 8th of June, 1945, in Case No. 4/Khirbet el Hiqab, partly allowed:—

1. The cancellation of a past debt is valuable consideration.

2. Unlike in cases of equitable title, possession need not have passed to support a claim for specific performance.

(*A. M. A.*)

ANNOTATIONS:

1. "Forbearance to sue ..... is valuable consideration for a promise .....": Halsbury, Vol. 7, p. 143, para. 202.

See *ibid.*, pp. 144 *et seq.*, para. 204, on "past consideration".

2. On specific performance *cf.* C. A. 179/45 (12, P. L. R. 505; 1945, A. L. R. 708) and note in A. L. R.

3. Note that the contract of sale was not signed by all the parties thereto and *cf.* C. A. 176/34 (7, C. of J. 161), C. A. 200/35 (1937, S. C. J. (N. S.) 48; 1, Ct. L. R. (N. S.) 113), C. A. 254/40 (8, P. L. R. 134; 1941, S. C. J. 110) and C. A. 273/40 (9, P. L. R. 177; 1942, S. C. J. 956).

(*H. K.*)

FOR APPELLANTS: Cattan.

FOR RESPONDENTS: Nos. 1—6, 10 & 12 — A. Shukeiri.
Nos. 7, 8, 9 & 11 — Absent — served.

JUDGMENT.

This is an appeal from a decision of the Land Settlement Officer, Safad, in Case No. 4/Khirbet el Hiqab, an abandoned village.

We quote from the decision as follows:—

> "The area is about 2,500 *dunums*, and the cultivable lands at least are registered in *Tabu*.
>
> Registration of the whole 24 *qirats* is said to have been in the name of Ibrahim Khalil Hadida. I have the documents showing 12 *qirats* in his name dated 1294 *A. H.* In 1310 *A. H.* registration of the remaining half was apparently carried out in Ibrahim's name. There were 4 brothers: Ibrahim, Muhammad, Mahmud and Mustafa. In 1326, Ahmad Ibn Muhammad and Rashid Ibn Mahmud raised an action in the Courts against Ibrahim, asserting that, although Ibrahim was registered owner, he and his three brothers should really have 6 *qirats* each, and Ibrahim should be considered as a nominee. The vendors to Ibrahim agreed that that was the manner in which the sale was carried out; Ibrahim said "no", and maintained that he owned all the lands of the *Khirbet* by transfer to his name in 1294 and 1310. Judgment was given in favour of the Plaintiffs, Ahmad and Rashid as heirs of their fathers, for half the registered shares. Those shares subsequently passed to outsiders and do not enter into the dispute.
>
> The Defendants in this case are the heirs of Ibrahim, and they claim the remaining 12 *qirats*. The Plaintiffs are the heirs of Mustafa, the fourth brother. They claim 6 *qirats* by inheritance from Mustafa and 6 *qirats* by purchase from the heirs of Ibrahim. It is to be understood that the Defendants would include Plaintiffs 1 and 3, while the Plaintiffs would exclude all the Defendants".

We shall first deal with the claim of the Appellants to six *qirats* alleged to have devolved by inheritance from Mustafa who was not a

registered owner. The Appellants in the Court below relied on a decision of the Turkish Courts in the year 1326. The plaintiffs in that case were Ahmad Ibn Muhammad and Rashid Ibn Mahmud, nephews of Ibrahim, against their uncle, the said Ibrahim Hadida. The plaintiff in Land Court Case No. 46/37 Haifa was Aysha Ibrahim on her own behalf and on behalf of the heirs of her mother Karma, widow of Ibrahim (the registered owner) against one Said Suleiman el Bitar for cancellation of certain entries in the Land Registry in the name of the latter when acting in pursuance of a Power of Attorney given by Karma. The Court there held that Aysha and her co-heirs had always been in possession. While we do not agree with the Land Settlement Officer in thinking that that judgment was *res judicata* as against the present Appellant, nevertheless we think that the latter cannot rely on it for establishing the possession of Mustafa. Nevertheless we are not prepared to interfere with the decision of the Land Settlement Officer to the effect that the Appellants had failed to prove Mustafa's ownership in six *qirats* notwithstanding the fact that there was certain evidence of payment of tithes, and of a judgment for recovery of possession.

The next ground of appeal is that the Settlement Officer erred in not ordering specific performance of an agreement of 3rd July, 1935, whereby certain of the heirs of Ibrahim agreed to sell to the Appellants six *qirats* in consideration of their refraining from suing for a sum of LP. 400.— lent by virtue of a document made before the Notary Public of Safad in 1925. The Settlement Officer was of opinion that the fact that the LP. 400.— had been already paid by the Appellants could not be regarded as consideration. In this we think he erred because it is clear that the consideration was that the Appellants would regard the debt as cancelled provided the Respondents carried out the agreement to transfer the land. We also think that the Settlement Officer erred in holding that proof of delivery of land was necessary. That would be necessary in a case where equitable title was being set up but not where specific performance is sought. Although the document of 3rd July 1935 narrated that five persons were parties to it we observe that only three persons signed.

We, therefore, set aside the decision of the Settlement Officer with regard to these six *qirats* and order specific performance in respect of the shares of the three persons who signed the document, namely, Fatmeh, Saadah and Aysha. No costs of this appeal.

Delivered this 21st day of February, 1946, in the presence of Mr. O. Mergurian for Appellants, and in the presence of Mr. Abdel Rahman El Nahawi for Respondents.

British Puisne Judge.

CRIMINAL APPEAL No. 201/45.

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

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

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Jalal Afif Kharouf. RESPONDENT.

Appeal by A. G. — T. U. I. Ord., sec. 67 — Finger print evidence, CR. A. 25/45, 59/45 — Findings of fact.

Appeal from the judgment of the District Court, Haifa, dated 1st November, 1945, in Criminal Case No. 182/45, whereby the Respondent was acquitted of a charge of breaking into a shop and committing theft therein, *contra* section 297(a) of the Criminal Code Ordinance, 1936; appeal dismissed:—

The Attorney General is not entitled to appeal on the ground that the lower Court should, on the evidence, have come to a different finding of fact.

(*A. M. A.*)

REFERRED TO: CR. A. 25/45 (12, P. L. R. 198; 1945, A. L. R. 454); CR. A. 59/45 (*ibid.*, pp. 231 & 567).

ANNOTATIONS:

1. Note that the decision in this case seems to be based on sec. 67 as it stood before the amendment of 1944 (Criminal Procedure (T. U. I.) (Am.) Ord., No. 31 of 1944) as there are now five (and not only three) grounds on which the Attorney General may appeal; it appears, however, that the appeal in the instant case would not have fallen under the new sec. 67(1)(a).

2. *Cf.* CR. A. D. C. Jm. 90/45 (1945, S. C. D. C. 559) and note for cases under sec. 11(3) of the M. C. J. O. which corresponds to sec. 67 of the T. U. I. Ord. before the amendment.

(*H. K.*)

FOR APPELLANT: Kokia.

FOR RESPONDENT: Hamoudeh — by delegation.

JUDGMENT.

This was an appeal by the Attorney General against a decision of the A/Relieving President of the District Court of Haifa acquitting the Accused who was charged under sections 297(a) and (b) of the Criminal Code Ordinance. The facts were that undoubtedly a breaking and entering within the meaning of these sections had been effected, and that on the inside of the broken window two finger-prints of the

Accused were found. Now on this evidence, and accepting as we do that finger-prints are legal evidence, we should have thought that the learned Judge would not have had much difficulty in coming to the conclusion that there was sufficient evidence upon which to call upon the Accused for his defence; but before we go any further, I must state once again that this Court is not a trial Court and we do not propose to usurp functions of a trial Court.

The Attorney General has appealed under section 67, Criminal Procedure (Trial Upon Information) Ordinance, which allows an appeal by the Attorney General on three grounds, *viz.* that evidence was wrongly admitted or excluded; that the law was wrongly applied to the facts; that the punishment awarded was insufficient. The last ground does not arise in this case. Criminal Appeals Nos. 25/45 and 59/45 were sufficient authority for holding that the evidence of finger-prints when properly tendered by the experts is perfectly admissible in evidence.

In this case the learned Judge did not exclude the evidence of the finger-prints. In fact, in his judgment he makes it clear that he accepted it and that he accepted the decisions in the cases to which I have referred. But he reasoned, even admitting this evidence I do not think it sufficient to connect the Accused with the offence. If instead of the finger-prints the evidence had been that the Accused himself was actually seen on the spot where the finger-prints were found, the Judge would be equally entitled to say that he still was not satisfied that the Accused was sufficiently connected with the offence. We might disagree with him on a point of fact, and it is purely a question of fact, but we cannot say that he was wrong in law, within the ambit of the appeal allowed to the Attorney General under section 67(1) of the Criminal Procedure (Trial Upon Information) Ordinance.

For these reasons the appeal by the Attorney General must be dismissed.

Delivered this 19th day of December, 1945.

Chief Justice.

---

1 CRIMINAL APPEAL No. 187/45.

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

BEFORE: Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Leonard Payne. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal by accused — M. C. J. O., sec. 11, M. C. P. R. r. 277(2) — Evidence of accomplice.

Appeal from the judgment of the District Court of Jerusalem in its appellate capacity in Criminal Appeal No. 69/45, dated 19th October, 1945, whereby Appellant's appeal from the judgment of the Chief Magistrate's Court of Jerusalem in Criminal Case No. 9024/45, dated 30.8.45, whereby Appellant was convicted of accepting a gratification by a public servant in respect of an official act contrary to section 106 of the Criminal Code Ordinance, 1936, and sentenced to four months' imprisonment, was dismissed; appeal dismissed:—

1. An appeal lies under sec. 11 of the M. C. J. O. when it is alleged that there was not sufficient evidence on which findings of fact could lawfully be made.

2. Instances where a witness should be treated as an accomplice discussed.

(*A. M. A.*)

ANNOTATIONS:

1. Note that the appeal in this case fell under sec. 11(2)(a) of the M. C. J. O. which gives a wider right of appeal to the accused person than that given to the A. G. by sec. 11(3); the position is different under the T. U. I. Ordinance since its amendment in 1944. *Cf.* CR. A. 201/45 (*ante*, p. 158) and notes thereto.

2. On the second point *cf.* CR. A. 39/42 (1942, S. C. J. 224) and note 1, CR. A. 44/43 (10, P. L. R. 283; 1943, A. L. R. 426), CR. A. 71/44 (1944, A. L. R. 450) and CR. A. 151/44 (11, P. L. R. 629; 1945, A. L. R. 267).

(*H. K.*)

FOR APPELLANT: Levitzky and S. T. Cohen.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal by leave from a judgment of the District Court, Jerusalem, dismissing an appeal from a judgment of one of the learned Acting Chief Magistrates of Jerusalem who had convicted the Appellant of an offence contrary to section 106 Criminal Code Ordinance and sentenced him to four months' imprisonment with special treatment.

The learned Acting Relieving President dismissed the appeal as he thought that the matter did not fall within the ambit of section 11, Magistrates' Courts Jurisdiction Ordinance, 1939. In this, however, we think that he erred because the sole question before him was whether there was sufficient evidence on which the Magistrate could lawfully find facts necessary to support the judgment. Much of the judgment

of the District Court was directed to a criticism of the judgment of the Magistrate and to some extent to a criticism of Rule 277(2), Magistrates' Courts Procedure Rules, 1940.

The Magistrate believed the main witnesses for the prosecution one, at any rate, of whom (Muhammad Abdul Rahman Abu Issa) was admittedly an accomplice. The Appellant was one of a police party who had searched the house of Muhammad Abdul Rahman who is the owner of taxi cabs and who also owns a garage. They found 28 tyres and it transpired that Mahmoud had committed an offence by reason of not reporting to the appropriate controller his possession thereof. About midnight the police party (among whom was the Accused) returned and, after some conversation, Mahmoud agreed to pay LP. 120 to the Appellant in return for the Appellant's destroying the police file which had been opened with the intention of a case being lodged against Mahmoud. When Mahmoud went to obtain money from the bedroom one, Abdul Rahman Abu Issa, his nephew and son-in-law, saw him taking money from the bed-room; but, when Mahmoud actually paid the money to the Appellant, Abdul Rahman Abu Issa was standing behind the door which was closed.

The sole question of law and fact before the Magistrate was whether Abdul Rahman was or was not an accomplice. In spite of the District Court's criticism of the Magistrate's judgment, we think that the Magistrate did direct his mind to the proper considerations and did advise himself as to the necessity for deciding whether or not Abdul Rahman was an accomplice.

Mr. Levitzky has argued that the Magistrate did not sufficiently realise the effect of the relationship between Mahmoud and Abdul Rahman and the fact that Abdul Rahman would naturally be anxious to keep his uncle out of trouble. Mr. Levitzky contends that Abdul Rahman was something more than a mere independent observer. We do not agree. From the evidence of Mahmoud there was nothing to show that Abdul Rahman had any intention of assisting in the commission of a crime. We think that the Magistrate realised the necessity of treating Abdul Rahman's evidence with great caution. Being a nephew of Mahmoud, we do not think that it was reasonable to expect Abdul Rahman to interfere with his uncle's actions.

Mr. Levitzky points to what Abdul Rahman did on the following day as showing that he had guilty knowledge at the time. It seems that, on the following day, one Khalil Hammouri, another accomplice, came to Abdul Rahman and told him to return to his uncle the LP. 120 as the Appellant and others were now demanding LP. 300 and were not

content with LP. 120. Khalil Hammouri gave Abdul Rahman LP. 120 which Abdul Rahman (not unnaturally) returned to his uncle, having been requested to do so by Khalil Hammouri. We do not agree with Mr. Levitzky when he argues that this shows that Abdul Rahman was an accomplice. The question whether Abdul Rahman was an accomplice was a question of fact. From a perusal of the record of the evidence (including that of Mahmoud Abdul Rahman and Khalil Hammouri and Abdul Rahman himself) we think that there is nothing to show that Abdul Rahman had guilty knowledge.

For these reasons we think that the Magistrate rightly decided that he was not an accomplice. We accordingly dismiss the appeal.

Delivered this 5th day of December, 1945.

British Puisne Judge.

CIVIL APPEAL No. 261 & 264/1944.

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

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

IN THE APPEAL OF:—

Muhammad Ali Qasem Asqul. APPELLANT.

v.

Palestine Jewish Colonisation Association, and ten others. RESPONDENTS.

Withdrawal of appeal — Notarial notice addressed to Court — Withdrawal cannot be revoked — Watson v. Cave.

Appeals from the decision of the Land Settlement Officer, Safad Settlement Area, dated 18th June 1944, in Case No. 1/Birya, dismissed:—

Once an appellant withdraws his appeal, he may not go back on the revocation and the appeal must be dismissed.

(*A. M. A.*)

APPROVED: Watson *v.* Cave (No. 2), 1881, 17 Ch. D. 23, 50 L. J. Ch. 561, 44 L. T. 117.

ANNOTATIONS:

1. The appeals in this case had been adjourned from the previous day — see *ante*, p. 137.

2. The notarial notice of 29.12.44 withdrawing the appeals was in the following terms :

"And whereas it transpired to me lately that the decision of the said Settlement

Officer is correct and conforms with the actual facts which facts I was not aware of and due to which the said decision was given and against which I have no objection; therefore, I hereby declare and admit the contents and correctness of that decision because it reveals the full facts and for this reason I pray from Your Honourable Court to cancel and annul the said appeal lodged by me and in my name to Your Honourable Court in respect of the said appeal cases and I also declare that I have cancelled and annulled all the powers of attorney given by me to advocates Henry Eff. Cattan and Subhi Bey El Khadra and Awni Bey Abdul Hadi and others whose names were mentioned in the said powers of attorney signed by me in the said cases in order to represent me before Your Honourable Court and before any other Court."

3. The new power of attorney given by the Appellant was dated 10.12.45, *i. e.* the date of the previous day's hearing (*supra*, note 1); in support of his objection to the hearing of the appeal counsel for Respondent referred to O. 58, rr. 1 & 2 of the R. S. C. J. and to Watson *v.* Cave (*supra*).

4. Note that Watson *v.* Cave (*supra*) dealt with an appeal that had been withdrawn *with the consent of the respondent* and the court held that respondent's agreement to the withdrawal created a contract from which the appellant could not recede. The case was distinguished in the recent decision of the Court of Appeal in *Re* Samuel (No. 2), 1945, 2 All E. R. 319.

(*H. K.*)

FOR APPELLANT: Cattan and S. Khadra.

FOR RESPONDENTS: No. 1 — Eliash, Scharf and Feiglin.
Others — no appearance.

RULING.

We think that Dr. Eliash's contention must be upheld. It is true that English Rules of the Supreme Court do not themselves apply here. We consider that the case of Watson *v.* Cave 1881 Vol. 17 Chancery Division (No. 2) page 23 at page 25 is a useful guide. In view of the definite terms of the solemn notarial notice of 29th December, 1944, we consider that the appellant could not revoke such withdrawal.

Civil Appeals 261, 264/44 are therefore dismissed.

Given this 11th day of December, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 195/45.

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

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

IN THE APPLICATION OF :—

Badawi Ahmad Ijneid. APPLICANT.

v.

Attorney General. RESPONDENT.

Plea — Ignorance of Law — New evidence.

Application for leave to appeal from the judgment of the District Court, Jaffa, dated 8th November, 1945, in Misdemeanour Case No. 196/45, whereby Applicant was convicted of an offence *contra* Regulation 24A(1)(d) of the Defence Regulations, 1942, and sentenced to four months' imprisonment; appeal dismissed:—

A fresh defence after conviction, based on facts which were in the cognizance of the Court of trial, will not be entertained on appeal.

(*A. M. A.*)

FOR APPLICANT: Ghussein.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

The only issue in this case is whether the Accused has successfully discharged the burden of proof that he had a reasonable excuse for having this property on him. Despite the commendable fairness of the Crown Counsel, we see no reason to remit this case for a retrial. In the first place we would remark that people in Palestine are presumed to know the criminal law of Palestine. The Accused pleaded to the indictment. He does not allege any duress in making that plea — the trial proceeded without any objection from him and he put forward his defence. The fact that counsel, whom he has since consulted, speculates that he can produce evidence which he alleges would be acceptable as reasonable proof, would not be sufficient to justify us in returning this case for further enquiry, particularly in view of the fact that the trial Court was aware of the nature of the evidence which counsel now says he is in a position to adduce, and it did not see fit to suggest to the Accused that he should call this evidence to substantiate his somewhat improbable averment.

For these reasons the appeal is dismissed and the sentence of the lower Court confirmed.

Delivered this 5th day of December, 1945.

Chief Justice.

HIGH COURT No. 99/45.

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

BEFORE : Shaw J. and Frumkin J.

IN THE APPLICATION OF —

Eid Bin Ali el Jarab'ah. PETITIONER.

v.

1. Odeh Hussein el Homran,
2. The Chief Execution Officer, Magistrate's Court, Beersheba. RESPONDENTS.

Judgment of Tribal Court based on report of a referee whose appointment allegedly defective — Non-interference of High Court, as point was not raised in appeal.

Return to an order *nisi* issued on the 27th November, 1945, directed to the second Respondent calling upon him to show cause, if any, why his order dated 7th November, 1945, in Execution file No. 87/45 Beersheba Magistrate's Court, should not be set aside and further why he should not refrain from executing the purported order of the Beersheba Tribal Court confirming an arbitrator's award; order *nisi* discharged:—

Fact that order directing a certain person to make an enquiry and report to Tribal Court was not countersigned by a District Officer, will not be taken into consideration by High Court, if point was not one of grounds of appeal raised before appellate Tribal Court.

(*M. L.*)

FOR PETITIONER: Nazzal.

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

ORDER.

This is a return to an order *nisi* dated 27.1.45 calling upon the second Respondent to show cause why his order dated 7.11.45 in Execution File No. 87/45 of the Beersheba Magistrate's Court, should not be set aside, and further why he should not refrain from executing the purported order of the Beersheba Tribal Court confirming an arbitrator's award.

In his petition the Petitioner states that the Tribal Court referred the dispute to a single arbitrator with the consent of both parties. Having heard Faiz Eff. Nazzal, for the Petitioner, and Abdul Rahim Eff. El Shareef, for the second Respondent, I have come to the conclusion that the reference was one which could validly have been made

under Rule 11 of the Tribal Courts Rules 1937 (see Laws of Palestine 1937, Vol. 3, p. 841). I do not regard it as having a true reference to arbitration. It was, I think, an order to Sheikh Abed Rabbo Abu el Ihsein to make an enquiry and report to the Court, and that is what Sheikh Abed Rabbo Eff. did. It is true that the order directing him to report ought to have been countersigned by a District Officer, but the fact that it was not so countersigned was not one of the grounds of appeal raised before the Appellate Tribal Court, and I do not think that it is a circumstance which the High Court ought to take into consideration.

The Tribal Court, after perusing the papers of the case and the report, gave a judgment in accordance with the report, which stated that the land in dispute was in the possession of the Plaintiff (*i. e.* the first Respondent) and his brothers.

I can see no sufficient reason for holding that the judgment was a nullity and I think that it is one which must be executed.

The order *nisi* must, therefore, be discharged with fixed costs in the sum of LP. 10 (ten pounds).

Given this 2nd day of January, 1946.

British Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 184/45.

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

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

IN THE APPEAL OF:—

Dr. S. Sikales. APPELLANT.

v.

Dr. Nasouh el Nabulsi. RESPONDENT.

Failure to pay rent — Tenant alleging a counterclaim against landlord.

Appeal from the judgment of the District Court of Jaffa in its appellate capacity dated 16th May, 1945, in Civil Appeal No. 28/45, from the judgment of the Magistrate's Court of Jaffa, dated 3rd March, 1945, in Civil Case No. 111/45, dismissed:—

Tenant discontinuing to pay rent — liable to eviction notwithstanding an alleged counter-claim against landlord.

(*M. L.*)

ANNOTATIONS: See C. A. 488/44 (12, P. L. R. 380; 1945, A. L. R. 718) and annotation thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Taji.

FOR RESPONDENT: Michaeli.

JUDGMENT.

In the Magistrate's Court the present Respondent claimed that Appellant had not paid two promissory notes in respect of rent, and asked for the eviction of the Appellant and payment of the said notes. It is clear from the defence filed by the Appellant that he did not deny the non-payment of the notes but alleged that he was not liable to pay because he had certain counterclaims against the Respondent.

The Magistrate gave judgment for the present Respondent, which judgment was upheld by the District Court.

We see no merit in this appeal at all. It is clear both from the written defence and the proceedings before the Magistrate that although Respondent asked payment for the rent, the Appellant withheld payment because he considered he had a claim in respect of some chairs of his kept by the Respondent.

We agree with the judgment of the District Court that this alleged counterclaim which was actually never proved, did not entitle Appellant to discontinue payment of the rent, and we accordingly dismiss the appeal with costs on the lower scale, and we fix the advocate's hearing fee at LP. 10.

Delivered this 3rd day of December, 1945.

A/British Puisne Judge.

HIGH COURT No. 109/45.

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

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPLICATION OF:—

Yusuf Awad Mohammad Abu Ta'ah. PETITIONER.

v.

The Local Building and Town Planning Commission, Jerusalem & an. RESPONDENTS.

Refusal to grant a building permit — Powers of a Local Building and Town Planning Commission in connection with "outline schemes".

Return to an order *nisi* issued on the 2nd day of January, 1946, directed to the Respondents calling upon them to show cause, if any, why the requisite building permit should not be issued; order *nisi* discharged:—

1. High Court will not interfere with a refusal of a building permit unless satisfied that the permit was refused capriciously or on no reasonable ground.

2. A Local Building and Town Planning Commission is justified in examining an application for a permit in the light of the existing "outline scheme" and to take into consideration any road, street *etc.*, whether existing or proposed, if covered by the definition of "road" in the local scheme.

(*M. L.*)

ANNOTATIONS: See H. C. 104/45 (*ante*, p. 123) with annotations.

(*A. G.*)

FOR PETITIONER: Nazzal.

FOR RESPONDENTS: Said.

ORDER.

De Comarmond, J.: The Petitioner in this case applied for an order *nisi* directed to the Respondents to show cause, if any, why a building permit should not be granted to Applicant and why they should not refrain from demolishing Petitioner's building.

An order *nisi* was issued but the Respondents were only called upon to show cause, if any, why the requisite building permit should not be issued.

On behalf of Respondent No. 2 the point has been taken that he has nothing to do with the granting of building permits and should be put out of cause. Faiz Eff. Nazzal, who appeared for Petitioner, did not object, and the order *nisi* against Respondent No. 2 was accordingly discharged.

The relevant facts are the following:—

(a) Petitioner's brother, one Atta Awad Abu Ta'ah, was prosecuted before the Magistrate's Court, Jerusalem, for building without a permit at Khillet el Tarha, Lifta Village, within the Jerusalem Town Planning Area.

(b) Atta pleaded guilty on the 17th July, 1945, and was fined by the Magistrate, who also ordered the Jerusalem Local Building & Town Planning Commission to demolish the unauthorised building.

(c) No appeal was lodged against the order of demolition, and it is important to note that an appeal in such a matter may be made

not only by a party to the proceedings but also by the owner of the property to which the order relates (section 35(8) of Ordinance No. 28 of 1936, as replaced by section 5 of Ordinance No. 31 of 1941).

(d) Petitioner's brother, Atta, subsequently applied in his own name for a building permit, which was refused on the ground that the front set-back of the building would be too near the proposed road line.

On behalf of the Respondent we have affidavits sworn by Saba Eff. Said and by Mr. Pommerantz, the senior Engineering Assistant of the Municipal Corporation of Jerusalem.

Saba Eff. Said appeared for Respondent No. 1 and submitted that Petitioner had no *locus standi* because he had not applied for a building permit. This is admitted by the Petitioner's advocate who, however, produced a power-of-attorney which, he claims, authorised Atta to act for Petitioner. We need not consider this point, in view of the decision we have arrived at on the main issue.

Saba Eff. also alluded to the fact that the order to demolish was still in force and that the unauthorised building had not been pulled down. In this connection we have decided to proceed as if the second ground of the Petitioner's application were the only one before us; but, in so doing, we do not intend to prejudice in any way the Magistrate's order of demolition. The said second ground reads as follows:—

> "It is submitted that the issue of a permit cannot be refused arbitrarily, when as in this case the building falls within the four walls of the Town Planning Regulations according to the present condition of the land".

We desire to make it clear that we would not interfere in such a matter unless satisfied that the Respondent had capriciously or on no reasonable ground refused a building permit.

It is quite clear in this case, and it is not disputed by Petitioner, that the Respondent did examine the application for a permit and did refuse it, giving one reason for the refusal (that the front set-back was not sufficient). In the affidavit filed on behalf of the Respondent it is stated that there are two other grounds of refusal based respectively on the inadequacy of the rear set-back and on the fact that the site is not a "plot" as defined in Part II of the Jerusalem Outline Town Planning Scheme (Modification), 1943, published in Palestine *Gazette* of the 14th September, 1944, Supplement No. 2, page 901.

The main contention urged before us by Faiz Eff. Nazzal is that the Respondent came to a wrong decision because the set-backs are ample

as the road now stands, and would be inadequate only when the proposed road is in existence. In other words, his contention is that the proposed roads in a town planning scheme cannot be taken into consideration until they have been actually laid out. Such a contention, if correct, would mean that a scheme would be continually interfered with pending its being carried into effect. This is not the law. Section 13(2) of the Town Planning Ordinance, 1936, provides for restrictions on building when an "outline scheme" is in existence, and the definition of "road" in Part II of the aforementioned Jerusalem Outline Town Planning Scheme (Modification) 1943, clearly includes any street, *etc., whether existing or proposed.*

We are therefore of opinion that in the present case Respondent No. 1 was justified in examining the application for a permit in the light of the existing scheme.

We therefore see no ground for granting the order prayed for, and the order *nisi* is accordingly discharged with inclusive costs against the Petitioner in the amount of LP. 10.

Given this 4th day of March, 1946.

British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

HIGH COURT No. 2/46.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPLICATION OF :—

Yousef Habib Khasho. PETITIONER.

v.

Chief Execution Officer, District Court of Jerusalem & an. RESPONDENTS.

Action in Religious Court for separation — Cross-action by wife for alimony and for custody and maintenance of children — Jurisdiction of Religious Court.

Return to an order *nisi* issued on the 24th January, 1946, directed to the first Respondent calling upon him to show cause why he should not abstain from executing the judgments of the Ecclesiastical Court of the Catholic Community and the Court of Appeal given on 31st of August, 1945, and the 15th of October,

1945, respectively, whereby Petitioner was adjudged to pay alimony for his wife and maintenance for his children in the sum of LP. 12.— with fees and costs, as from the 18th of August, 1944, as laid down in the judgment of the lower Court in Case File No. 251/45, Execution Office, District Court, Jerusalem; order *nisi* discharged:—

> Ecclesiastical Court seized with an application for separation has jurisdiction to make orders not only for alimony but also for custody and maintenance of the children, this being ancillary to order of separation.
>
> (*M. L.*)

REFERRED TO: Special Tribunal 1/28 (1, P. L. R. 395); C. A. 62/37 (4, P. L. R. 249; 1937, S. C. J. (N. S.) 249; 2 Ct. L. R. 133); H. C. 28/38 (5, P. L. R. 351; 3, Ct. L. R. 287; 1938, 1 S. C. J. 373); Privy Council Leave Appl. 41/42 (10, P. L. R. 328; 1943, A. L. R. 487); H. C. 4/44 (11, P. L. R. 7; 1944, A. L. R. 189); H. C. 103/42 (9, P. L. R. 579; 1942, S. C. J. 582); C. A. 60/43 (10, P. L. R. 241; 1943, A. L. R. 217); H. C. 1/44 (11, P. L. R. 592; 1944, A. L. R. 729); H. C. 63/44 (1944, A. L. R. 792); H. C. 27/45 (12, P. L. R. 357; 1945, A. L. R. 734).

ANNOTATIONS: See cases referred to and annotations thereto in A. L. R.; see also H. C. 108/45 (*ante*, p. 44) with annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: Assal.

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

ORDER.

Shaw, J.: The Petitioner, who is the husband of the second Respondent, brought an action on 18.8.44 before the Ecclesiastical Court of the Latin (Catholic) Community asking for an order of separation and for an order depriving his wife of her right to alimony. It is agreed that the parties are both members of the Latin Catholic Community, and that they were married in the Church of the community on 29.9.35.

The second Respondent filed a cross-action on 23.8.44 asking for alimony for herself and her three children.

In the result the Ecclesiastical Court of first instance gave the custody of the children to the second Respondent and ordered the Petitioner to pay LP. 13 per month — that is to say LP. 5 per month for the support of the second Respondent, and LP. 2 per month for each of the four children (another child having been born to the second Respondent during the pendency of the proceedings). An appeal was made to the Ecclesiastical Court of Appeal and the judgment was confirmed, but the allowance in respect of the second Respondent was reduced to LP. 4 per month.

Shafic Eff. Asal, advocate for the Petitioner, does not dispute the validity of the allowance of LP. 4 per month in respect of the second

Respondent, and I am unable to find that the judgment of the Ecclesiastical Court has been shown to be contrary to natural justice in any respect.

The only question to be decided is whether the Ecclesiastical Court had jurisdiction to award the allowance of LP. 2 per month in respect of each child. Shafic Eff. submits that the allowance which the Ecclesiastical Court ordered in respect of the children was maintenance, and that as the Petitioner had objected to the Ecclesiastical Court's dealing with the question of maintenance for the children, the order which the Court made was *ultra vires*.

There are really two points to be considered. The first is whether the order of the Ecclesiastical Court awarding maintenance for the children was made in the exercise of its jurisdiction under Article 54(2) of the Palestine Order-in-Council 1922 (Laws of Palestine, Vol. 3, p. 2582), and therefore an order which could only be made if the parties had consented to the jurisdiction. Secondly, if the answer to this question is in the affirmative, whether the Petitioner had in fact consented to the jurisdiction of the Ecclesiastical Court.

The following cases were referred to by Shafic Eff. Asal for the Petitioner:—

Special Tribunal 1/28 — 1 P. L. R. 395.
C. A. 62/37 — 4 P. L. R. 249.
H. C. 28/38 — 5 P. L. R. 351.
Privy Council 41/42 — 10 P. L. R. 328.
H. C. 4/44 — 11 P. L. R. 7.

The following cases were referred to by Anastas Eff. Hanania advocate for the second Respondent:—

H. C. 103/42 — 9 P. L. R. 579.
C. A. 60/43 — 10 P. L. R. 241.
H. C. 1/44 — Annotated L. R. 1944, Part 46, p. 729.
H. C. 63/44 — Annotated L. R. 1944, Part 50, p. 792.
H. C. 27/45 — 12 P. L. R. 357.

The relevant portions of Article 54 of the Palestine Order-in-Council read as follows:—

> "54. The Courts of the several Christian communities shall have:—
> (i) Exclusive jurisdiction in matters of marriage and divorce, alimony, and confirmation of wills of members of their community other than foreigners as defined in Article 59,
> (ii) Jurisdiction in any other matters of personal status of such persons, where all the parties to the action consent to their jurisdiction."

In Special Tribunal 1/28 it was held that the periodical allowance payable out of a Jewish husband's estate to a widow pending the payment to her of *Ketuba* was a "matter of marriage" within the contemplation of Article 53(a) of the Palestine Order-in-Council, 1922, and in consequence was within the exclusive jurisdiction of the Rabbinical Court. Corrie, J., in the course of his judgment, said:—

> "Clearly, however, the widow's right of maintenance arises out of the marriage. I hold, therefore, that it is a "matter of marriage" within the meaning of Article 53(a) of the Palestine Order-in-Council, and hence is within the exclusive jurisdiction of the Rabbinical Court".

C. A. 60/43 was an appeal against a judgment whereby an order had been made for judicial separation, the custody of both children of the marriage being given to the Respondent. The Appellant had also been ordered to pay LP. 6.— maintenance to the Respondent, calculated at the rate of LP. 2 per head each for the Respondent and the two children. The following passage appears in the judgment:—

> "In my opinion, where an application is made for a decree of judicial separation and an ancillary and consequential claim is also made for custody of a child, if the Court applied to has no jurisdiction to grant the judicial separation on such application as being within the exclusive jurisdiction of another Court, similarly such Court has no jurisdiction to make an order as to such custody. I would, however, guard myself from saying that where the District Court can and does properly make an order as to maintenance of a wife and child, it cannot also make an order as to the custody of such child, for the reason that such application is not a matter of marriage or divorce.
>
> I agree entirely that there is a distinction to be drawn between guardianship and custody, and that although the questions may be combined they can also be entirely separate and distinct.
>
> Similarly as regards the claim for maintenance in this case, having held that the District Court had no jurisdiction to make a decree of judicial separation, I also hold that in this case and on such application the District Court had no power to make the ancillary orders as to custody and maintenance".

This case was followed in H. C. 63/44 where the parties both belonged to the Latin Church. The learned judge observed in his judgment that:—

> "... the matter seems to be one within the sole jurisdiction of the Ecclesiastical Court, which Court has definitely awarded the Petitioner the custody of these two daughters".

Having considered these and other cases to which the parties have referred, I have no hesitation in holding that the question of the custody

of the children was ancillary to the order for separation. It was the Petitioner himself who asked for an order of separation, and that order could be made only by the Latin Ecclesiastical Court. In my judgment that Court clearly had jurisdiction to make an order regarding the custody and maintenance of the children. The Ecclesiastical Court in this case had indeed exclusive jurisdiction to make the orders for custody and maintenance.

In the result I find that the order *nisi* must be discharged and the second Respondent will have fixed costs in the sum of LP. 10.— (ten pounds).

Given in open Court this 26th day of February, 1946, in the presence of Yehia Eff. Hammoudeh (for Sh. Eff. Asal) for Petitioner, and in the presence of Mr. Hanania for Respondent No. 2.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

HIGH COURT No. 89/45.

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

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

IN THE APPLICATION OF :—

Eliezer Zabrovsky. PETITIONER.

v.

1. The General Officer Commanding Palestine, representing the Commander-in-Chief, Middle East,
2. Inspector General of Police and Prisons. RESPONDENTS.

Habeas corpus application by father of a Palestinian deported from Palestine and detained in Eritrea — Scope of powers to deport under Emergency Regulations and Defence Regulations — Limits of jurisdiction of Courts in Palestine.

Return to a summons in the nature of *Habeas Corpus* directed to the Respondents calling upon them to show cause why they should not produce Arie Ben Eliezer, son of Petitioner, before this Court, or to await the further order of this Court; rule discharged:—

1. While an order by High Commissioner for summary arrest and deportation of a Palestinian from Palestine is lawful under Regul. 15, Emergency

Regulations, 1936, and Regul. 17 G, Defence Regulations 1939, he has no power in law to detain a Palestinian in a foreign country; any person so detained would forthwith be ordered by High Court to be released.

2. No Court in Palestine has jurisdiction to issue a writ of *habeas corpus* in respect of a person detained in another country by a lawful order made in that country.

(*M. L.*)

DISTINGUISHED:

1. Rex *v.* Secretary of State for Home Affairs, O'Brien *ex parte,* 2 K. B. 1923, 39 T. L. R. 413, 487, E. & E. Digest Vol. 16, pp. 248, 258, 271.

2. Barnado *v.* Ford, App. Cases 1892 p. 326 (Gossage's Case) 67 L. T. R. 1; 8, T. L. R. 728; E. & E. Digest Vol. 16, p. 248.

ANNOTATIONS: See the a/m English cases.

(*A. G.*)

FOR PETITIONER: Seligman.

FOR RESPONDENTS: Solicitor General — (Griffin).

RULING.

Counsel for the Petitioner has raised preliminary objections. They were advanced under three heads. The first one was that the affidavits filed in this petition should be rejected because they were merely hearsay. In our opinion both affidavits purport to depose to what was within the particular knowledge of the deponent, and this objection must be overruled.

The second objection was that the affidavit should have been made by the Respondents in person, that is by the General Officer Commanding and the Inspector-General of Police, as there was no evidence in the affidavit itself to show on whose behalf the deponent was speaking. As to this we shall refer to the affidavit. First of all Major Wickstead stated that he was an officer in the Security Intelligence of the Middle East (S. I. M. E.) and in that capacity it was part of his official duties to look into the question of detentions under the regulations, which is the issue raised in this case. It is of course well known that in the military organisation the General Officer Commanding delegates his authority, and the clear inference which we must draw from the affidavit is that this officer dealt with these questions of detention under the authority of the General Officer Commanding. The same applies to the affidavit sworn by Mr. Curtis on behalf of the Inspector-General of Police. We do not consider that there is any substance in the preliminary objection.

The third ground of objection was that the Palestine Government had no power to detain in Eritrea — all they could do was to deport, and the fact of detention in Eritrea was not denied. This appears

to be the real issue for trial, and we are unable to dispose of it by way of preliminary objection.

We therefore call upon the Solicitor General to show cause.

Given this 13th day of December, 1945.

Chief Justice.

FitzGerald, C. J.: ORDER.

This is a return to a summons in the nature of *Habeas Corpus*. The case involves questions of grave constitutional importance. That a Palestine citizen, resident in Palestine, should be exposed to a summary arrest, transported to Eritrea and imprisoned there without any conviction or Order of a Court of Justice, is a matter of as serious concern to this High Court of Palestine, as the fact that a British subject, resident in England, should be exposed to a similar summary arrest and transported to Ireland was to the Court of Appeal in England; and this Court will be no less assiduous in insisting that the Executive Government shall establish step by step legal justification for the arrest, than the English Court of Appeal was in the case of Rex *v.* Secretary of State for Home Affairs, O'Brien *Ex parte*, 2 K. B. 1923.

The facts of this case are that one Arie Ben Eliezer was, by order made by the High Commissioner on the 18th day of October, 1944, summarily arrested and ordered to be deported from Palestine. It is not questioned that under regulation 15 of the Emergency Regulations, 1936, and regulation 17(G) of the Defence Regulations, 1939, the High Commissioner was fully empowered to make these orders. A further order was made, the legality of which has not been called in question, directing the Respondents to convey Ben Eliezer to Eritrea and to keep him under custody whilst being so conveyed.

It is not denied that the man is still being detained in Eritrea. The liberty of the subject is in question, and the duty of this Court now is to enquire whether or not the legal instruments which effect his detention were lawfully made. Mr. Seligman argues that he is detained in Eritrea by virtue of an order of the Palestine Government, and such order, he says, is illegal. If in fact he was being so detained, I would agree with him, because I know of no law which enables this Government to detain a Palestine citizen in a foreign territory. In support of his contention he has produced a number of official communiqués, the substance of which quite clearly conveys that this man has been detained at the request of the Palestine Government. It is equally clear that he would be released immediatly on a similar request by the Palestine Government, the Respondents are not in a position to

controvert this. In an official communiqué I do not expect to find set out in technical language the nature of the legal steps that will be taken to effect the purpose envisaged by the communiquè. In regard to this part of the argument by counsel I need only say that despite the language in which they may be couched, all the communiquès that the Palestine Government could issue would be powerless in law to detain this man in Eritrea. If the case could be left at that the rule would be made absolute fortwith. But the fact is that Mr. Seligman was silent as to the vital issue as far as his client is concerned. That is the fact that the legislature of Eritrea has promulgated an enactment (Proclamation No. 54) authorising a person in Eritrea known as the Chief Administrator to arrest and detain 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 activities prejudicial to public safety or to the safety of the British or any of the Allied Armed Forces, or for the preparation or instigation of such an act.

Purporting to act under that proclamation, the Chief Administrator of Eritrea made an order on the 4th day of October, 1945, ordering Arie Ben Eliezer to be detained, and it is by virtue of that legal instrument that Arie Ben Eliezer is to-day deprived of his liberty in Eritrea. It can, indeed it must, be conceded that that instrument was issued at the instigation, persuasion or representation of the Palestine authorities, who are represented for the purpose of this action by the Respondents. But this Court is not concerned with the motive that lead a person to exercise a legal right provided it is satisfied that he had that right and that it was lawfully executed by him. It follows that in the exercise of what we conceive to be his legal right it is irrelevant whether the Chief Administrator of Eritrea acted on his own volition or was moved thereto by the Palestine authorities. Mr. Seligman based the whole of his argument on the analogy, as he conceived it, between the case of Art O'Brien and that of his client. I now proceed to examine the principles of law established in the O'Brien case. In that case the Secretary of State for Home Affairs, purporting to act under a Defence Regulation, ordered the arrest of Art O'Brien, his transportation to Ireland and his detention there in the prison of Mount-Joy in Dublin. This Order which apparently was in writing under the hand of the Home Secretary was the only instrument by virtue of which Art O'Brien was detained. The Court enquired into the validity of that instrument, and they came to the conclusion that it was illegal that the Home Secretary had no power to make the order, and in consequence they made the rule absolute.

It seems to me to be abundantly clear from the judgments of the learned Lord Justices, particularly from that of Lord Justice Scrutton, that if the Court were satisfied that the Home Secretary was lawfully entitled to arrest a man in England and deport him to Ireland, and if he was detained in that latter country by virtue of a warrant of detention issued by a person who in that country was authorised to issue it, they would have discharged the rule. 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 Gosage (in the case of Barnado *v.* Ford, Appeal Cases 1892), or than the Home Secretary could in the case of Art 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.

Given this 18th day of December, 1945.

Chief Justice.

Shaw, J.: This is a return to an order *nisi* dated 6th November, 1945, calling upon the Respondents to show cause why they should not produce Arie Ben Eliezer, Petitioner's son, before this Court.

An order for deportation was made against Arie Ben Eliezer by the Officer Administering the Government of Palestine, on 18th October,

1944, under the provisions of the Emergency Regulations, 1936, and he is at present held in detention in Eritrea.

The validity of the order for deportation is not contested, but the case for the Petitioner is that the detention of Eliezer in Eritrea is in fact a detention by the Government of Palestine, since it is they who sent him there, and who are effectively having him kept there in detention. It is submitted that the Government of Palestine have no authority to detain Eliezer in Eritrea.

I think it cannot be disputed that the last submission is correct, and I also do not think that it can be seriously doubted that if the Government of Palestine so desired, they could have Eliezer brought back to Palestine. But, in my judgment, the question whether the Government of Palestine could arrange for Eliezer to be brought back to Palestine cannot form any part of the *ratio decidendi* in this case.

Eliezer is being held in Eritrea by virtue of an order dated 14th October, 1945, made by the Chief Administrator of the Territory of Eritrea under the provisions of Proclamation No. 54, dated 23rd June, 1944. It has not been made to appear before this Court that the order of detention is *ultra vires* the laws of Eritrea. If it is not *ultra vires* those laws, then the detention in Eritrea is lawful. The fact that it has been brought about at the instance of the Government of Palestine cannot make it unlawful.

I will give an analogy. Let me suppose that the law of Palestine provided for detention in the Jerusalem District but not in the Galilee District. If a person were detained in the Galilee District, a writ of *Habeas Corpus* would doubtless succeed, since the detention would be unlawful. But if the law provided for detention also in the Galilee District, no writ would lie, since the detention there would be lawful. In the present instance Eritrea is Galilee. It is true that the Government of Palestine does not legislate for Eritrea, but if the detention is good under the laws of Eritrea, it is, I think, quite beyond doubt that no writ can issue. The Government of Palestine can be requested to arrange for the release of Eliezer from detention in Eritrea in exactly the same way as they could be requested to release him if he were detained in Palestine. But they cannot be compelled to do so by writ of *Habeas Corpus*, in any event so long as the detention in Eritrea is lawful under the laws of Eritrea.

For these reasons I find that the petition fails, and must be dismissed.

Given this 18th day of December, 1945.

British Puisne Judge.

HIGH COURT No. 84/45.

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

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

IN THE APPLICATION OF:—

Mariam Hafez el Qassem. PETITIONER.

v.

The Assistant Chief Execution Officer, Tulkarm & an. RESPONDENTS.

Sale consequent on partition proceedings — Magistrate making an order for registration of land in question on foot of a report drawn up by his Chief Clerk as to costs of partition proceedings — Magistrate's order, or so called order, altered by his successor in his capacity as C. E. O. — Non-interference of High Court.

Return to an order *nisi* issued on 12th October, 1945, directed to the first Respondent calling upon him to show cause why his order of 23rd June, 1945, should not be set aside, and why the Judicial Orders of 21st July, 1941, 9th December, 1944, and 13th December, 1944, should not be acted upon; order *nisi* discharged:—

1. All acts of a Magistrate in partition cases and sales consequent on partition proceedings must be magistarial acts as distinct from acts by an Execution Officer.

2. High Court's powers under sec. 7(b), Courts Ord., 1940, are discretionary; it may, in certain circumstances decline to interfere even where an order of a Chief Execution Officer, has the effect of an alteration of an order, or a so-called order, of a Magistrate.

(*M. L.*)

ANNOTATIONS:

1. On the first point see H. C. 24/44 (11, P. L. R. 117; 1944, A. L. R. 243) with note 1 thereto in A. L. R.

2. On powers of High Court being discretionary see H. C. 41/43 (1943, A. L. R. 196) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Hijab.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — In person.

ORDER.

This is the return to an order *nisi* directed to the first Respondent calling upon him to show cause why his order of 23rd June, 1945, should not be set aside.

The history of this matter is unfortunate, and some of the trouble

is doubtless due to the fact that, until a few recent judgments of the Supreme Court, it was not always sufficiently realised that all acts of a Magistrate in partition cases and sales consequent on partition proceedings must be magisterial acts as distinct from acts of an Execution Officer.

The Petitioner was a co-owner with others of nineteen parcels of land. We are told that, by a judgment of the Magistrate of 21st July, 1941, (a copy of which unfortunately has not been produced to us) those parcels were ordered to be sold, the costs of the partition to be borne by the parties in proportionate shares. It seems that the Petitioner, who is said to have conducted the sale and defrayed the cost of maps, registration fees, Court fees, witness allowances, *etc.*, was eventually declared the highest bidder at the figure of LP. 515.

On 9th December, 1944, the then Magistrate, Tulkarm, (Hussein Eff. Abd el Samad) ordered the land to be registered in the name of Petitioner, subject to accounts being taken of the costs defrayed by her, and deduction thereof from the purchase price. By this he presumably meant that an account should be taken of the expenses she had incurred. It seems that the Chief Clerk of the Magistrate's Court then, in the presence of the advocate for the present Petitioner but in the absence of the other parties, made a finding that the amount which the Petitioner had paid to Government on account of survey fees and registration was LP. 618.187 mils. A report to this effect was drawn up by the Chief Clerk of the Magistrate's Court purporting to act as Chief Execution Officer of the Magistrate's Court. This report was submitted to the Magistrate, who wrote at the foot of the document, "I order that a letter should be sent to the Land Registry". He then signed his name, below which he wrote the word "Magistrate". This so-called order was dated 13th December, 1944. We have been told that this so-called order of the Magistrate was not served on anyone; but nevertheless it appears to have been acted upon, because registration was effected on 17th January, 1945.

It seems that the Petitioner obtained registration without paying any money. She should, of course, have deposited the LP. 515 before registration (see Articles 105 and 109 Ottoman Execution Law). The other parties, who now deny that she ever paid as much as LP. 618.187 mils, complain that they were never given an opportunity of appearing before a Magistrate or an Execution Officer with a view to making their submissions on this matter.

We are also told that the so-called order of 17th December, 1944, which purported to be an order of the Magistrate *qua* magistrate, was

never served on anyone. It seems that, a few months ago, other interested parties raised the matter before the present Magistrate of Tulkarm (Ja'far Eff. Hashem) who, on 21st July, 1945, after hearing parties, purported in his capacity as Chief Execution Officer, Magistrate's Court, to order the present Petitioner to refund the sum of LP. 515 by paying it into Court, less LP. 87.314 mils, at the same time directing that an attachment on produce belonging to the parties represented by the present Respondent should be raised. The Magistrate remarked that, if the Petitioner thought that she had a right to LP. 425.977 mils, she should seek a declaration from the appropriate Court. It is of that order that the Petitioner now complains.

It is obvious that many irregularities were in the earlier stages committed, and it seems to us that Ja'far Eff. Hasham, on 23rd June, 1945, merely made an honest attempt to put matters right. We guard ourselves against saying whether, in his capacity as Execution Officer, he had any power to alter the order, or so-called order, of the Magistrate of 13th December, 1944, which seems to have confirmed and approved the report of the Chief Clerk of the Magistrate's Court purporting to act as Chief Execution Officer. Nevertheless, in the very special circumstances of this case, and realising that our powers are discretionary (section 7(b) Courts Ordinance, 1940) we do not think that we ought to interfere. We have been told that Land Case No. 8/45 is pending in the Land Court, Nablus, in connection with the registration of 17th January, 1945. When the sum of LP. 515 is paid into Court, as ordered on 23rd June, 1945, it should remain in Court pending the decision in Land Court, Nablus case No. 8/45.

Subject to the foregoing, the order *nisi* is discharged with fixed costs of LP. 10.—.

Delivered this 18th day of December, 1945, in the presence of Hassan Eff. Khamash for the Petitioner, and in the absence of the Respondents.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL 215/45.

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

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPEAL OF:—

Roberto Levy & 2 ors. APPELLANTS.

v.

Itzhaq Trachtingot. RESPONDENT.

Mandatory injunction — Trespass — Jurisdisction of Magistrates' Courts, C. A. 37/45, Magistrates' Law, art. 24, M. C. J. O., sec. 3(c), P. O. in C., art. 40(1)(a), Law of Execution, art. 43 — Goodson v. Richardson, Deere v. Guest, Thompson v. Park, Grand Junction Waterworks Co. v. Hampton U. D. C.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 10th June, 1945, in Civil Case No. 68/45, allowed:—

A mandatory injunction to vacate premises will not, in the absence of exceptional circumstances, be granted where the alternative remedy may be sougt in the Magistrate's Court.

(*A. M. A.*)

REFERRED TO: C. A. 37/45 (12, P. L. R. 354; 1945, A. L. R. 678); Deere *v.* Guest, 1836, 6 L. J. (Ch.) 69; Grand Junction Waterworks Co. *v.* Hampton Urban District Council, 1898, 2 Ch. 331, 67 L. J. (Ch.) 603, 78 L. T. 673, 14 T. L. R. 467.

DISTINGUISHED: Goodson *v.* Richardson, 1874, 9 Ch. App. 221, 43 L. J. (Ch.) 790, 30 L. T. 142; Thomson *v.* Park, 1944, 2 All E. R. 477, (1944) 1 K. B. 408, 170 L. T. 207.

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. 293; see *ibid*, p. 103 for previous proceedings in this case.

2. *Cf.* Mo. D. C. T. A. 432/45 (1945, S. C. D. C. 340).

3. See Halsbury, Vol. 18, p. 9, para. 13 on the question whether and when an injunction will be granted notwithstanding the existence of a particular statutory remedy.

(*H. K.*)

FOR APPELLANTS: Klementynovski.

FOR RESPONDENT: E. Z. Fellman.

JUDGMENT.

De Comarmond, J.: This is an appeal from a decision of the District Court of Tel-Aviv in Civil Case No. 68/45.

The Plaintiff (now Respondent) who is the owner of a building situate at Tel-Aviv, filed a Statement of Claim dated the 15th February, 1945, praying that the Defendants (now Appellants) be ordered jointly and severally to forthwith keep off and be restrained from re-entering and making any further use or occupancy whatsoever of any part of the Plaintiff's building and that they be ordered to pay the costs of the action.

The Statement of Claim named four Defendants. At the hearing, the case against one Defendant was not proceeded with because he had died. The learned Judge granted the order prayed for.

The facts are simple. The Defendants on or about the 12th of January, 1945, invaded a number of rooms in Plaintiff's building and established themselves therein. The building was empty at the time, save for a few machines, and it appears that the Respondent intended to use the building as a factory. I need only add that the Defendants (now Appellants) are stated to have offered to pay rent, but this fact does not alter the position which was, and still is, that they had trespassed on Plaintiff's property without the slightest shadow of a right.

In the circumstances, there is no doubt that the Plaintiff was justified in vindicating his rights before the Court. The only question is whether he chose the appropriate remedy and the proper forum.

Before examining the questions of law in this case, I would mention that the learned Judge recorded in his decision certain findings of fact which have some relevance. Thus he was satisfied that the building was not inhabited when the Defendants entered it; he found that it contained machinery of great value for the manufacture ("cutting" is probably meant) of diamonds, and certain other chattels. After inspecting the premises, the learned Judge stated that he was satisfied that the machinery had been locked up in rooms adjoining those occupied by the Defendants and was not being damaged and that the Defendants did not seem to have done physical damage to the premises.

After recording his findings of fact and mentioning that the Plaintiff's ownership was not questioned, the learned Judge addressed himself to the question whether this was a proper case for the grant of a mandatory injunction, and he reached the conclusion that it was.

The point was raised before the District Court on behalf of the Defendants that the remedy by injunction could not be resorted to because Article 24 of the Ottoman Magistrates' law provides an appropriate remedy.

On the strength of the judgment of the Supreme Court in Civil Appeal No. 37/45, 12 P. L. R. 354, it is clear that in the present case the Magistrate's Court had jurisdiction to deal effectively with the case and I need not decide whether the correct source of jurisdiction is Article 24 aforementioned or section 3(c) of the Magistrates' Courts Jurisdiction Ordinance, 1939.

The crux of this case is whether the jurisdiction vested in the Magistrate's Court by the aforesaid Article 24 and section 3(c) excludes the case from the jurisdiction of the District Court.

One enactment which has a bearing on this question is Article 40(1)(a) of the Palestine Order in Council, 1922, which lays down that District Courts shall exercise jurisdiction in all civil matters not within the jurisdiction of the Magistrates' Courts. It is obvious that this Article takes away from the District Court cases of recovery of possession governed by Article 24 of the Ottoman Magistrates' Law or section 3(c) of the Magistrates' Courts Jurisdiction Ordinance, 1939.

Is it correct to hold, as the learned District Court Judge has held, that in spite of the existence of an adequate statutory remedy he could in this case deal with the matter and grant an injunction ? My answer to this question is that assuming that the District Court could in proper circumstances grant a mandatory injunction in a case even though a specific remedy is provided for within the exclusive jurisdiction of the Magistrates' Courts, the circumstances of the present case do not justify the application of the equitable remedy of injunction.

I consider that it is not a sound argument to urge that the Magistrate's order carried out by the Execution Officer would be fruitless because the ejected occupiers might come back. This is pure surmise, and such a reasoning, if accepted, would be equally applicable in most cases of recovery of immovable property. I might here mention that the Appellant's advocate has drawn attention to Article 45 of the Ottoman Law of Execution which deals with re-entry after execution.

Furthermore, the findings of fact of the learned District Court Judge preclude the argument that there was urgent need for the protection of the premises, and the suggestion that proceedings before the Magistrate would have been protracted and the fact that the Defendants in the Court below were alleged to be paupers are not factors justifying resort to the remedy of injunction in this case.

The case of Goodson *v.* Richardson (1874) 9 Ch. App. 224, has been quoted by the Respondent and accepted by the learned District Court Judge as good authority in support of his decision. I must point out that in the Goodson case an injunction was granted to an owner of land under which water-pipes had been laid without his consent. The facts were, therefore, not similar to those in the present case and this greatly diminishes the value of the decision as an authority in the present case. Moreover I wish to call attention to the reference made in the Goodson case at page 225 to the case of Deere *v.* Guest which, said Lord Selborne —

> "when rightly considered, amounted to neither more nor less than an action of ejectment brought in the Court of Chancery without

any equitable circumstances as to induce that Court to assume jurisdiction."

Another case quoted during the hearing of this appeal is Thompson *v.* Park 170 L. T. p. 207 in which an injunction was granted pending the trial of an action between the parties. In the Thompson case an injunction was granted pending a decision in the main action and the circumstances were such that it was not obviously desirable and urgent that an injunction be granted in order to avoid having two schools functioning under the same roof in bad harmony. The same considerations do not arise in the present case.

I would refer to the case of Grand Junction Waterworks Company *v.* Hampton Urban District Council (1898) 2 Ch. D. 331 the headnote of which is that "the Court will not interfere by way of injunction or declaration of right when the legislature has pointed out a mode of procedure before a magistrate; unless (it seems) in very special circumstances". In the present case I am of opinion that very special circumstances do not exist and I cannot therefore find my way to support the decision.

It is to be regretted that the Respondent did not go to the Magistrate's Court and it seems that his desire to obtain quick results has had the opposite result.

The appeal is allowed and the decision of the District Court is set aside. I allow fixed costs in the sum of ten pounds (LP. 10).

Delivered this 20th day of March, 1946.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 20/46.

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

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

IN THE APPEAL OF:—

Mousa Mahmoud Saleh. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Failure of accused to go into the witness box — Comment by prosecution.

Appeal from the judgment of the District Court, Nablus, dated the 24th January, 1946, in Criminal Case No. 234/45, whereby Appellant was convicted of robbery, *contra* Sections 287 and 288 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, allowed and conviction quashed:—

The fact that the accused chooses not to give evidence on his own behalf should not be unfavourably commented upon by the prosecution.

(*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 18/44 (11, P. L. R. 101; 1944, A. L. R. 158) and CR. A. 64/45 (1945, A. L. R. 578).

(*H. K.*)

FOR APPELLANT: A. Khory.

FOR RESPONDENT: Assistant Government Advocate — Akel.

JUDGMENT.

The result may be unfortunate, but we are of opinion that this appeal must be allowed. The accused person was convicted on the evidence of a single witness, whom the trial Court believed. Now the trial Court was quite entitled to convict on the evidence of a single witness, and provided this Appeal Court is satisfied that the Court warned itself that the evidence was that of a single witness and accepted it, this Court will not interfere.

But there is, in our opinion, a fatal defect in this conviction. It appears that the Accused did not choose to go into the witness-box. In the course of his summing up, counsel for the prosecution referred to this fact as adverse to the Accused.

It is well settled law in the Criminal Courts that where the Accused elects to take advantage of the provisions of the Criminal Procedure (Trial Upon Information) Ordinance, the fact that he exercises that option in a certain way shall not be a matter for unfavourable comment by counsel for the prosecution.

For these reasons, whatever may be the facts of the case, the interests of justice and of the proper conduct of criminal trials leave us no option but to allow this appeal.

The conviction and sentence are quashed.

Delivered this 20th day of February, 1946.

Chief Justice.

CRIMINAL APPEAL No. 17/46.

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

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

IN THE APPEAL OF:—

Ali Hussein el Said & an. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Evidence — Conviction based on the evidence of a single witness.

Appeal from the judgment of the District Court, Nablus, dated the 28th January, 1946, in Criminal Case No. 12/46, whereby Appellants were convicted of robbery, *contra* Sections 287 and 288 of the Criminal Code Ordinance, 1936, and sentenced to four years' imprisonment each, dismissed:—

Although the Court should show that it appreciates the fact, when convicting on the evidence of a single witness, such a conviction does not entail the same danger as a conviction based on the uncorroborated evidence of an accomplise.

(*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 203/45 (*ante*, p. 16, at pp. 18—9); see also first paragraph of the judgment in CR. A. 20/46 (*ante*, p. 186).

(*H. K.*)

FOR APPELLANTS: 1 — Elia.
2 — in person.

FOR RESPONDENT: Assistant Government Advocate — Akel.

JUDGMENT.

It is no reflection on the manner in which this appeal has been conducted that we do not call upon the counsel for the Crown to reply.

Mr. Elia raised two points, — the first was the possibility of error. As to this we can only say that there is always a possibility of error in human affairs. The judge hears the witnesses and the submissions, and if he comes to the conclusion that they raise an inference of guilt beyond any possibility of doubt, he is justified in convicting, and the Court of Appeal will not readily interfere with such conviction unless it can be satisfied that the evidence adduced makes it clear that the conviction was unreasonable.

The evidence before the judge in this particular case was the evidence of one witness who identified the Accused at an identification parade.

Mr. Elia laid great stress on what he termed 'the danger of convicting on the evidence of one witness', and he drew an analogy between it and convicting on the uncorroborated evidence of an accomplice. But in fact there is a basic difference between the two. It is true, as Mr. Elia has pointed out, that the Criminal Courts regard it as always dangerous to convict on the uncorroborated evidence of an accomplice, but there is no such danger in convicting on the evidence of a single witness, who is not an accomplice.

It is true that this Court desires to be satisfied that the trial Court fully appreciated that the evidence was that of a single witness.

In this case it is abundantly clear that the trial Court was fully alive to the fact that the only evidence against the Accused was that of a single witness.

For these reasons the appeal must be dismissed.

Delivered this 20th day of February, 1946.

Chief Justice.

CRIMINAL ASSIZE No. 44/45.

IN THE COURT OF CRIMINAL ASSIZE SITTING AT JERUSALEM.

BEFORE: Shaw J., Curry, P. D. C. and Judge Hasna.

IN THE CASE OF:—

Attorney General. PROSECUTOR.

V.

1. As'ad Abdallah Rantisi,
2. Ahmad Hussein Imwafi. ACCUSED.

Confessions — Extra judicial confessions to be discouraged — Magistrate who recorded confession not to sit in committal proceedings.

It is undesirable for a magistrate who recorded the confession of an accused to sit in the committal proceedings.

(*A. M. A.*)

FOR PROSECUTION: Crown Counsel (Rigby).

FOR ACCUSED: Cattan and Hikmat Taji.

JUDGMENT.

— — — — — — — — — —*

We would also like to draw attention to the great amount of time that is spent in the courts of this territory in hearing evidence on the point whether a confession has or has not been made voluntarily. We feel that the time has come when those in authority should consider whether it is not advisable to make legal provision for the recording of confessions by Magistrates, and for the exclusion (with perhaps certain exceptions) of confessions which have not been so recorded. The aim of a good investigating officer should be carefully to collect evidence and not to rely on a confession. We think that a very great amount of time could be saved in the work of the Courts if proper legislation were enacted. We would further say that it is undesirable that a Magistrate who has recorded a confession should subsequently sit at the hearing of the committal proceedings. A Magistrate who has recorded a confession is a very important witness in the case and it is not satisfactory for him to sit in a judicial capacity in a case in which he is a witness. The accused or his advocate might wish to cross-examine him in connection with the taking of the confession.

When a confession is recorded by a Magistrate we think that it should not be taken in the presence of the police. The accused person should be properly cautioned, and the Magistrate should satisfy himself that it is a voluntary confession, and he should so certify. We think that a certificate to the following effect would be appropriate — to be made at the foot of the record — "I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him." Every question put to the accused and every answer given by him should be recorded in full.

Finally, we would place on record our appreciation of the hard work done and the ability which has been shown by those who have conducted the prosecution and the defence in this involved and very distressing case.

Delivered this 21st day of December, 1945.

British Puisne Judge.

---

* Omitted. (*Ed.*)

CIVIL APPEAL No. 270/45.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Edward Zvi Fellman. APPELLANT.

v.

Shlomo Fellman. RESPONDENT.

Arbitration — Function of Court when dealing with award — Interpretation of contracts, Kelantan v. Duff Development Co.

Appeal from the judgment of the District Court, Jaffa, dated 24.6.45, in Civil Case No. 69/44, allowed:—

An award will not be set aside or remitted if the arbitrator erred when deciding a legal question (*in casu* interpretation of a deed) submitted to him.

(*A. M. A.*)

FOLLOWED: Kelantan Government *v.* Duff Development Co., 1923, A. C. 395, 129 L. T. 356, 39 T. L. R. 337.

ANNOTATIONS: See Halsbury, Vol. 1, pp. 680—1, *Error in law on face of award;* see also F. R. Absalom, Ltd. *v.* Great Western (London) Garden Village Society, Ltd., 1933, A. C. 592, 102 L. J. (K. B.) 648, 149 L. T. 193, 49 T. L. R. 350, quoted *in extenso* in Russell on Arbitration, 13th ed., pp. 191 *et seq.*

Vide also C. A. 135/45 (12, P. L. R. 525; 1945, A. L. R. 826) and note in A. L. R.

(*H. K.*)

APPELLANT: In person.

RESPONDENT: In person.

JUDGMENT.

This is an appeal from the decision of the District Court at Jaffa remitting to an arbitrator an award made by him.

In view of the judgment of the District Court which discussed in detail the nature of the transactions between the parties and the legal implications of those transactions, I find it necessary at the outset to make the preliminary observation that in proceedings of this nature the Court to which the application is made is not a Court of Appeal in the ordinary sense of the term. Its functions as an appellate tribunal are circumscribed. The underlying principle of all arbitration proceedings is that the parties to the dispute wish to oust the jurisdiction of the

Courts, because of expense, delay, or other factors which make arbitration the more appropriate procedure. This cardinal point must be borne in mind when the issue as to whether or not an award should be remitted comes up for consideration. An award can be remitted if it discloses legal misconduct, but it will not necessarily be remitted merely because the Court would have come to a different conclusion to that arrived at by the arbitrator.

Now, this submission to arbitration arose out of a dispute between the Appellant and the Respondent, who at the relevant time were partners, as to the interpretation and effect of a Deed made between them. The submission was in the following terms :

> "Whereas and we had matters in common in the affair of Mr. Sheinzwit, and
>
> Whereas there exist disputes in respect of the quarters, between us, regarding the rights and monies due to each of us,
>
> Now therefore, we have agreed to appoint Mr. Max Seligman as the sole and single arbitrator, to hear all our mutual claims and mutual accounts, of both parties in connection with the said matter, and we undertake to abide by every decision of the arbitrator and it is hereby specifically agreed that the above mentioned arbitrator must adjudicate on the matter in accordance with Law and he has no permission to make any settlement whatsoever, without obtaining the prior consent in writing, of the undersigned.
>
> Mr. E. Z. Fellman hereby declares that he undertakes all responsibilities towards Mr. Shlomo for his claims against Dr. Heinrich Fugel, and in case it will appear that Mr. Shlomo has claims and rights against him, although Dr. Fugel is not a party to this arbitration.
> And in witness hereof, we set out signature, from our good will, hereunto, this 30th day of June, 1943.
>
> And in case, Mr. Seligman resigns his appointment as arbitrator, then the parties, with common consent, are to appoint another sole arbitrator, or every party will do so, on its part.
>
> 30.7.43.
>
> (Signed) S. Fellman
> E. Z. Fellman."

That was clearly a submission without reservation. It was submitted to a lawyer and the Deed of Submission specifically provides that he must adjudicate on the matter in accordance with law. The inference I draw from this is that it was submitted to him because he was a lawyer and they resorted to him to determine the law instead of submitting it, as they normally would, to a Court of law. Another point to be borne in mind is that during the course of the proceedings the arbitrator sent to the Appellant and Respondent written notice that

he desired further legal argument on certain specific legal questions. They appeared before him and argued those legal questions.

I find it unnecessary to enquire into the reasons which induced those two lawyers to indulge in rather involved transactions by which mortgages which they held were registered not in their own names, but in the names of members of their family. The nature of the transactions which gave rise to this litigation is set out in detail in the Award of the arbitrator. Briefly stated, the dispute between them arose out of this transaction: a lawyer Abcarius Bey had accepted a mortgage for LP. 1,600.— on the property of Reuben Sheinzwit whom he had defended on a capital charge. Dr. Shlomo Fellman, who is the Respondent, suggested to the Appellant that this mortgage might be bought in at a discount. They did buy it at a discount which showed a profit of LP. 450. An agreement was then drawn up, Clause 6 of which was in the following terms:—

> "Shlomo Fellman and Edward Zvi Fellman and Moshe Foguel and Dora Foguel will share in equal shares in all the losses and expenses which may arise in connection with or as a result of the mortgage of LP. 1,600 which is being purchased."

So far the transaction seems simple. The mortgage debt was not paid on maturity and sale proceedings were instituted in the Execution Office. At this stage the Appellant entered into some other negotiations by which he shared in the buying of the mortgage. Land prices soared, and the land which was now in the hands of the Appellant by virtue of those further negotiations was worth many times more than the amount of the mortgage. He contended that all he had to pay to the Respondent was his share of the LP. 450.— profit. The Respondent says — "No, I am entitled to a share of the final profits made by your dealings in this land".

That was the issue submitted to the arbitrator. The facts were not in dispute. It seems to me that what was then submitted was purely a question of law, which was — Was the Respondent under the Deed which he executed with the Appellant entitled to a greater sum than a share of the LP. 450.— ? Certain well established principles of law can now be applied. They are set out in several cases, but it will be sufficient if I merely refer to the case of the Government of Kelantan *v.* Duff Development Co. Ltd. Appeal Cases (1923). The principle established in that case, as I interpret it, is that where a question of construction is specifically referred to arbitration, the decision of the arbitrator on that point cannot be set aside because the Court would have come to a different conclusion, unless it appears on the face of

the Award that the arbitrator has proceeded illegally, *e. g.* that he has decided on evidence which is inadmissible or on principles of construction which the law does not recognise. To quote from Lord Cave :—

> "No doubt an award may be set aside for an error of law appearing on the face of it, and no doubt a question of construction is generally speaking a question of law, but where a question of construction is the very thing referred for arbitration then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion."

I cannot avoid the conclusion that the whole dispute between those parties arose out of the proper construction of Clause 6 of the Agreement dated the 7th April, 1938. That was the point submitted to the arbitrator for his decision; it was not a question of law being incidentally involved, it was the whole kernel of the dispute.

It is unnecessary for me to say whether in fact I would have come to the same conclusion as the arbitrator because even if I failed to do so it would not, in view of the nature of the submission, be a ground for remitting the award.

It follows that I consider the District Court erred in remitting the award. The appeal must be allowed with costs at the lower scale to include LP. 15.— advocate's attendance fees.

Delivered this 27th day of March, 1946.

Chief Justice.

CRIMINAL APPEAL No. 8/46.

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

BEFORE: FitzGerald, C. J., Shaw and Ablul Hadi, JJ.

IN THE APPEAL OF:—

Imkheiber Hussein Kataf. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder — Provocation must be immediate, C. C. O. sec. 216(*b*) — *Resolution to kill — Preparation.*

Appeal from the judgment of the Court of Criminal Assize sitting at Jaffa, dated 9.1.46, in Criminal Assize Case No. 48/45, whereby Appellant was convicted of murder *contra* section 214 of the Criminal Code Ordinance, 1936, and sentenced to death, dismissed:—

In order to make a homicide manslaughter the provocation must be immediate.

(*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 119/44 (1945, A. L. R. 69) and note; *vide* also CR. A. 118/45 (*ibid.*, p. 690, at p. 694).

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

Although this appeal was argued at length and with characteristic ability, the issue was confined within narrow limits. Mr. Cattan, who appeared for the Appellant, did not ask for an acquittal. His submission was that the Court should reduce the verdict from one of murder to manslaughter. His argument proceeded upon two lines. The first was devoted to a submission that this Court should reject the evidence given by the Accused in his statement to the police and in the lower Court, and substitute for it a theory propounded by Mr. Cattan which, he says, is the only logical theory which fits in with the events as they were established at the trial. This theory is that the Accused induced the woman to go to his house merely for the purpose of making another effort to persuade her to return to her husband, which undoubtedly would be an understandable and laudable action on his part. The theory then follows the line that when she came to the house, not only did she reject his efforts to persuade her, but she used abusive language to him, and that she told him that she would not return to her husband as she intended to go into a brothel; that there and then he lost control of himself and he stabbed her.

Now this defence was never placed before the Assize Court, and this speculation, because it amounts to no more, could not be accepted by this Court unless we were satisfied that the conclusion arrived at by the lower Court was totally unreasonable. As we are unable to discover any justification for such a finding, we must forthwith dismiss as untenable the first line of argument.

The other ground submitted by Mr. Cattan was that, owing to the provocation, the conditions precedent to a conviction for murder in Palestine had not existed. He bases his argument as to provocation on the traditions and customs of the Arabs. It is of course within the knowledge of this Court that the Arabs place a very high value on sexual morality, and the Court will always give full consideration to the effect of customs and traditions which have been accepted by

the people as forming part of their way of life, provided that such customs and traditions are not repugnant to natural justice as conceived by British standards. It is unnecessary to make a definite pronouncement as to whether the facts established could ever constitute such provocation as would justify the reduction of the verdict from murder to manslaughter, because we are satisfied that in any event in the circumstances of this case they do not do so. It must be borne in mind that not all provocation is sufficient to reduce a homicide to manslaughter. The provocation must fall within the ambit of section 216(b) of the Criminal Code Ordinance, which stipulates that the provocation must be immediate provocation. The provocation alleged in this case was that the Accused, who was the cousin of the victim, and also of her husband, had been told that she was leading an immoral life and that she intended to go to a brothel. It must be emphasized that he was told this before he left Syria, which was many days before the murder. This provocation, it was argued, was reinforced by further provocation in Jaffa, when he was informed that the woman had actually gone to a brothel. But even after he had been informed to this effect, he recollected himself sufficiently to go to the woman's house, for the purpose, according to his own statement, of using efforts to induce her to come to his house. He eventually succeeded, and so we have also intervening the period taken for the journey from her house to his. When he arrived at his house there is evidence that he closed the door, fastened it on the inside with wire, and then committed the murder. The period that had elapsed, together with the sequence of events between the time when he was first told of the intention and the actual act of stabbing, would in our opinion bring the provocation, even if it were provocation in law, outside the ambit of immediate provocation within the meaning of the sub-section.

We must now consider whether he had resolved to kill this woman and so fulfilled the requirements of section 216(b) of the Criminal Code Ordinance. Here Mr. Cattan pointed out, and we accept it as a fact, as the Court below accepted it, that the man in the ordinary course of his business, which was that of an ice-cream vendor, carried this knife with him; therefore, argues counsel, the possession of the knife cannot be taken as an indicative of a resolution to kill. But apart from this fact, there was in our opinion ample evidence upon which the Assize Court could have come to the conclusion that he had formed the resolution. There was his own statement that when he had heard that this woman proposed to go to the brothel in Jaffa, he got blind, his blood boiled, and he straightaway went to her house.

Considering the sequence of events, the Court in our opinion were fully justified in drawing the inference — indeed it seemed the only reasonable inference that could be drawn — that he resolved to kill this woman, and that he had gone to her house to put into execution that resolution.

Finally we must deal with the last requirement of the section — that he killed the person after he had prepared himself to kill her. Here again we think the Court drew the one irresistible inference that it could have drawn. The very act of going to the woman and enticing her, in the circumstances related in his statement to the police, to come to his house, was in itself a sufficient act of preparation to give effect to his intention to kill.

For these reasons the appeal must be dismissed.

Delivered this 30th day of January, 1946 .

Chief Justice.

CIVIL APPEAL No. 378/45.

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

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

IN THE APPEAL OF :—

Khamiseh bint Salem Shehadeh widow of Mansi Khairiyeh & an. — APPELLANTS.

v.

Dalieh widow of Ahmad Abdallah Obeid & an. — RESPONDENTS.

Arbitration — Replacement of arbitrator, sec. 7 — Acquiescence — Presumption in favour of award — Remittal for remaining points to be dealt with.

Appeal from the judgment of the District Court, Jerusalem, dated 12.10.45, in Civil Case No. 62/43, allowed and case remitted:—

A party who has acquiesced in the irregular appointment of an arbitrator cannot object to the appointment after an award has been delivered.

(*A. M. A.*)

ANNOTATIONS :

1. On the applicability of sec. 7 of the Arbitration Ord. see Mo. D. C. Jm. 334/45 (1945, S. C. D. C. 562) and Mo. D. C. Jm. 433/45 (*ibid.*, p. 620) and notes.

2. *Cf.* Annotated Laws of Palestine, Vol. 2, pp. 139 *et seq.*, heading *"Acquiescence, Estoppel, Waiver"* (dealing with setting aside of awards).

(*H. K.*)

FOR APPELLANTS: A. Atalla.

FOR RESPONDENTS: R. Farajalla.

JUDGMENT.

In this case there was a submission to the arbitration of three arbitrators. During the course of the proceedings an arbitrator died, and eventually another arbitrator took his place. This appointment is now questioned. We agree that section 7 of the Arbitration Ordinance does not apply, because in our opinion that section is limited to the case where each party is entitled to nominate an arbitrator. It is in our opinion, for the purposes of this case unnecessary to enquire into how this arbitrator was appointed because it is abundantly clear that each of the parties appeared before the reconstituted Arbitrators and acquiesced in the proceedings, and under the well-accepted principles of arbitration proceedings that the Court will always lean towards upholding an award and will not allow a party to acquiesce in an irregularity until such time as he finds out whether the award was in his favour or not.

We are therefore of opinion that the parties cannot now object to the filling of the vacancy by this third arbitrator, and consequently this would afford no ground for setting aside the award.

This Court is now confronted with the difficulty that there were other grounds of appeal submitted to the District Court. The District Court did not deal with them but decided the case on the first issue alone. In these circumstances it seems that there is no course open to us save to remit the case to the District Court with instructions to deal with the other issues which arose on their merits in the light of our decision in this appeal.

Costs to abide the event, but for the purposes of this appeal to be on the lower scale with LP. 10 advocate's attendance fees.

Delivered this 27th day of February, 1946.

Chief Justice.

CIVIL APPEAL No. 356/45.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Said Darwish el Hatu & an. — APPELLANTS.

v.

Suleiman Mahmud Abu Dalal. — RESPONDENT.

Dispossession — Settled title holder must sue under sec. 3(c) M. C. J. O. and not in Land Court.

Appeal from the judgment of the Magistrate's Court of Gaza, sitting as a Land Court, dated 22nd of October, 1945 in Civil Case No. 322/45, dismissed:—

The proper remedy open to an owner, whose title derives from Land Settlement, and whose land is interferred with, is to sue for dispossession under sec. 3(c) of the Magistrates' Courts Jurisdiction Ordinance, and not to apply to the Land Court.

(*A. M. A.*)

ANNOTATIONS:

1. *Vide* C. A. 37/45 (12, P. L. R. 354; 1945, A. L. R. 678), referred to and qualified in C. A. 244/45 (*ante*, p. 129).

2. Note, however, that the Land Court has jurisdiction to issue orders for non-interference in the enjoyment of a person's possession of land: C. A. 48/37 (1937, S. C. J. (N. S.) 491; 1, Ct. L. R. 82).

(*H. K.*)

FOR APPELLANTS: M. N. Hawari.

FOR RESPONDENT: S. Saleh.

JUDGMENT.

We do not require to call upon the Respondent's advocate. This is an appeal from a judgment of the Magistrate of Gaza, sitting as a Land Court, whereby he dismissed an action by the Appellants who had asked for an order against the Respondent that he should not enter upon certain land and that he should not "object to the Plaintiffs", which we take to mean object to the Plaintiffs' title. It is unnecessary to set out the facts at length or to deal with the various matters argued before us. Suffice it to say that in 1931 the parties entered into a *mugharasah* agreement. In 1934 land settlement operations commenced in this area. The Appellants' advocate admits that the land was registered wholly in favour of his clients under deed No. 385/34 of 18th October, 1934. It is alleged that in 1938 the

Respondent trespassed and commenced to cultivate and remained on the land until 1945 when the Appellants brought an action in the Magistrate's Court Gaza for equivalent rent, which action was amicably settled on payment by the Respondent of LP. 2 as rent for the period 1938—1945. It is said that thereafter the Respondent opposed the appellant's title whereupon the Appellants brought this action in the Land Court. The Magistrate dismissed the action because the Defendant had been in possession by reason of the *mugharasah* agreement.

We do not think that this was a sound reason and we accordingly must not be taken as agreeing with the reasons given by the Magistrate for dismissing the action. We think, however, that the action was bound to fail because the question of ownership had already been decided in favour of the Appellants by the Land Settlement Officer. The Magistrate, sitting as a Land Court, has only the powers given to him by section 3 Land Courts Ordinance. The Appellants' remedy was to take the deed of registration granted to them by the Land Settlement Officer to the Magistrate's Court and there sue for dispossession under section 3(c) Magistrates' Courts Jurisdiction Ordinance. The appeal is dismissed with fixed (inclusive) costs of LP. 10.

Delivered this 20th day of February, 1946.

British Puisne Judge.

CIVIL APPEALS Nos. 389—391/44.

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

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPLICATION OF:—

Reuven Lev & 3 ors. APPLICANTS.

v.

Yosef Forer. RESPONDENT.

Bill of costs — Application for review, C. P. R. 284 — Advocates to raise question of costs if judgment is ambiguous.

Application under Rule 284 of the Civil Procedure Rules, 1938, for review of taxation, from the order of the Acting Chief Registrar, dated 12th December, 1945; order of the A/Chief Registrar varied:—

Order as to costs in C. A. 389—391/44 explained.

(*A. M. A.*)

ANNOTATIONS :

1. The judgment containing the order for costs in question is reported in 12, P. L. R. 240 and 1945, A. L. R. 430.

2. The only other reported application of this kind in the Court of Appeal is that in C. A. 2/39 (6, P. L. R. 175; 1939, S. C. J. 181); for applications in the Land, resp. District Court see C. A. 137/40 (7, P. L. R. 387; 1940, S. C. J. 202; 8, Ct. L. R. 194) and Mo. D. C. T. A. 72/45 (1945, S. C. D. C. 190).

3. *Vide* C. A. 2/45 (12, P. L. R. 387; 1945, A. L. R. 776) and note 2 in A. L. R. for authorities on taxation of costs generally.

(*H. K.*)

FOR APPLICANTS: Eliash.

FOR RESPONDENT: Gluckman.

ORDER.

This is an application (we believe the first of its kind to come before this Court) under Rule 284, Civil Procedure Rules, 1938, for the review of a bill of costs. The matter arises from the judgment of this Court in Civil Appeal No. 389/44, Palestine Law Reports, Vol. 12, page 240 at page 243.

The facts are that nine appeals, which were consolidated for hearing, were all dismissed, with costs to be taxed on the lower scale to include one advocate's attendance fee at the hearing of LP. 15. When the matter came before the learned Chief Registrar for taxation, he experienced difficulty in ascertaining what this Court meant, and he rather plaintively expressed the hope that in future this Court would be more explicit in the wording of orders as to costs.

Speaking for myself, as I was one of the members of the Court which decided the appeal, I must accept some responsibility for the vagueness of the order; but I would point out that the difficulty would have been removed at the time had the advocates, before the judges left the Bench after delivering judgment, drawn our attention to the ambiguity of our order. In the result, however, the learned Acting Chief Registrar came to the conclusion that this Court meant to award the Respondent nine sets of separate advocate's instruction fees as against each of the nine unsuccessful Appellants. I personally quite frankly admit that I cannot at this distance of time remember whether I and Mr. A/Justice Plunkett intended that there should be separate instruction fees, or even whether the matter was really ever present in our minds. My brother de Comarmond and myself have, however, had a consultation, and we think that if the matter had been brought to the notice of any Court at the time when judgment

was being delivered, such Court would have certified costs to be taxed on the lower scale in so far as instructions to oppose the appeal were concerned, as against each of the nine Appellants, but only in the amount of LP. 3 each.

As regards attendance to hear judgment being delivered, we think that only one attendance fee of 500 mils should have been allowed. The learned Acting Chief Registrar allowed LP. 90 for instruction fees, and LP. 4.500 for attendance at delivery of judgment, that is LP. 94.500 mils. That figure of LP. 94.500 mils will be reduced to LP. 27.500 mils. There will be no costs of this application for review.

Apart from the alterations stated, the order of the Acting Chief Registrar will stand.

Given this 22nd day of March, 1946.

British Puisne Judge.

CIVIL APPEAL No. 325/45.

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

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

IN THE APPEAL OF:—

Abdo Shahin & 2 ors. APPELLANTS.

v.

Subhiya Mahmud Muhammad el 'Id & 5 ors. RESPONDENTS.

Service on heirs — Description of heirs — C. P. R. 328, C. A. 85/45 — Correction of defect — "Good cause" R. 313(b) — Effect of R. 333.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area dated 26th July, 1945, in Case No. 83/Haifa; additional service ordered:—

Service on heirs must be individual.

(*A. M. A.*)

FOLLOWED: C. A. 85/45 (*ante*, p. 73).

ANNOTATIONS:

1. See the notes to C. A. 85/45 (*supra*).
2. *Vide* C. A. 451/44 (1945, A. L. R. 194).

(*H. K.*)

FR APPELLANTS: Weinshall.

FOR RESPONDENTS: Nos. 1, 2, 5 & 6 — Absent — served.
No. 3 — Cattan and S. Khadra.
No. 4 — F. Nazzal.

RULING.

A preliminary objection has been raised by Faiz Eff. Nazzal who appears for the fourth Respondent, or to put it more correctly, for the four Respondents designated as heirs of Tewfiq Bey El Khalil. The objection is that there is no proper appeal before this Court because each of the heirs of Tewfiq Bey El Khalil who left four heirs have not been individually served with a notice of appeal and other documents mentioned in Rules 313(b) and 328, of the Civil Procedure Rules, 1938, as amended by the Civil Procedure (Amendment) Rules, 1945. We have ascertained that a claim was put in under the Land (Settlement of Title) Ordinance, on behalf of the heirs of Tewfiq Bey El Khalil. We cannot help pointing out that such a vague description of parties should not be tolerated even for the purposes of land settlement proceedings, and we also wish to point out that the Respondents who have now raised the objection were originally responsible for this vague description. It is quite clear that for the purposes of this appeal service on a collection of persons designated as heirs of Tewfiq Bey El Khalil does not satisfy the provisions of Part XXXI of the Civil Procedure Rules. We cannot accept the suggestion that the fact that Respondents have described themselves as heirs of Tewfiq Bey El Khalil relieves the Appellants from the necessity of serving each interested person, the more so as a certificate of succession was produced at the land settlement proceedings and the names of the heirs could, therefore, have been ascertained. On the strength of the interpretation given in Civil Appeal No. 85/45 to the words "on all or any parties to the action occurring in Rule 313(b), we hold that in the present case it is fit and proper to direct that service be effected on each of the heirs of Tewfiq Bey El Khalil, within twenty-one days from to-day. We wish, however, to make it clear that this Court views with disfavour any negligence on the part of appellants and that it is only where good cause is shown that this Court would allow defects to be set right. It must be borne in mind that an appellant cannot be allowed to prolong appeal proceedings by neglecting to follow the procedure traced out.

We must now refer to a difficulty which has arisen in connection with Rule 333 as amended in 1945. Dr. Weinshall, for the Appellants, has submitted that the preliminary objection could not be raised because the notice of the alleged defect was not served on the Appellants at least seven days prior to the hearing of the appeal, as laid down in Rule 333. The written notice of the objection is dated 19th March

and was delivered to the Registry of the Supreme Court on the 20th March, for service on the Appellants. Unless service had been effected on the very same day the Appellant could not possibly receive the notice seven days prior to the 28th of March which was the date fixed for the hearing. It is not necessary for us to decide in the present case whether the preliminary objection should be disallowed because it was not served in time. The defect pointed out by Faiz Eff. Nazzal is such that it would have been discovered during the hearing and we would then have used the discretion conferred upon us by Rule 313(b) and caused the parties concerned to be duly served (because we consider that in the present instance there is a reasonable excuse for the Appellants' laxity).

We consider that Faiz Eff. Nazzal is entitled to an attendance fee for yesterday and we allow LP. 5 (five).

Delivered this 28th day of March, 1946.

British Puisne Judge.

CIVIL APPEAL No. 261/45.

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

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

IN THE APPEAL OF:—

Haj Taher El Masri & Co. Ltd. & 2 ors. APPELLANTS.

v.

Shakib Sharabi, in his own behalf and in his capacity as guardian over Fatmeh and Rudayna. RESPONDENT.

Discontinuance — Judgment given ex parte by Registrar after discontinuance against party defending — Interested person, Registrars Ord. sec. 6(b), C. P. R. 185, 113.

Appeal from the Order of the Land Court, Nablus, dated 28.6.45, in Land Case No. 34/44, dismissed:—

Where a number of defendants to a land case concede the claim and only one of them defends, it is not open to the Plaintiff to discontinue against the party interested and to obtain an *ex parte* judgment against the others under the provisions of sec. 6(b) of the Registrars Ordinance.

(*A. M. A.*)

ANNOTATIONS: The provisions regarding discontinuance, *i. e.* O. 26, r. 1 of the R. S. C. J., cannot be used "for bringing about indirectly that which cannot be effected directly": Robertson *v.* Purdey, 1906, 2 Ch. 615, 75 L. J. (Ch.) 685, 95 L. T. 330.

(*H. K.*)

FOR APPELLANTS: S. Hejab.
FOR RESPONDENT: Elia.

JUDGMENT.

These proceedings originated in a land dispute in which the Appellants preferred a claim against fourteen persons including the present Respondent; in fact the present Respondent claimed all the land. If therefore he was in a position to substantiate his claim, not only was he at that stage an interested person but he was the most interested person. It is now contended by the Appellant that the Respondent has ceased to be an interested party, and that therefore he had no *locus standi* to bring the action which is the subject matter of the appeal before us. At this point I proceed to analyse why he ceased to be an interested person. I turn to section 6(b) of the Registrars Ordinance which provides that:—

> "In uncontested cases and cases in which the parties consent to judgment being entered in agreed terms, judgment, on application, may be entered in Chambers by the Registrar of the Court where the action is brought: .....".

Rule 185 of the Civil Procedure Rules provides that a party can discontinue an action by giving notice in writing. The Appellant purporting to proceed under Rule 185 discontinued his action against the Respondent and then proceeded under 6(b) of the Registrars Ordinance to ask for judgment against the remaining 13 who did not contest his claim. The Registrar entered judgment accordingly. The Respondent applied under Rule 113 to have this judgment set aside. It was set aside by the District Court which considered that the proceedings were extraordinary. The District Court, in our opinion, were obviously right. It seems to us that the Registrar was never seized because in fact it was not an uncontested case. The only reason that could be advanced as why it was uncontested arose from the procedure adopted by the Appellant which was designed not to have the issue tried on its merits, but to oust the Respondent from his legal right. We are of opinion that the Appellant's failure to notify the Registrar that notice of discontinuance had not been served on the Respondent, wrongly led the Registrar to accept the case as uncontested and wrongly led him to assume jurisdiction under section 6(b) of the Registrars

Ordinance. For these reasons we are of opinion that the order of the District Court was right and the appeal must be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 16th day of January, 1946.

Chief Justice.

CIVIL APPEAL No. 216/45.

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

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPEAL OF :—

Hassan Jum'a El Jandaly & 3 ors. APPELLANTS.

v.

Aniseh bint Dr. Yousef Salim. RESPONDENT.

Prior purchase — Land Code, Art. 42 — Co-owner — Proportion to number of co-owners who chose to exercise the right — All co-owners should be made parties.

Appeal from the judgment of the Magistrate's Court, Haifa, sitting as a Land Court dated the 11th June, 1945, in Land Cases Nos. 1, 2, 3 and 4/45 (consolidated); judgment of the lower Court varied:—

Method of ascertaining the share to which a co-owner exercising his right of prior purchase under Art. 42 of the Land Code, is entitled indicated.

(*A. M. A.*)

FOR APPELLANTS: Weinshall.

FOR RESPONDENT: S. Khadra and Elia.

JUDGMENT.

De Comarmond, J.: The Respondent in this appeal was the Plaintiff in four cases before the Haifa Land Court. In each case she cited one Defendant. The four cases were consolidated and judgment was delivered on the 11th June, 1945. The four Defendants in the Court below are now the Appellants.

The four Appellants, the Respondent and four other persons were co-owners in the *Miri* lands known as parcel No. 17, block 11219. On the 24th January, 1944, each of the four Appellants bought from one of their co-owners, Nayef as-Sahly, three shares (each share being 1/192 of the whole) and on the 12th February, 1944, each of the

four Appellants bought from another co-owner, Maryam as-Sahly, three shares. These transactions reduced the number of co-owners to seven.

The Respondent (Plaintiff in the Court below) then claimed from each of the Appellants (Defendants in the Court below) one half of the shares purchased as aforesaid from Nayef and Maryam as-Sahly. The claims were made under Article 42 of the Ottoman Land Code, which is translated as follows in Tute's Commentary on the Ottoman Land Code, and in Ongley's Ottoman Land Code (1892 Edition), respectively:—

> *Tute*:
> "42. If amongst three or more co-possessors there is one who wishes to transfer his share, he may not give preference to anyone of those jointly interested. If the latter wish to acquire the share they can take it in common. If one co-possessor disposes of the whole of his share to one of the other co-possessors, the others can take their proportionate shares in it. The provisions of the preceding Article are applicable in this case".
>
> *Ongley*:
> "When one of the partners of three or more than three is about to alienate his share to another, one of the partners cannot have the preference over the others. If the others are candidates also, they have the right to take such share in partnership. If one of the said partners alienates to another partner the whole of his share, the other partner can take the share which falls to him of such share, and the rules stated in the foregoing article are also applicable concerning these".

It is clear that the object of this Article is to make it possible for "partners" or "co-possessors" to acquire equal fractions of the holding of a partner or co-possessor who desires to sell out. The Article does not contemplate that the right of preference will be exercised by a co-owner in the proportion of the share of the whole property which he already owns (*vide* Chiha's Traité de la Propriété Immobilière en Droit Ottoman, Edition 1906, pages 299—300) and there can be no doubt that the number of co-owners who elect to exercise the right determines the fraction to which each is entitled.

I have alluded to "co-owners who elect to exercise the right" and this is important, because it seems quite clear to me that a co-owner who declines to exercise his right or who loses such right (by being time-barred for example) is not to be reckoned. This may cause some difficulty when a claim is made under Article 42 by one of several co-owners entitled to exercise the right of preference: if the other co-owners have not waived their right but have not yet claimed, how is

the calculation made? Such a difficulty does not arise in the present case, but it seems to me that the Court before which a claim is made under Article 42 should insist on all the interested parties being put in cause.

It is not disputed in the present case that the Respondent (formerly Plaintiff) was entitled to claim a portion of the shares sold by two of her co-owners to four other co-owners: the difficulty which has arisen is about the fraction which she was entitled to claim.

The position can be best set out thus:—

(a) There were nine co-owners; two of them sold their 24 shares (out of a total of 192 for the whole property) to four co-owners; one of the three co-owners who did not take part in the transaction (present Respondent) decided to enforce her rights under Article 42 of the Ottoman Land Code, and the two remaining co-owners kept silent and are now time-barred.

(b) If the two co-owners who have sold out and offered to sell to all their co-owners, *i. e.* to seven persons, the said seven persons would have been entitled to take the shares "in common" or "in partnership" and would thus each have acquired 1/7th of the holding of the vendors. If, however, any one of the seven co-owners had declined to exercise his right of preference, the remaining six co-owners would each have been entitled to claim one-sixth of the holding of the vendors.

(c) Two co-owners have made no move and are now time-barred, and for the purposes of this case they need not be considered because their right to claim has been extinguished.

(d) We are thus left with five co-owners, one of whom claims that the other four have acquired shares, by preference, from two co-owners who have sold out to them.

Plaintiff in the Court below (now Respondent) contended that she was entitled to one-half of the shares bought by each of the four co-owners, *i. e.* she took into account each buyer and herself and wanted to share out equally. The Defendants, however, contended in their statement of defence that the claimant was only entitled to a 1/7th part of the shares purchased by them (Dr. Weinshall for the Appellants has stated that he was prepared to increase the fraction to one-fifth, in view of the fact that two co-owners have shown no interest in the matter).

I fail to see how Plaintiff's (Respondent's) contention could be correct. The four co-owners who are now the Appellants have clearly signified their desire to exercise their right of preference. When the Plaintiff signified that she, too, was a candidate (to use the terminology in Ongley's translation), the number of candidates rose to five,

and each of them was entitled to one-fifth of the holding sold by Nayef and Maryam as-Sahly. The learned Magistrate was quite right to hold that the *Awlawiyeh* is to be divided between the registered co-owners in proportion to their number, but I consider that he overlooked the fact that the Plaintiff, together with the four Defendants, were competing for the alienated shares.

I therefore hold that the Plaintiff in the Court below was entitled only to one-fifth of the six shares acquired by each of the Defendants, *i. e.* to one-fifth of the shares bought by each of the Defendants from Nayef and Maryam as-Sahly, and the judgment given by the Magistrate on the 11th June, 1945, must be amended accordingly.

The Magistrate's judgment is therefore varied to the following extent: instead of three shares out of 192 shares, the Respondent is entitled to one-fifth of the six shares acquired by each of the Appellants. The price to be paid by Respondent will be calculated at the rate of LP. 80 *per dunum*, as decided by the learned Magistrate.

The question of costs will be decided after hearing the advocates appearing for the parties.

Delivered this 5th day of March, 1946, in the presence of Mrs. Ginsburg for Appellants, and in the presence of Subhi Bey El Khadra for Respondent.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

After hearing argument the Court decide that the Appellant will have fixed costs in the sum of fifteen pounds (LP. 15).

British Puisne Judge.

CIVIL APPEAL No. 340/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Hinde Friedman, widow of the late Haim Friedman & 2 ors. — APPELLANTS.

v.

Sara Friedman & 5 ors. — RESPONDENTS.

Succession — Certificate of co-acquisition property — Effect of certificate of succession, C. A. 83/39.

Appeal from the order of the District Court of Jerusalem dated 18th September, 1945, in Succession (Application) No. 211/44, dismissed:—

> Palestine law does not recognise the type of property known as "coacquisition property". If foreign law is invoked in its application the existence of such property must be proved.
>
> (*A. M. A.*)

REFERRED TO: C. A. 83/39 (6, P. L. R. 462; 1939, S. C. J. 467; 6, Ct. L. R. 136).

ANNOTATIONS: On the nature and effect of a certificate of succession see C. A. 290/42 (10, P. L. R. 159; 1943, A. L. R. 166) and note 4 in A. L. R.

(*H. K.*)

FOR APPELLANTS: Tunik.

FOR RESPONDENTS: Eisenberg and Gilead.

JUDGMENT.

This Court does not require to call upon the Respondents.

This is an appeal from a judgment of the District Court of Jerusalem in Succession Case No. 211/44. The facts are that one Mordechai Friedman, a Hungarian Jew belonging to no religious community, died in Jerusalem on 13th December, 1944, leaving him surviving his second wife, Sara, and certain children by his first wife (who had predeceased him) and certain grandsons being the children of his son Haim Friedman who had predeceased his father. The principal Appellant is Mrs. Hinde Friedman, Haim's widow.

The sole ground of appeal is that the learned President refused to issue a certificate of succession to what is apparently known in Hungarian Law as "coacquisition property", his refusal being based on the fact that it had not been proved that any such property existed. In this we think he came to a correct conclusion. It is true that in Civil Appeal 83/39 Vol. 6, P. L. R. p. 462 it was laid down that a certificate of succession does not purport to decide what property is comprised in the estate but merely declares who are the heirs, if any, of the deceased. That is doubtless a correct statement of the law with regard to land in Palestine and also with regard to ordinary movables; but, when it is alleged that there is a type of property unknown to Palestine law, we think that the existence of such property must first be proved before the District Court acting under section 26 of the Succession Ordinance can be called upon to make any declaration regarding it. For these reasons the appeal is dismissed.

The Appellant will pay the costs of the first Respondent to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 5 and will also pay one set of costs to Respondents 2, 3 and 4 to be taxed on the lower scale to include an advocate's attendance fee of LP. 5.—.

Delivered this 5th day of March, 1946.

British Puisne Judge.

CIVIL APPEALS NOS. 306/44, 311/44, 318/44.

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

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPEALS OF :—

C. A. 306/44:—

Ahmad Ibrahim Issa el Akki and 9 ors. — APPELLANTS.

v.

Government of Palestine and 276 ors. — RESPONDENTS.

C. A. 311/44:—

Ahmad Faraj Nimer el Hawasheen and 261 ors. — APPELLANTS.

v.

Government of Palestine and 24 ors. — RESPONDENTS.

C. A. 318/44:—

The Government of Palestine. — APPELLANT.

v.

Ahmad Faraj Nimer el Hawashin and 285 ors. — RESPONDENTS.

Land settlement — Decision as to boundaries does not prevent future claims as to ownership, sec. 29 — *Note to judgment, C. A.* 100/44 — *Yoklama registration, Tute, Goadby and Doukhan, C. A.* 227/40, *L. Code Art.* 78, *C. A.* 21/43, *possession of miri otherwise than for cultivation — Unassigned State lands, Art.* 68 — *P. C.* 56/38, *C. A.* 98/39 — *Areas and boundaries of kushans, C. A.* 160/43, *L. A.* 15/28, *Art.* 47 — *Prescription, C. A.* 230/45, *C. A.* 21/43 — *What amounts to cultivation — C. A.* 145/41, *C. A.* 294/43 — *Failure*

to call evidence — Grazing rights, L. A. 13/33, C. A. 65/40, C. A. 125/40.

Appeals from the decision of the Settlement Officer, Haifa Settlement Area dated the 11th May, 1944, in Case No. 3/Mansi, allowed:—

1. An explanatory note at the foot of a judgment need not be valueless if it does not alter the judgment.
2. Notwithstanding sec. 29 of the Land (Settlement of Title) Ord., if the Settlement Officer has not determined the rights of Government in any particular case, then Government is not estopped from claiming the land in other proceedings.
3. Art. 78 of the Code cannot be invoked in support of a claim over land which is incapable of cultivation.
4. Art. 47 applies in the case of an original grant by the state as well as to sales between private persons.
5. Grazing stock does not, for the purpose of establishing a prescriptive title, amount to cultivation.
6. In unassigned State lands grazing rights cannot be established by user.

(*A. M. A.*)

REFERRED TO: L. A. 15/28 (4, C. of J. 1475); L. A. 13/33 (3, C. of J. 811); P. C. 56/38 (7, P. L. R. 105; 1940, S. C. J. 277); C. A. 98/39 (6, P. L. R. 507; 1939, S. C. J. 478; 6, Ct. L. R. 142); C. A. 65 & 76/40 (7, P. L. R. 288; 1940, S. C. J. 168); C. A. 125/40 (8, P. L. R. 165; 1941, S. C. J. 205; 9, Ct. L. R. 171); C. A. 227/40 (8, P. L. R. 107; 1941, S. C. J. 107; 9, Ct. L. R. 210); C. A. 145/41 (1941, S. C. J. 651); C. A. 21/43 (10, P. L. R. 231; 1943, A. L. R. 331); C. A. 160/43 (11, P. L. R. 397; 1944, A. L. R. 651); C. A. 294/43 (not reported); C. A. 100/44 (12, P. L. R. 83; 1945, A. L. R. 379); C. A. 230/45 (13, P. L .R. 37; *ante*, p. 12).

ANNOTATIONS: See the cases cited and the notes thereto in S. C. J. and A. L. R.; *vide* also C. A. 169/45 (13, P. L. R. 4; *ante*, p. 143).

(*H. K.*)

C. A. 306/44:—

FOR APPELLANTS: W. Salah.

FOR RESPONDENTS: No. 1 — A/Government Advocate — (Touqan).
Other Respondents — Not served.

C. A. 311/44:—

FOR APPELLANTS: S. Khadra.

FOR RESPONDENTS: No. 1 — A/Government Advocate — (Touqan).
Other Respondents — Not served.

C. A. 318/44:—

FOR APPELLANT: A/Government Advocate — (Touqan).

FOR RESPONDENTS: Nos. 1—262 — S. Khadra.
Nos. 263—268 — Absent — served.
Nos. 269—278 — W. Salah.
Nos. 278—286 — Absent — served.

JUDGMENT.

Shaw, J.: By consent of the parties these three appeals have been consolidated. They are appeals from the judgment dated 11.5.44 of the Settlement Officer, Haifa Settlement Area, in Case No. 3/Mansi. In the original case the Plaintiffs were Ahmad Faraj Nimer el Hawashin and 267 others, the Defendant was the Government of Palestine, and there were eighteen third-parties of whom ten, who are represented by Walid Eff. Salah, advocate, are now the Plaintiffs in C. A. 306/44. The remaining eight third-parties, namely Nos. 279—286 of the Respondents in C. A. 318/44, were served but did not appear at the hearing of these appeals. Of the original Plaintiffs 262 have been represented by Subhi Bey el Khadra, advocate, in C. A. No. 311/45, and six, namely Nos. 263—268 of the Respondents in C. A. No. 318/44, were served but did not appear.

In C. As. Nos. 306/44 and 311/44 the Government of Palestine is the real Respondent in each case, and the others are formal Respondents. In C. A. No. 318/44, which is the Government appeal, the Respondents are the clients of Walid Eff. and Subhi Bey and certain others who have not appeared.

There is now no dispute between the ten original Third-Parties who are represented by Walid Eff., and the 262 original Plaintiffs who are represented by Subhi Bey. Their dispute was settled in the earlier case Mansi/2 in which the arbitration award given by Ahmad Bey Khalil was confirmed on 13.1.43.

The decision of the Settlement Officer may be summarised as follows. He found that the interests of the ten third-parties (Appellants in C. A. No. 306/44) were no more and no less than those of the Plaintiffs, but that the same social conditions did not apply, and he held that they should be allowed to convert what was previously a communal interest into an individual right on payment of *Bedl Misl*. With regard to the other claimants the Settlement Officer held that in the balance of area within the present village limits of the community they are entitled as of right to full ownership of such areas as have been under maintained cultivation for the prescriptive period, and to a communal right (not a right of individual ownership) for purposes of grazing in the rest. The Settlement Officer embodied the results of his findings in a comprehensive summary which he declared to be an integral part of his decision.

The case for the Appellants in C. As. Nos. 306/44 and 311/44 is that they are entitled to the land in dispute by virtue of their extracts

of registration (or *kushans*). There are two *kushans* (Exhibit 1 and 2) and they contain the following particulars:—

Exhibit 1 —	Locality	Mazra'at W'ar El Ghabiyia
	Category	*Miri*
	Description	Malsa land
	Boundaries	N. Mazrat Ghabiya
		S. Waret Beit Rasa
		E. Wadi Mashra'a el Safa
		W. Basa el Nuriyeh
	Area	301 *dunams* 530.40 metres

This registration is alleged to cover, *inter alia*, the major part of Block 11858 and a corner of Block 11857. It may be observed here that the Appellants in C. A. No. 306/44 are interested particularly in the area covered by this *kushan* which is alleged to cover the western part of the land in dispute. It should also be observed that the area claimed by virtue of this *kushan* is about double the area shown in it, but it is known to be quite usual, in the case of old Turkish *kushans*, to find that the area shown is much less than the real area.

In Civil Appeal 160/43 (A. L. R. 1944, p. 651) the Court approved of a correction from 34 old *dunams* (under a *kushan* of 1882) to 625 *dunams*.

The date of this registration is 4.1.29.

Exhibit 2:—		
	Locality	Mazraat El Buseila
	Category	*Miri*
	Description	Malsa land
	Boundaries	N. Bassa el-Ma
		S. Ard Umm el-Fahm
		E. Ard Umm Qalayid
		W. Wadi Mashara el Safa
	Area	3647 *dunums* 782.40 metres.

The word *"Malsa"* means flat or plain and it should be observed that in the earlier (*Yoklama*) registration the land is described as *"Tarla"* which means "cultivable".

This *kushan* (Exhibit 2) is alleged to cover some 7,500 metric *dunams*, and to include the remainder of the blocks in suit as well as the cultivated land already successfully claimed at Settlement. The date of this registration is 6.5.30.

These *kushans* are derived from an earlier *Yoklama* registration (Exhibit 7) dated 1289 (which corresponds to 1872 *A. D.*), and the bound-

aries are the same as those shown in Exhibit 7, in which, however, the orientation of the boundaries is not shown — that is to say Exhibit 7 gives a boundary without stating whether it is north, south, east or west.

The area in dispute is shown in the survey plan (marked C. A. 306, 311 and 318/44). The area is marked in that plan by the letters A B C D E F G. From point G the boundary of the land in dispute is shown by the blue and red line (with pencil hatching) running from G back in a westerly direction to A.

The Settlement Officer has stated that the village lands to which this claim refers may be divided roughly into three main categories:—

A — Plain lands fully cultivated;

B — Scattered garden areas and enclosures;

C — Hilly grazing areas.

The Settlement Officer states that it is the third category, *i. e.* the hilly grazing area of some 3,500 *dunams* in extent, which Government contests on the ground that it constitutes "unassigned State land" as described in the Memorandum of Claim.

The first submission which has been made by Walid Eff. is that in the earlier case (Mansi/2) the Government did not put forward any claim, although the land which was then the subject of dispute between the clients of Walid Eff. and those of Subhi Bey was the same land as is now in dispute. Walid Eff. submits that the Government having failed to claim then is now estopped. He relies on the provisions of section 29 of the Land (Settlement of Title) Ordinance (Cap. 80) which reads as follows:—

> "The rights of Government in land shall be investigated and settled whether they are formally claimed or not. All rights to land which are not established by any claimant shall be registered in the name of the High Commissioner for the Government of Palestine".

The Settlement Officer has made a note at the foot of his decision, dated 13.1.43, in Case Mansi/2 which reads as fololws:—

> "This is a confirmation of a boundary settled by arbitration. It does not decide nor confirm ownership".

It is submitted by Walid Eff. that this note is of no effect, and he refers to C. A. 100/44, 12 P. L. R. 83. It is of course true that the Settlement Officer could not alter his judgment after delivery, but in his note he does not purport to do so. The note is purely explanatory, for the purpose of showing what matters had been dealt with in the judgment, and I am unable to find that there can be any valid objec-

ion to it. But it remains to be decided whether Government was estopped by reason of the fact that its rights had not been investigated and settled in Case Mansi/2.

Having considered the submissions which have been made I find that Government is not estopped from claiming. It might perhaps be argued with some justification that the Settlement Officer ought to have investigated and settled the claims of Government in case No. Mansi/2 if indeed he remembered that Government had a claim. But the fact remains that he did not do so, and Government was not a party to Case Mansi/2. I cannot regard the Settlement Officer, who was acting in a judicial capacity in Case Mansi/2, as being at the same time an agent whose duty it was to prosecute a claim on Government's behalf. If the Settlement Officer had in fact investigated and settled the rights of Government in case Mansi/2 then there is no doubt, I think, that Government would have been bound by his decision unless set aside on appeal. It may be observed that the parties agree that the only part of the present disputed area which was the subject matter of Case Mansi/2 is a portion of Block 11858.

The next submission of Walid Eff. is that in certain earlier cases, namely Ghubaiyat/1, Ghubaiyat/2 and Mansi/1, in which the same *kushans* were relied upon, the Settlement Officer gave decisions against the submission of Government that certain areas were outside the *kushans* and other areas waste land. I am unable to find any merit in this submission. If the Settlement Officer, when dealing with the area to the north of the area now in dispute, came to the conclusion that they fell within the boundaries of the *kushans*, it by no means follows that the present disputed area falls within those boundaries.

Walid Eff. also complains that the Settlement Officer failed to hear the evidence which the Appellants were prepared to call in regard to the boundaries, and in regard to land (if any) situated outside the boundaries of the *kushans*.

I have already stated that the earlier registration (Exhibit 7) was of the *Yoklama* type. In para. 4 of his judgment the Settlement Officer states:—

> "Both these registrations derive without material change from a *Yuklama* register of 1289 *A. H.* in which the lands of all the Turkman sub-tribes are recorded. The manner of acquisition in each case is stated to be *"Haq Qarar"*. In assessing the scope of a grant of this nature it must be observed that the *Yuklama* was not in itself a registration but a statement of rights. A commission appointed for the purpose made enquiry into the ownership and

possession of units of land, recording their findings in what is now known as the '*Yuklama*'. It was incumbent upon the persons whose names were entered therein to perfect their rights by registration on payment of the prescribed fees in the subsequent *Daimi* registers".

Walid Eff. has submitted that the Settlement Officer has failed to give these *Yoklama* registrations their proper value. He has referred to the Ottoman Land Laws by Tute. At p. 77 Tute says:—

"When the Registers were first made towards the end of the 18th century this restriction was in operation. A very large number of title deeds issued in this period were frankly based on possession of more than ten years duration. Such entries are generally described as having been made by *'euklama', i. e.* as the result of local inspection and enquiry.

Title deeds of this character are generally accepted by the Courts...".

He has also referred to the Land Law of Palestine by Goadby & Doukhan in which the following appears at p. 312:—

"'Evidence in writing sufficient to support an adverse title' would include entries in the *Youklamta* records and *'Hodgets'* of the Moslem Religious Courts where these are relevant".

At p. 295 of the same book this passage appears:—

"From time to time a *Youklama* (Land Census) was held. Entries in the *Tapu* books were made on information received through the *Youklama* and *kushans* issued to persons who were in a position to establish a title to their holdings.

It was first the practice of the local *Tapu* Officers acting under the provisions of the *Tapu* Law and Regulations to issue temporary *kushans*. Permanent certificates of title were issued from the *Daftar Khani* in Constantinople. This system was subsequently abolished".

Walid Eff. has submitted that in the earlier case No. 1/Ghubaiyat the learned Settlement Officer took a more favourable view of *Yoklama kushans*. He has referred to para. 6 of the judgment in that case which reads as follows:—

"As for the title itself, the registration dates back to the original entry in 1296 *A. H.* by virtue of *Haq el Qarar* or right by decision. Devolution of title in exchange of old *sanads*, by inheritance, sale and transfer has been recorded from time to time down to the present day in the registers without material change of the boundaries and essentials of the old record, and in this respect it has the same value and is not different from any other pre-Settlement title in this country. It may have been common practice, but not a point of law and certainly not a practice that has been generally followed, that rights to cultivated land alone could be conferred by grant of *Haq Qarar*".

In C. A. 227/40 (8, P. L. R. 107) where *Miri kushans* had been issued the Court observed (see p. 110):—

> "Government cannot now deny the category of the land or its ownership. And in addition there is all the uncontradicted evidence led by the Appellants. Further there is in fact a *Yoklama* registration".

I think it is now necessary to quote the whole of para. 6 of the Settlement Officer's judgment which reads as follows:—

> "It is abundantly clear, however, that the boundaries described in these *Yuklama* records referred to a more extensive area than the number of *dunams* quoted. As to the two with which this case is concerned, there is nothing sufficiently definite or precise whereby the boundaries can now be applied with any certainty. The *'Bass'* or Marsh as already stated has disappeared. There are obvious gapes in the perimeter and very much is left to the imagination and although they include some of the hilly area which could never have been fit for cultivation, I cannot say they cover anything like the whole area now claimed.
>
> I therefore conclude that the *Yuklama* record from which the title of claimants derives was in fact a statement of the *miri* ownership acquired by prescriptive cultivation and possession expressed in terms of *dunums*, while the boundaries quoted were intended to express or circumscribe in very general terms the sphere of communal possession. The category *'Miri'* must have applied only to the assessed area of cultivation since the communal limits necessarily include roads, cemeteries, threshing floors, *wadis, etc.*, and certainly *mewat* land unfit for cultivation.
>
> If this conclusion is correct, and for purpose of this decision I hold that it is, I also infer that expansion and development of the cultivable areas within the communal boundaries was anticipated and it remained for a future cadastral survey and settlement to summarise and determine other private and public rights and the category of the lands according to the law and conditions obtaining at the time. It has already been stated that these titles have never been modified in any material or determined by competent authority until the advent of present Land Settlement operations. Prescriptive title by cultivation and possession to an extent greatly in excess of the area originally granted has now been accepted and confirmed at Settlement. In the balance of area within the present village limits of the community I hold that claimants are entitled as of right to full ownership of such areas as have been under maintained cultivation for the prescriptive period and to a communal interest, not a right of individual ownership, for purpose of grazing in the rest".

Walid Eff. has submitted that in view of the fact that the Settlement Officer found that the Arab Turkman, of which tribe the Appellants

are a sub-section, have been settled on the land for a considerable period prior to the *Yoklama,* they are in any event entitled to ownership by virtue of Article 78 of the Ottoman Land Code. This land is *Miri,* and in C. A. 21/43 (10, P. L .R. 231) it was held that "for a claimant of *Miri* land to succeed in a claim under Article 78 of the Ottoman Land Code, he must establish both possession and cultivation for a period of ten years, and in a case where land is incapable of cultivation a claimant cannot invoke that Article".

So it is clear that this submission could only be valid in regard to land which is capable of cultivation. It could not be supported in the case of the hilly areas which, as the Settlement Officer says, — "could never have been fit for cultivation".

On the other hand I do not know what the Settlement Officer's authority is for his conclusion that "the boundaries quoted were intended to express or circumscribe in very general terms the sphere of communal possession". I do not see why the officials who complied the *Yoklama* could not have registered individually the areas under actual cultivation or which were capable of cultivation. In short I consider that the Appellants are entitled to ownership of all of the land which is shown to be covered by their *kushans.*

I would observe that in its Memorandum of Claim the Government did not rely on Article 68 of the Ottoman Land Code. They claimed that the land was "unassigned State lands". When *Miri* land is registered in favour of people of whom the Settlement says in para. 4 of his judgment — "The community still depends materially upon the maintenance of considerable flocks and herds which to-day number some 5,000 head", it would be, in my judgment, an unwarrantable derogation from the registration to say that they are not entitled to keep large areas for the purposes of grazing, and to try to forfeit those areas under the provisions of Article 68. Each case must of course be considered on its merits.

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 the Appellants have since obtained formal *kushans* (Exhibits 1 and 2) without material change.

In P. C. Appeal 56/38 (7, P. L. R. 105) to which Walid Eff. has referred, the following appears at p. 113:—

> "Their Lordships are of the opinion that the latest *tapou* register is competent evidence as to the character of the land in question,

and the strictest proof should be required before holding that in such a matter the subsisting entries are incorrect".

Again in C. A. 98/39 (6, P. L. R. 507) the following appears at p. 509:—

"We have had a lengthy argument in regard to the burden of proof from the Appellant. He puts forward the propositions that a *kushan* by itself is not sufficient — that a *kushan* is not a document of title, that the Land Registry is merely an office for the registration of deeds and not of titles, that it must be shown that the *kushan* was properly obtained. We do not agree with these contentions. As the Land Court rightly remarked, a *kushan* is proof of registration, and registration is the best *prima facie* evidence of a right to be registered. By producing evidence of registration, the onus of proof is shifted to the Appellant to prove that the registration was improperly obtained, and the correct way to do that is to bring an action asking for the cancellation of the *kushan*. We agree that a registered title is not indefeasible — there is no guarantee to that effect, but when once a person produces evidence, by a *kushan*, that he is the registered owner, the onus is on the other side to prove that the *kushan* was obtained by mistake or fraud, and this must be done in an action to set aside the registered title. A registered title carries a presumption of ownership (See L. A. 737/23) and this general rule has been applied for many years in the Courts of this country".

Walid Eff. has submitted that the whole question is whether or not the land in dispute is within the areas covered by the *kushans* and, relying on Article 47 of the Land Code, he further submits that it is the boundaries alone which are to be taken into account and not the areas shown in the *kushan*. He relies again on C. A. 160/43 for authority for the proposition that Article 47 applies in the case of an original grant by the State as well as to sales between private persons. L. A. 15/28 (4 Rutenberg 1475) is an authority to the contrary, but I am unable to see why Article 47 should not apply in the case of a grant by the State, and I consider the later authority to be the better. It was given with knowledge of the decision in L. A. 15/28.

Walid Eff. further submits that even if Article 78 is applicable (although he says it is not since he bases his claim on the *kushans*) his clients have acquired prescriptive title even if the land is outside the *kushans*. He relies on the finding by the Settlement Officer that the Arab Turkman had been settled upon the land prior to the *Yoklama*, and he refers to C. A. 230/45 (not reported). The Court in its judgment in that case stated:—

"It is true that possession alone under Article 78 is not sufficient; the possession must be coupled with cultivation; but once the

> prescriptive title is vested in a person by reason of ten years possession with cultivation, it is not necessary, in order, that title may be confirmed at Settlement, to establish that the claimant continuously cultivated it after the prescriptive period".

To this argument he adds the plea that possession depends on the nature of the land, and he refers to C. A. 21/43 (10, P. L. R. 231).

I will say at once that I am unable to find that grazing stock on the land is equivalent to cultivation. It clearly is not. It is not, of course, necessary that the cultivation should consist of a crop grown for human consumption. Cultivation of a crop intended for animal fodder would be cultivation for the purposes of Article 78. But merely to graze stock on land upon which grass and other vegetation grows wild is not to cultivate it.

I will also say at once that if the boundaries of the land could really not be ascertained the Settlement Officer would be justified in applying the provisions of Article 78. Indeed that would be the only possible course for him to follow. In this connection Naim Bey Touqan has referred us to C. A. 145/41 (S. C. Judgments 1941 Vol. 2, p. 651) where the following passage appears in the judgment:—

> "We, therefore, hold that he was correct in rejecting the claim under Art. 47, as the boundaries were not definitely fixed, and that the only possible claim of the Appellants to the uncultivated land was under Article 78, that is to say by possession and cultivation".

The question whether the Settlement Officer was right in holding that the boundaries could not be identified is the all important question in this appeal, and Subhi Bey's arguments have been specially directed to this issue. He has referred to C. A. 294/43 (not reported). In that case it was submitted that the decision was in too general terms, and the case was by consent remitted in order that the Settlement Officer might re-hear the claims and adjudicate thereon by deciding whether or not each parcel or part of a parcel was within the registrations or *kushans* produced. The Court gave a direction that if he should find that any particular parcel or part of a parcel is not within their registration he should give the appellants an opportunity of leading oral evidence with a view to their establishing their claim based on possession and revival.

It is however urged by Subhi Bey that it is not necessary for the case to be remitted because we can, he submits, ourselves determine the boundaries. The important boundaries for the purpose of this case are the southern and the eastern. With regard to the southern boundary our attention has been drawn to the fact that Mr. Beidas,

who appeared on behalf of the Government at the hearing before the Settlement Officer, agreed that Lajjun (see the plan) formed part of the Umm el Fahm unit. This admission appears at p. 8 of the type-written record. It is therefore submitted by Subhi Bey that the southern boundary has been definitely fixed along the line B C D E F. But against this it must be observed, as indeed it was submitted by Mr. Beidas at p. 9 of the record, that "Umm el Fahm quoted as a boundary does not necessarily mean the whole length of that common village boundary".

It may be observed here that Subhi Bey does not dispute that the valley, roads and springs in the disputed land are the property of the High Commissioner. It may also be observed that Naim Bey agrees that Waret Beit Ras, which is shown as the southern boundary in Exhibit 1, is in the western part of Aradi Umm el Fahm. He also agrees that the eastern boundary shown in Exhibit 2 (*i. e.* Ard Umm Qalayid) is in Khirbet Beit Lidd. So it appears that there is no dispute as to the line K J being the boundary of the larger area of which the present land in dispute forms part. The real difficulty is to locate the eastern boundary from point J to where it meets the line B C D E F. Subhi Bey submits that it would be reasonable to draw a straight line from J to F, but that is to lose sight of the valid submission of Mr. Beidas to which I have referred above.

I do not think it is possible for us to locate the boundaries, and the question arises whether the case ought to be remitted to the Settlement Officer with an order directing him to make further enquiry with a view to locating them. One of the submissions made by Walid Eff. was that the Settlement Officer did not hear evidence regarding the boundaries or in respect of land (if any) falling outside the boundaries shown in the *kushans*. He has referred to a note at p. 3 of the type-written record which shows that the Plaintiffs were "prepared to call evidence as to topography if necessary".

If a person merely informs the Court that he is prepared to call evidence "if necessary" I do not consider that he can be heard to say that the Court refused or failed to hear evidence which ought to have been heard. A person who wishes to call evidence should clearly indicate to the Court that he so wishes. And if the Court refuses to hear the evidence he should request that a note of the refusal be made upon the record with the grounds therefor. On the other hand if a person has shown any clear desire to lead evidence I think that the Court should, before giving a judgment against him, ascertain whether he wishes to press for his evidence to be heard. In the present case

I consider that the learned Settlement Officer misdirected himself in regard to the *Yoklama* registration, and that if he had not done so he would have called upon the Plaintiffs and third-parties to lead their evidence.

In the result I find that this case must be remitted to the Settlement Officer in order that he may hear such relevant evidence as the Appellants in C. A. 306 and 311 may wish to tender (and such evidence as the Government of Palestine may wish to tender in reply) with a view to establishing the position of the southern and eastern boundaries, and also that he may hear evidence from both sides in regard to such land (if any) as may be found to fall outside the boundaries shown in the *kushans*. I also give the following directions to the learned Settlement Officer:—

(a) That he should give the ownership of all lands which are found to fall within the boundaries shown in the *kushans* to the holders of these *kushans;*

(b) That the *kushans* should be accepted as good for the purpose of establishing ownership in the absence of evidence showing that they have been improperly obtained;

(c) That Article 78 of the Land Code should not be applied to land which is found to fall within the boundaries shown in the *kushans;*

(d) That the Government of Palestine should not, in this case, be allowed to invoke Article 68 of the Ottoman Land Code, in view of the fact that their original claim was that the land was unassigned State land;

(e) That evidence that the Appellants have for many years used the land for purposes of grazing should be taken into consideration, together with the other evidence, for the purpose of determining the boundaries.

There remains C. A. 318/44. The Government of Palestine has appealed against the decision of the Settlement Officer that the Appellants should be given a communal interest for the purpose of grazing in the areas to the ownership of which they are not entitled. It has been submitted that the question of grazing was not in issue; that there was no evidence to justify a finding that they had such an interest; and that the Settlement Officer had no power to order registration of common grazing rights, such registration being unknown to the land tenure in Palestine.

In L. A. 13/33 (3 Rutenberg 811) to which Naim Bey has referred the Court stated:—

> "Secondly, although the people of the village have been accustomed to graze their flocks on part of the land in dispute, nevertheless such grazing does not give rise to a right of pasture. The Respondent is registered at the *Tabu* as the owner of the whole land in question".

Naim Bey has also referred to C. A. 65/40 (7, P. L. R. 421) in which it was successfully submitted that the use of unassigned pasturage did not entitle the Respondents to any right against Government, the registered owner of the said land.

The following passage appears at p. 51 of the Land Law of Palestine by Goadby and Doukhan:—

> "This article appears intended merely to make clear that grazing land adjacent to a village over which *ab antiquo* usage or definite allotment for the use of the village as village *Metruki* cannot be established, is open to all comers for grazing purposes though the State may in the case of strangers collect a fee. Although the terms of the Article are imperative it should not be assumed that the villagers have a right against the State to prevent enclosure of *Otlak* grazing ground or its grant by *Tapu* as *Miri*. The object of the Article is not to secure a right but to establish a distinction between the villagers and strangers as regards exaction of a fee".

Naim Bey has also referred to C. A. 125/40 in which the following passage appears:—

> "It is clear that grazing and woodcutting are rights, which are recognised by the law, but I do not think that their exercise gives any right to the land itself".

In the case of unassigned State land I am unable to find that grazing rights can be established by user. I would therefore allow Civil Appeal 318/44.

The Appellants in C. As. 306 and 311/44 will have their costs on the lower scale for each appeal separately, and an advocate's fee of LP. 20.— each for attendance at the hearing. These costs and fees will be paid by the first Respondent. The Appellant in C. A. 318/44 will have costs on the lower scae and an advocate's attendance fee of LP. 10.— to be paid by the clients of Subhi Bey.

Delivered this 28th day of March, 1946 in the absence of Appellants and in presence of 'Issa Eff. Hazou for the first Respondents in C. A. 306 and C. A. 311/44; and in the presence of 'Issa Eff. Hazou for the Appellant and in the absence of the Respondents in C. A. 318/44.

British Puisne Judge.

CIVIL APPEAL No. 293/45.

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

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

IN THE APPEAL OF:—

Tewfiq Renno. APPELLANT.

v.

Dr. S. Stern. RESPONDENT.

Applicability of sec. 8(1), R. R. (D. H.) Ord. to contractual tenants — "Lodger" and "sub-tenant".

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 29.5.45, in C. A. No. 36/45, from the judgment of the Magistrate, Haifa, dated 27th February, 1945, in Civil Case No. 1690/44, allowed:—

1. A tenant of a dwelling house can be evicted for one of the causes enumerated in paras. (a) to (d) of sec. 8(1) Rent Restrictions (Dwelling Houses) Ordinance no matter whether such tenant is a contractual or statutory tenant.

2. "Lodger" in sec. 8(1)(b) R. R. (D. H.) Ord. includes "sub-tenant".

(*M. L.*)

ANNOTATIONS:

1. The great importance of this case is in the fact that it decides for the first time in Palestine that sec. 8(1) of the Rent Restrictions Ord. applies both to statutory and contractual tenancies. Some bearing on this point have also C. A. 466/44 (12, P. L. R. 187; 1945, A. L. R. 423) and C. A. 59/45 (*ibid.*, pp. 459 & 624).

2. On previous District Court decisions on the position of lodgers see C. A. D. C. T. A. 180/45 (1946, S. C. D. C. 122) and C. D. C. T. A. 60/44 (1945, S. C. D. C. 550) and annotations thereto.

(*A. G.*)

FOR APPELLANT: Catan.

FOR RESPONDENT: Klug.

JUDGMENT.

This is an appeal from a decision of the District Court of Haifa, in its appellate capacity, whereby the judgment of one of the Magistrates of Haifa in Civil Case No. 1690/44 was affirmed. The Plaintiff (now Appellant) had applied for an order of eviction and for judgment in the sum of LP. 34.500 for arrears of rent; the learned Magistrate refused to make an order of eviction and found that the Defendant owed only LP. 5.750 which had been duly tendered in payment but

was refused by the Plaintiff. The aforesaid sum was subsequently deposited into Court.

The Plaintiff (Appellant) asked for eviction of his tenant on four grounds, namely, non-payment of rent, subletting without permission, making an unreasonable profit from sub-letting, committing waste.

It should here be observed that the two parties agreed in their pleadings that there was a contract of lease expiring in March, 1945. The lease was, therefore, still in existence when the action was instituted in September, 1944.

As to non-payment of rent, the learned Magistrate believed the Defendant's evidence that the rent had been regularly paid and that the only amount outstanding at the beginning of the action was the rent due on 20th August, 1944, which the Plaintiff had refused to accept. The District Court, on appeal, sustained this finding. We find no reason whatever for disagreeing with the finding of the two Courts below on the question of payment of rent.

On the issue of sub-letting without permission, the learned Magistrate held that the Plaintiff had not shown that the contract of lease contained a clause prohibiting sub-letting. The Magistrate went on to say that the *Mejelle* does not prohibit sub-letting. The District Court upheld the Magistrate's finding. We find no merit in Appellant's contention that the Magistrate's decision on this issue should have been reversed by the District Court.

We will now deal with the only substantial point in this appeal, namely, whether both the Courts below erred when they held that the Defendant-Respondent being a "contractual tenant" and not a "statutory tenant", section 8 of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, could not be invoked against him. This particular ground of appeal refers to the Magistrate's refusal to investigate the allegation of unreasonable profit derived by the Defendant-Respondent by sub-letting one room for LP. 10 per month whereas he pays LP. 5.750 per month for the whole flat leased to him. The ground of the Magistrate's refusal (which was endorsed by the District Court on appeal) was that section 8(1)(b) does not apply in cases where there is a lease. Mr. Klug, who appeared for the Respondent, submitted the argument that section 8 does not confer on a landlord additional grounds for evicting his tenant when there is a contract of lease in existence. The object of the section is, in our opinion, to ensure that the tenant of a house to which the ordinance applies (whether such tenant occupies the house by virtue of contract of tenancy which is in force or by virtue of sub-section (3) of that section in the case of a

contract of tenancy which has expired) can only be evicted for non-payment of rent, or breach of a condition of his tenancy, or for one of the causes enumerated in paragraphs (a) to (d) of the said sub-section. Were it otherwise, the object of the Ordinance would be set at nought and we find no ground for holding that eviction cannot be ordered under section 8(1)(b) when the tenant holds a lease.

Another point raised by Mr. Klug is that the said section 8(1)(b) does not help the landlord in the present case because the sub-tenant of Defendant-Respondent could not be described as a lodger.

It is perhaps regrettable that the word "lodger" was not defined so as to clearly indicate the legislator's intention. We cannot, however, agree that the word, as used in the context, excludes a sub-tenant. Our view is that the legislator's object was to ensure that the paragraph would not be circumvented by a restrictive meaning being placed on the word "sub-tenant".

We, therefore, hold that the Court below erred in their interpretation of the provisions of section 8(1)(b) of Ordinance 44 of 1940 and that the decisions of both Courts on this point must be set aside and the case remitted to the Magistrate for determination of the issue raised by the Plaintiff in paragraphs 3(c) of the amended statement of claim. The appeal is, therefore, allowed to this extent.

With regard to the allegation made by Plaintiff that the Defendant had committed waste, we find no reason for disagreeing with the learned Magistrate's finding of fact.

The Appellant will have the costs of this appeal on the lower scale with LP. 10 (ten) advocate's attendance fee.

Delivered this 28th day of May, 1946.

Chief Justice.

CIVIL APPEAL No. 297/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Mrs. Lily, widow of Bishara Aleco, in her capacity as one of the heirs of her late husband and as guardian of her minor children. APPELLANT.

v.

Mrs. Julia Aleco & an. RESPONDENTS.

Promissory notes — Period of prescription — Whether period prior to appointment of administrator of estate should be deducted — Fergusson v. Fytte, Murray v. East India Co. — Construction and effect of admission — Construction — Oral evidence.

Appeal from the judgment of the District Court of Jaffa, dated 21.7.45, in Civil Case No. 19/42, dismissed:—

The period between the death of the holder and the appointment of administrators to his estate is not deducted when computing the period of prescription on a promissory note.

(*A. M. A.*)

REFERRED TO: Fergusson *v.* Fytte, 1841, 8 Cl. & Fin. 121, H. L., at p. 140, 32 E. & E. Digest, p. 351, para. 343; Murray *v.* East India Co., 1821, 5 B. & Ald. 204, 32 E. & E. Digest, p. 315, para. 1.

ANNOTATIONS: See Halsbury, Vol. 20, p. 619, para. 782:—

"Time which has once begun to run will as a rule continue to do so, even though subsequent events occur which make it impossible that an action should be brought...

Thus, if time has begun to run against a person entitled to sue, ... the fact of his death and that there is an interval between his death and the grant of administration does not prevent time from running against ... the administrator".

(*H. K.*)

FOR APPELLANT: Olshan.

FOR RESPONDENTS: No. 1 — F. Kanafani.
No. 2 — Absent — served.

JUDGMENT.

Frumkin, J.: This is an appeal from a judgment of the District Court of Jaffa in an action brought on behalf of the estate of one Bishara Aleco, deceased (Appellant) against his sister Julia Aleco (Respondent).

The action was based on a promissory note issued by the Defendant, who is the Respondent in this appeal, to the order of her brother. Several defences were brought on behalf of the Respondent, the first one being that of prescription. But the principal defence was that there was lack of consideration inasmuch as the promissory note was given to secure costs in an action brought by the deceased on behalf of the estate of the father of the parties and it was agreed that should the Respondent waive her rights to share in the inheritance of the father, she will not have to pay the amount mentioned in the promissory note. The Court below overruled the defence as regards prescription, but accepted the other defence of the Respondent, and on that ground dismissed the action. Hence the present appeal.

The first ground of appeal is that no oral evidence is admissible to contradict the contents of a written document. The promissory note shows that value was received in cash. On behalf of the Appellant it is argued that the defence that it was given on account of certain costs can only be proved in writing and not as it was in this case by the evidence of the Respondent and her husband. It is true that there was documentary proof to show that the estate of the father of Bishara and Respondent was registered in the name of Bishara only, but we are left again, it is argued, with only oral evidence to show that this waiver was a consequence of the arrangement made between the parties at the time when the promissory note was made.

The second ground of appeal is that whatever be the position as regards the admissibility of oral evidence, even if all the evidence is accepted it shows no lack of consideration.

This is so. The defence of the Respondent cannot be regarded as a complete denial of consideration. In fact in another action between herself and the estate of her brother she has admitted that she owes the estate money; and, anxious as Mr. Olshan is to have the law as to oral evidence reconsidered by this Court in the present action, it is not necessary to deal with his first ground of appeal inasmuch as the Appellant should succeed on the second ground. This would dispose of the appeal if not for the plea of prescription advanced on behalf of the Respondent.

To my mind the District Court went wrong in holding that there was no prescription. Let us examine the dates as to prescription. The promissory note matured on 4.1.37. Bishara died on 1.12.41. An administrator for his minors was appointed on 29.1.42. The action was lodged on 19.2.42. It is clear therefore that the action was brought some 40 days after the expiration of the statutory five years. The question is whether the period which elapsed between the death of the deceased and the appointment of the Administrator should be deducted. No authority has been quoted to this effect. Obviously, had the death of the testator occurred before the beginning of the period of prescription, namely before the maturity of the promissory note, prescription would not have begun to run until the appointment of the Administrator. The authorities quoted in the judgment of the Court below go only so far. It is true that in Fergusson *v.* Fytte (referred to in the English & Empire Digest, Vol. 32, p. 351, para. 343) an action was not brought until after twenty years from the date of the death, but there the death took place in India and it was held that the English Statute of Limitations did not take effect, the action having

been brought within six years after English Probate or Letters of Administration were taken out to deceased's creditor. In Murray *v.* East India Company (referred to in Chalmers' Bills of Exchange, 10th Edition, p. 351, Note (1)) the holder of the accepted bill died intestate before its maturity. No authority has been produced, and I know of no such authority, to justify a deduction of the period which elapsed between the date of death and the appointment of an Administrator, from the period of prescription, if the death took place after the period of prescription already begun to run.

In overruling the defence as regards prescription the Court below also relied on an admission by the Respondent in another case where she admitted to owe money to the estate. This cannot be regarded as a clear admission referring to the promissory note in question.

In spite of the fact that the Appellant succeeds on his second ground of appeal the judgment of the District Court must stand because the action is barred by lapse of time.

It is for this reason that the appeal is dismissed with costs on the lower scale to include LP. 15.— advocate's attendance fees.

Delivered this 21st day of March, 1946.

Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION Nos. 44—52/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPLICATION OF:—

Bracha Ben-Yaacov & ors. APPLICANTS.

v.

Joseph Forer. RESPONDENT.

Privy Council leave to appeal — Extension of time for furnishing security.

Application for the extension of the time granted by the Court for the submission of the Bank Guarantees by Applicants for a further one month, granted:—

1. Court of Appeal has power to extend time for furnishing security

within 3 months from date of hearing application for leave to appeal to Privy Council.

2. Where question of period for lodging security was not raised before Court of Appeal at time of application Court of Appeal is not precluded from dealing with it at a later date.

(*M. L.*)

ANNOTATIONS :

1. As to the previous proceedings between the parties see C. A. 16—24/45 (1945, A. L. R. 628) and annotations.

2. On power of Court of Appeal to extend time for furnishing security see P. C. L. A. 20/43 (11, P. L. R. p. 50; 1944, A. L. R. 265) and notes thereto, see also P. C. L. A. 25/44 (12, P. L. R. p. 264; 1945, A. L. R. p. 486).

(*A. G.*)

FOR APPLICANTS: Eliash.

FOR RESPONDENT: Goitein.

ORDER.

We think that we have the power to grant an extension within the three months period from 4th December, 1945. The question for us now to decide is whether good cause has been shown why the security of LP. 200 by each of the nine Applicants was not furnished within the period of two months as ordered by this Court on 4th December, 1945.

We think that, as the question of period (*i. e.* six weeks, or two months within which security should be lodged) was not argued or even raised before the Court on 4th December, 1945, we are not precluded from now dealing with it. In the special circumstances of this case, especially having regard to the fact that there are nine Applicants, we deem it reasonable to order that the security of LP. 200 to be given by each of the nine Applicants be lodged on or before 3rd March, 1946.

We so order.

Given this 13th day of February, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 29/46.

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

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

IN THE APPEAL OF:—

Ibrahim Khalil el Yassin & 2 ors. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Evidence — Statement made by accused before commission of crime — Evidence Ord., sec. 9, T. U. I. Ord., sec. 37 — Evidence as to line of conduct — Rebutting evidence on information — Failure to object to admissibility of evidence — Inadmissibility on procedural grounds — Duty of the prosecution regarding evidence — Confessions — Time lapse between arrest and confession.

Appeal from the judgment of the District Court, Nablus, dated 20th February, 1946, in Crime No. 14/46, whereby Appellants were convicted of robbery *contra* section 287 of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonment. Appellants Nos. 2 and 3 were also convicted of being in possession of firearms *contra* section 66(A) of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment to run concurrently with the sentence of 10 years; appeal dismissed:—

1. A statement made by the Accused before the commission of the crime is admissible to prove a line of conduct.

2. The name of a witness called in rebuttal need not appear on the information.

(*A. M. A.*)

ANNOTATIONS :

1. On the first point *cf.* CR. A. 57/43 (10, P. L. R. 291; 1943, A. L. R. 450) and note 4 in A. L. R.; *vide* also CR. A. 124/43 (*ibid.*, pp. 559 & 660) and note 1 in A. L. R.

2. On the second point see sec. 38 of the T. U. I. Ordinance as enacted in the 1944 Amendment Ordinance which allows only three specified exceptions to the rule prohibiting the calling of such witnesses without previous notice.

3. On the effect of the prosecution not calling witnesses named in the information see CR. A. 157/44 (12, P. L. R. 89; 1945, A. L. R. 367).

(*H. K.*)

FOR APPELLANTS: T. Moghannam.

FOR RESPONDENT: Crown Counsel — (Borton).

JUDGMENT.

Although this appeal has been argued at considerable length, and everything that could have been a aid in favour of the Accused has been argued with ability by their counsel Mr. Moghannam, the only legal grounds which could be advanced stand out clearly.

The first ground was that the evidence of Ahmed Mahmud Hassan as to a meeting he had with one of the Accused twenty-five days before the crime, was inadmissible in that it was a statement of the Accused and as such did not come within the ambit of section 9 of

the Evidence Ordinance or section 37 of the Trial Upon Information Ordinance. It is however quite clear that it is not evidence within the meaning of either of those sections — it was evidence as to a line of conduct of the Accused which was relevant to the issue and was clearly admissible.

The second ground was that the evidence of Izzat Tabara, the Assistant Superintendent of Police (prosecution) in Nablus was inadmissible in that he did not appear before the Magistrate and the statutory notice of the intention to call him at the trial Court had not been given. We think that that objection fails for two reasons. The first was that it was rebutting evidence which the Crown were compelled to call because of an objection to the confession tendered in the lower Court. We might also observe that no objection was made to this evidence at the trial Court in which case the appeal Court would rarely interfere. Secondly, it is to be observed that the objection was based on the Criminal Procedure (Trial Upon Information) Ordinance, which is an Ordinance regulating procedure. Counsel could have objected, and insisted upon his objection if the lower Court had refused to entertain it, but once the evidence has been admitted, this Court is bound to take cognizance of it, and receive it unless it should be rejected as inadmissible in itself on well established principle of law. The appeal on this point must also fail.

The next point advanced in favour of the Accused was that the prosecution withheld material evidence. As to this counsel for the Accused in our opinion exaggerated the duties of the prosecution. It is undoubtedly true that it is the duty of the prosecution to place all the relevant facts, be they in favour or against the Accused, before the Court. But the name of the witness who, according to Mr. Moghannam, was to give the material evidence, was on the information. She was therefore available to the Court, and the Crown was entitled to exercise their well established right to call such witnesses as they choose from the names appearing from the information and to leave the defence to call the others.

The last point raised was that confessions were wrongly admitted in that they were not free and voluntary. Now, as the learned Crown Counsel has pointed out, it is abundantly clear that the learned President fully directed his mind to this question and after a most exhaustive examination of all the arguments adduced by counsel on behalf of the Appellants he came to the conclusion that the confessions were free and voluntary. It is true that this Court, generally speaking, would not interfere with findings of fact of the lower Court but,

as we have repeatedly stated, we will enquire as to whether the findings of fact can be justified, and if we are satisfied that those findings are based on reasoning that is faulty or on principles of law which cannot be maintained we would interfere with them, but not otherwise. In this case we can find no such faulty reasoning or application of false principles of law. All the arguments advanced by Mr. Moghannam centre round the inferences to be drawn from the facts. As to this, all we need say is that there was abundant evidence on which the lower Court was fully justified in coming to the conclusion that these confessions were free and voluntary.

It is said that the lapse of time between the arrest and the taking of the confessions vitiates the convictions. As to this, we observe that the lapse is in the extreme case only some two days and in the light of the explanation given by the Inspector, this would not constitute such a lapse as would preclude the convictions from being accepted. The last argument adduced on this point was that there were discrepancies in the confessions. Here again, as the learned Crown Counsel has pointed out, discrepancies in confessions are very often more an indication of their voluntariness and of their truthfulness than those which never disclose a misplaced word or comma.

For all these reasons we are of the opinion that this appeal must be dismissed and the convictions and sentence confirmed.

Delivered this 27th day of March, 1946.

Chief Justice.

CIVIL APPEAL No. 242/45.

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

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

IN THE APPEAL OF:—

Haj Yousef Khalil el Haj Ibrahim. APPELLANT.

v.

Amin Asa'ad el Wahdan. RESPONDENT.

Specific performance — Conditions requisite before grant of relief — Damages.

Appeal from the judgment of the Magistrate's Court, Jenin, sitting as a Land Court, dated 20th June, 1945, in Land Case No. 15/44, dismissed:—

Specific performance will not be granted where the Plaintiff may adequately be compensated by damages.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* C. A. 97/44 (1945, A. L. R. 14), C. A. 132/44 (*ibid.*, p. 122), C. A. 192/44 (*ibid.*, p. 161) and C. A. 66/45 (12, P. L. R. 521; 1945, A. L. R. 788) and notes to these cases.

2. As to the *dictum* in this case that "possession must have been taken" in order to succeed in a claim for specific performance, see C. A. 254/45 (*ante*, p. 155) wherein it is pointed out that this requirement "would be necessary in a case where equitable title was being set up *but not where specific performance is sought*" (italics supplied).

(*H. K.*)

FOR APPELLANT: F. Kassab.

FOR RESPONDENT: Elia.

JUDGMENT.

This case arises out of a contract made some ten years ago, under which the Appellant bought a share in *masha'* land. He himself never took possession of that land but he made an arrangement with the Respondent under which he, (the Respondent) retained possession as lessee of the Appellant. The Appellant now claims specific performance of this ten-year old contract. He seeks an equitable remedy which the Court would only grant when every other remedy has failed, and when the circumstances are such that he is entitled to this relief. It is true that these Courts have granted specific performance of contracts in relation to land, but they have been careful to set out the special circumstances which are: — that there must have been a contract or agreement to sell, the purchase money must have been paid, and possession must have been taken.

Let us now examine what in fact was it that the Respondent sold. It was, in our opinion, a right to participate in the exploitation of an undefined area of land. Failure to concede that right can certainly be remedied by damages if the person claiming it is able to sustain his claim.

For these reasons alone we consider that the Magistrate came to a correct conclusion and the appeal must therefore be dismissed with inclusive costs of LP. 10.— advocate's attendance fee.

Delivered this 25th day of March, 1946.

Chief Justice.

CRIMINAL APPEAL No. 19/46.

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

BEFORE: Edwards, Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Naif Ismail Mabrouk Abu Jazar. APPELLANT.

v.

The Attorney General. RESPONDENT.

Evidence — Evidence of witness compared with statement made to police — Evidence on appeal, T. U. I. Ord., sec. 71(i)(a) — Contradictions — R. v. Catherine Hullet, R. v. Albert Edwards, R. v. Harris.

Appeal from the judgment of the Court of Criminal Assize sitting at Jaffa dated 24th January, 1946, in Criminal Assize Case No. 56/45, whereby Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death; appeal allowed and conviction quashed:—

The conviction having been based on the evidence of a single witness, the Court admitted, on appeal, evidence as to a statement made by the witness to the police.

The Court thereupon quashed the conviction as it was not satisfied that the trial Court would have convicted had it read that statement.

(*A. M. A.*)

FOLLOWED: CR. A. 46/42 (1942, S. C. J. 207; 11, Ct. L. R. 247); R. *v.* Edwards, 1913, 8 Cr. App. Rep. 38; R. *v.* Hullet, 1922, 17 Cr. App. Rep. 8; R. *v.* Harris, 1927, 20 Cr. App. Rep. 144.

ANNOTATIONS :

1. Note that in CR. A. 132/43 (10, P. L. R. 583; 1943, A. L. R. 737) where the conviction was also based on the evidence of a single witness, the Court of Criminal Appeal refused "to consider an affidavit sworn by this witness to the effect that his evidence was incorrectly recorded by the trial Court".

Cf. also CR. A. 10/42 (9, P. L. R. 49; 1942, S. C. J. 35; 11, Ct. L. R. 149), CR. A. 42/42 (9, P. L. R. 222; 1942, S. C. J. 235; 12, Ct. L. R. 56) where R. *v.* Hullet was also followed, CR. A. 79/43 (1943, A. L. R. 629) and CR. A. 129/43 (10, P. L. R. 596; 1943, A. L. R. 743) and notes in S. C. J. and A. L. R.

2. See note 2 in A. L. R. to CR. A. 129/43 (*supra*) on the effect of a witness contradicting his own previous statement.

(*H. K.*)

FOR APPELLANT: F. Ghussein.

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

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Jaffa whereby the Appellant was convicted of murder contrary

to section 214(b) of the Criminal Code Ordinance and sentenced to death.

The Appellant was one of three persons who are alleged to have been present at the scene of the crime. One of those, who was the second Accused at the trial, was acquitted while the other person, namely, one Taleb el Moghrabi, is at large.

The trial Court in its judgment frankly admitted that they based their conviction on the evidence of a single eye-witness, namely a woman called Hamdeh.

When the case came on for hearing before us on February 16, 1946, after hearing the Appellant's advocate, Fawzi bey Ghussein, we granted an application under sec. 71(i)(a) Criminal Procedure (Trial Upon Information) Ordinance for the hearing of the evidence of P/Sgt. Musbah Eff. Ashour. The reason why we granted that application was that at the trial this witness who gave evidence for the prosecution, on being cross-examined by the Appellant's then advocates (not Fawzi Bey Ghussein) replied: "I took down Hamdeh's statement on the 14th July, 1945, at 9.15 *a. m.*" It was and still is a matter of surprise to us that Appellant's then advocate did not continue to cross-examine this witness as to the contents of Hamdeh's statement. It was for that reason that we granted the application.

We have to-day heard the evidence of P/Sgt. Musbah Eff. Ashour. He swore that Hamdeh said to him "Nayef did not strike my husband but he was carrying a club and standing near Taleb". She also told the witness:—

> "I saw Taleb El Moghrabi, who was the watchman of Shukri and had with him an iron club and beating my husband on his head and body. Then I shouted, I saw another man beside me. I recognized him and he was Naif Ismail Abu Jazar and this man caught me and put his foot on my neck on the ground in order that I might not shout".

The Court of trial in the judgment said that Hamdeh's evidence satisfied them beyond doubt that Accused No. 1, that is, the Appellant, and Taleb Moghrabi struck Hamdeh's husband with instruments which looked like clubs. Then again it stated, "We do not hesitate to accept her evidence as regards the presence of and the part played by Accused No. 1".

We would here say that we agree with Fawzi bey Ghussein when he urges that the trial Court was satisfied not only that Hamdeh was telling the truth when she spoke of the presence of Accused No. 1, but also of the part played by him in striking her husband.

The trial Court went on to say that the mere fact that they could not tell whether the fatal blow was delivered by Taleb or by Accused No. 1, did not diminish or affect the responsibility of Accused No. 1, who was "clearly acting in concert with the said Taleb in pursuance of a common purpose".

Omar Eff. Wa'ari argues that even in her statement as to the Appellant, Hamdeh said that it was he the person who caught her and put his foot on her neck on the ground in order to prevent her shouting. This may be so; but in the Court of trial her evidence was that he had put her hand on her mouth. Fawzi bey says that the question is whether if the trial Court had had before them the statement made by Hamdeh to Sergeant Musbah on the 14th July, they would have concluded that the present Appellant did direct any blow or blows. He also mentions the fact that, although Hamdeh swore before the trial Court that she saw the second Accused, Saad, and recognised him by his voice and his face, yet the trial Court were not prepared to accept her evidence on this point because they thought that she might have been mistaken. He also points out that several of the reasons why they acquitted Saad apply equally to the Appellant, and in this connection he cites Criminal Appeal No. 46/42.

The important fact, however, is that from the judgment it is implicit that the trial Court entirely believed Hamdeh when she said that she saw the Appellant taking part in the striking or hitting of her husband. We now know from the evidence given this morning that she very definitely stated to the sergeant that Nayef did not strike her husband. In the circumstances Fawzi Bey contends that the principle laid down in the following three cases applies, namely R. *v.* Catherine Hullet, Criminal Appeal Reports Vol. 17 page 8 and R. *v.* Albert Edwards, Criminal Appeal Reports Volume 8, page 38 and R. *v.* Harris Vol. 20, page 144, Criminal Appeal Reports. With this contention we agree. As it is by no means certain that the Court of trial would have convicted had they had before them the statement made by Hamdeh to Sergeant Musbah at 9.15 *a. m.* on 14th July, 1945, we have no option but to quash the conviction, and to direct that the Appellant be set at liberty unless he is held on another charge.

Delivered this 23rd day of February, 1946.

British Puisne Judge.

CIVIL APPEAL No. 271/45.

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

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

IN THE APPEAL OF :—

Naftali Feuer & an. — APPELLANTS.

v.

Denis Lawson. — RESPONDENT.

Damages — Ascertainment and assessment — Agents — Directness of damages.

Appeal and cross-appeal from the judgment of the District Court, Tel-Aviv, dated 6th July, 1945, in Civil Case No. 342/42, dismissed:—

Damages incurred by a principal may be claimed by the agent if they flow directly from the breach.

(*A. M. A.*)

ANNOTATIONS :

1. The first appeal in this case (C. A. 203/43) is reported in 1943, A. L. R., at p. 739.

2. *Cf.* Halsbury, Vol. 1, p. 307, para. 494.

(*H. K.*)

FOR APPELLANTS: Koenigsberger.

FOR RESPONDENT: Sussman.

JUDGMENT.

This case has already been before this Court in Civil Appeal No. 203/43 when it was returned to the District Court to consider what were the actual damages suffered. Those damages were claimed in respect of a breach, which was admitted, of contract.

In giving judgment the learned President apparently was of the opinion that he was precluded from including damages which were suffered by the Plaintiff's principal, Hibbert Houses. In this we consider that the learned President erred. It must be recollected that the real issue in this case from the beginning was the amount of damages that flowed from the breach of the contract which was tendered in evidence. This being so, it is immaterial whether, in fact, Mr. Lawson disclosed in making the contract that he was acting for principals known as Hibbert Houses. It remains, therefore, to consider what were the damages which the Court could allow as being directly caused by the breach of this contract.

Mr. Sussman has argued that there was loss of profits, but he has failed to satisfy us that those losses of profits were sufficiently specific to enable us to say that they flowed directly from the breach of the contract, and for that reason we do not consider it necessary once again to remit this case to the President. The Court below allowed damages amounting to LP. 70.745 mils. In estimating this sum we consider that the learned President allowed items which might very well be questioned, but we do not propose to interfere with his judgment because it appears to us, that the amount awarded is sufficiently approximate, as far as we can gauge from the evidence, to the damages which were actually suffered.

For these reasons the appeal and cross-appeal must be dismissed. In this appeal each party will pay its own costs.

Delivered this 13th day of March, 1946.

Chief Justice.

CIVIL APPEAL No. 191/45.

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

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

IN THE APPEAL OF:—

Elijahu Oskarn & 11 ors. APPELLANTS.

v.

Joseph Zenober & 2 ors. RESPONDENTS.

Separate appeals — Existence of common interest — Trespass into a house by different people — Division of house into separate interests — Names and addresses, C. P. R. 314 — Date from which rules of procedure come into force.

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 4th of May, 1945, in Civil Appeal No. 171/44 from the judgment of the Magistrate, Haifa, dated 3rd November, 1944, in Civil Case No. 2800/43, allowed and case remitted:—

1. There is a sufficient community of interest to file a common appeal where two schools, serving the same interests and acting through common trustees, have been refused an order of possession in respect of two flats in the same building.

2. In the case of Jewish Communal Settlement villages, the naming of the village satisfies the requirement of R. 314 C. P. R. both as regards address and occupation.

3. A law takes effect from the official date of its publication in the *Gazette*.

(*A. M. A.*)

ANNOTATIONS:

1. On the necessity for separate appeals in case of separate interests see C. A. 215/44 (1945, A. L. R. 25) and note thereto; *cf.* also C. A. D. C. Ha. 112/44 (1945, S. C. D. C. 72).

2. On the second point see C. A. 309/44 (12, P. L. R. 106; 1945, A. L. R. 4) and note 4 in A. L. R.

3. On the last point see sec. 20 of the Interpretation Ord. 1945, regarding the coming into force of "regulations" (as defined in sec. 2); there is, *semble*, no corresponding provision as to Ordinances.

(*H. K.*)

FOR APPELLANTS: Ben-Haviv.

FOR RESPONDENTS: No. 1 — Werner.
Nos. 2 & 3 — Absent — served.

JUDGMENT.

This is an appeal from the District Court of Haifa, sitting in its appellate capacity on appeal from the Magistrate. The case undoubtedly raised issues of importance to the parties concerned and it was unfortunate but of course not necessarily wrong, that the appeal should have been dismissed on preliminary objections. The learned Relieving President dismissed the appeal on two main grounds which he sets out in his judgment. The first was that there was no common interest between all the Appellants, that a definite distinction could be drawn between the Appellants 1—7 and 8—12 and that therefore there should have been two separate appeals. Dr. Werner has quoted to us a long series of cases and from the principle established by them this Court would not be prepared to depart. That principle is that where separate issues are raised, between different parties, separate appeals must be brought. The test is was there in fact a common interest? The absence of such a common interest might prejudice the rights of the parties, hence the necessity for separate appeals. I now enquire whether there was a common interest in this case. There was undoubtedly a common interest in the lower Court; the learned Magistrate proceeded throughout on that assumption and his judgment flowed inevitably from that assumption. Nor is it surprising that the learned Magistrate considered the interest a common one because I note that Dr. Werner who now appears for the Respondents, argued in the lower Court that the parties entered the building in the same manner without consent or information and that it was important to hear the case against all together. It is quite true as Dr. Werner has submitted that it would

not necessarily follow that in the Appeal Court the interest would also be common, but in this case we are unable to find out what is the difference between the interest adjudicated upon in the lower Court and that involved in this appeal. It is true that there were separate flats, but the flats formed one school which was divided as most schools are into a higher school and a lower or kindergarten school but this, in our opinion, would not preclude the two schools which served the same interests and had trustees in common from having a common interest in enforcing such right as they thought they had against the common landlord. It was on this issue that in our opinion the learned Relieving President erred.

The second ground argued before the District Court on behalf of Respondents was that the notice of appeal did not comply with the provisions of Rule 314 of the Civil Procedure Rules which provides that the name, address and occupation of the Appellants must be given. It appears that all the parties came from a village which was a Jewish Communal Settlement Village. Now, in interpreting Rule 314 the Court must take cognizance of the general organization of the Communities in this country. It is well known to us that those Jewish villages are organized on a communal basis, and therefore it is sufficient compliance with the rule to give the name of the person and his village. We also consider that the statement that a party is a member of a communal village is a sufficient compliance with that part of the rule which provides that his occupation should also be stated. Having come to this conclusion it is unnecessary to consider the effect of the amendment of Rule 313 except to state that we cannot accept the argument of Dr. Werner that the coming into force of a rule which is published in the *Gazette*, does not take effect until the date when the *Gazette* has been delivered at a place where it is available to the parties. It is, we think, abundantly clear from the Interpretation Ordinance that a law which has been published in the *Gazette* takes effect from the official date of the publication of that *Gazette*. It follows that in our opinion this appeal must be allowed and the case will be remitted to the District Court of Haifa to be dealt with on its merits. Costs to be costs in the cause but to simplify final arrangements we certify the costs of this appeal to be on the lower scale and to include LP. 10 advocate's attendance fee.

Delivered this 5th day of February, 1946.

Chief Justice.

CIVIL APPEAL No. 4/46.

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

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

IN THE APPEAL OF:—

Rajab Abdallah el Farran & 3 ors. APPELLANTS.

v.

Fatoumeh bint Abdallah el Farran. RESPONDENT.

Equitable title — Consideration — Mejelle Art. 393 *— Point not taken in Court of trial.*

Appeal from the judgment of the Magistrate's Court, Gaza, sitting as a Land Court, dated 26.12.45, in Civil Case No. 361/45, dismissed:—

A point not taken in defence cannot be argued on appeal, even if referred to in counsel's address. This applies particularly to such special defences as that in Art. 393 of the *Mejelle*.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 305/44 (11, P. L. R. 613; 1945, A. L. R. 272) and note 1 in A. L. R.

Vide also C. A. D. C. Ha. 26/46 (1946, S. C. D. C. 238) and note 1.

(*H. K.*)

FOR APPELLANT: Zein el-Din.

FOR RESPONDENT: Elia.

JUDGMENT.

This is an appeal from the Magistrate's Court, Gaza. It concerns a claim to part of a house. Two grounds of appeal were taken, the first was a reliance on Article 393 of the *Mejelle*, the second was a general plea that no consideration had passed, and therefore the conditions precedent to the establishment of an equitable title, which the Respondent claims, were not present.

Dealing first with the implications of Article 393, the Article enables a special defence of an avoidance of contract to be put forward. It may well be that if this defence had been raised in the Court below it might have proved successful, but the fact remains that it was not raised and unless we could hold, which we do not, that a passing reference in the address of counsel for the defence was sufficient, we are unable to deal with this point. We would emphasize that where special defences are pleaded, especially a defence of the nature of Article 393 which is unknown to English law, it must be raised specifically in the Court below if the Court of Appeal is to take cognizance

of it. In this case we do not know whether the facts, which would enable the article to be successfully pleaded do exist. From the evidence on the record the Magistrate might have found either way, but as the defence was not raised in the Court we must assume that he would have found in favour of the Respondent. It follows that the first and main ground of appeal must fail.

The second ground was that no consideration had passed. This was entirely a question of fact. It is true that there was contradictory evidence. The deed itself clearly stated that the consideration had passed and a certain witness corroborated this. This was queried by other witnesses but the learned Magistrate found on this question of fact in favour of the Respondent and on the evidence we are unable to say that in this he was wrong.

For these reasons we are of opinion that the appeal must fail. We award LP. 10 inclusive costs.

Delivered this 11th day of March, 1946.

Chief Justice.

CIVIL APPEAL No. 321/45.

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

BEFORE: De Comarmond and Curry, JJ.

IN THE APPEAL OF:—

Mustafa Abdul Hafiz El Aswad & 6 ors. APPELLANTS.

v.

Adalla bint Habib Sekli & 26 ors. RESPONDENTS.

Amendment of appeal — When it may not be allowed.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area, in Case No. 83/Haifa, dated 26.7.45; amendment of notice of appeal refused:—

Application to amend the notice of appeal refused in the circumstances set out in the judgment.

(*A. M. A.*)

ANNOTATIONS: The last sentence of R. 313(b) of the C. P. R. as reenacted in 1945 reads: "Any notice of appeal may be amended at any time as the appellate Court may think fit".

These words are taken *verbatim* from O. 58, R. 2 of the R. S. C. J.; see the commentaries to that rule in the Annual Practice.

(*H. K.*)

FOR APPELLANTS: Cattan & S. Khadra.
FOR RESPONDENTS: Nos. 1—3 — Salomon.
No. 24 — Asst. Govt. Adv. — (Hazou).
Rest — Absent — not served (not interested).

JUDGMENT.

Mr. Cattan, on behalf of Appellants, has moved that paragraph 5 of the notice of appeal be amended by adding parcels 22A and 25 to the list of parcels therein mentioned.

Mr. Salomon who appears for Respondents Nos. 1, 2 and 3 objected on the ground that such an amendment would be tantamount to a new appeal. Mr. Salomon pointed out that the seven Appellants are jointly interested in the parcels mentioned in paragraph 5 of the notice of appeal, whereas Appellant No. 1 only is interested in parcels 22A and 25.

We find nothing in the grounds of appeal indicating that Appellant No. 1 intended to appeal in a matter in which he alone was interested. Throughout the notice of appeal it would appear that the Appellants were claiming jointly, and this could only apply in respect of parcels 15B, 22 and 23 of Block 11188.

It is to be noted moreover that in the decision of the Land Settlement Officer parcels 15B, 22 and 23 were dealt with together whereas parcels 22A and 25 were dealt with under a clearly separate heading.

This is much more than a technical or formal omission in the notice of appeal. We consider that we have no discretion to allow the amendment. The application for amendment is therefore refused.

Delivered this 29th day of March, 1946.

British Puisne Judge.

HIGH COURT No. 40/45.

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

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

IN THE APPLICATION OF:—

Abraham Gabriel Sawmy. PETITIONER.

v.

The Chief Execution Officer, District Court, Jerusalem & an. RESPONDENTS.

Husband and wife belonging to different Religious Communities — Jurisdiction of Religious Courts.

Return to an order *nisi* issued on the 22nd of May, 1945, directed to the first Respondent calling upon him to show cause, if any, why his order dated 12th April, 1945, delivered on the 14th of April, 1945, in Execution File No. 141/43 District Court, Jerusalem, should not be set aside and why the judgment of the Ecclesiastical Court of the Syriac Community in Jerusalem, dated 15th May, 1944, should not be executed; order *nisi* discharged:—

1. High Court — not a Court of Appeal from Religious Courts in Palestine, and it is not for it to say whether the judgment was justified by the particular law which the Religious Court applied.

2. Where there is evidence that before marriage wife was a member of a different Religious Community from that of her husband, and no registration of change of community has been made, fact alone that marriage was celebrated in Church of husband's Community, not conclusive for Court of that community to have jurisdiction in matters of personal status concerning the parties.

(*M. L.*)

DISTINGUISHED: H. C. 7/44 (1944, A. L. R. 192; 11, P. L. R. 128).

ANNOTATIONS:

1. On point 1 see H. C. 80/43 (1943, A. L. R. 611) and annotations.

2. On point 2 see H. C. 7/44 (*supra*); see also H. C. 124/43 (1944, A. L. R. 21; 11, P. L. R. 54) and annotations thereto.

(*A. G.*)

FOR PETITIONER: Cattan and Elia.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Barkave G. Eliah.

ORDER.

This is a return to an order *nisi*. It raises once again what this Court has often referred to as the difficult question of jurisdiction of the Religious Courts. Certain facts clearly emerge, but unfortunately other facts are the subject of contradictory evidence.

The Chief Execution Officer refused to execute a judgment of the Syrian Orthodox Court of Jerusalem, and this case is in fact an appeal against the Chief Execution Officer's refusal. Petitioner now prays that the order be set aside and that the first Respondent, that is the Chief Execution Officer, be directed to execute. The second Respondent was, or still is, the wife of the Petitioner.

On the 11th July, 1937, the second Respondent, being then 16 years of age, and the Petitioner were married in the Syriac Orthodox Church at Jerusalem in accordance with the rites and ceremonies of the Syriac Orthodox Community in Palestine. Two children were born of this

marriage. They were baptized in accordance with the rites and ceremonies of the Syriac Orthodox Community and have been brought up in that religion.

The marriage turned out unhappily. There were squabbles between the parties which seem to have culminated in a very serious criminal charge being preferred by the wife against the husband. On that charge the husband was acquitted, and as far as this Court is concerned, he is an innocent man. Mention of it is only relevant for the purpose of noting that immediately afterwards he became complainant, and took divorce proceedings against his wife. These proceedings he instituted in the Syriac Orthodox Court. The wife immediately contested the jurisdiction and having made her protest she took no further part in the proceedings. Despite this, the Court went on to give judgment in her absence.

That judgment was in the following terms:—

> "Whereas it was proved on the evidence adduced ... that the wife, Rabika, behaved improperly towards her husband, Ibrahim, and dispute arose between them which developed into rebellion of wife and suspicious behaviour by her;
>
> And whereas it was proved that the wife is leaving her home without the knowledge of the husband, and that she was several times prevented therefrom and she did not pay heed thereto, and it has become known recently that she has relations which are contrary to matrimonial loyalty, he was given a decree of separation, custody of the children, to whom the wife is forbidden all access, and the wife is refused alimony or maintenance".

After six months the decree of divorce was substituted for the decree of separation.

Now this Court is not a Court of Appeal from the Religious Courts of this territory, and it is not for us to say whether the judgment was justified by the particular law which the Court applied, but it must be obvious that the decision was disastrous in its results to this mother, who was never heard in her defence. Whatever the merits, this result cannot but cause us uneasiness, particularly as we will indicate presently, there was at least *prima facie* evidence to support the wife's plea of non-jurisdiction. As to this aspect of the case we need to say no more, except that if there is room for doubt as to the jurisdiction, we will lean towards that interpretation which will enable the case to be tried in a Court whose absolute impartiality can be questioned by neither party.

We turn now to consider this question of jurisdiction.

We agree with Mr. Cattan that the fact that this girl was married

in the Orthodox Church, and that her children were baptized according to the rites of that Church, raises a strong presumption that the Court of the Orthodox Community has jurisdiction in regard to matters concerning her personal status. But it is clear from the cases already decided in this Court that this fact alone is not conclusive. The question is: is she now estopped from pleading that she is not subject to this jurisdiction? High Court Case No. 7/44 was relied on, but a distinction can be drawn between that case and this, in that in the No. 7/44 case the Respondent for years before his marriage held himself out to be of the Community into which he had married. In this case there is a conflict of evidence on this point.

The Petitioner alleges that the family who came from the Lebanon were always known to him as Syriac Orthodox, that he met the second Respondent as a Syriac Orthodox, and in his own language, "he was betrothed to her as such". But against that, the second Respondent produced an extract from the Register of the Lebanese Republic to the effect that she was born in Beyrouth in 1920, and was registered as a Syrian Catholic. The Archbishop Patriarchal Vicar of the Syriac Catholic Community in the Lebanon issued a certificate which, if accepted, proved that her father was a member until his death in 1934 of the Syriac Catholic Community, and that he was registered as such in the Register of Deaths, Vol. 2, Fol. 31. Furthermore, her mother's identity card — an official document of the Lebanese Republic, issued in 1942 — described her as Syriac Catholic. There is also uncontested evidence that until her marriage in 1937, she was a postulant nun in the Convent of the Rosary in Jerusalem, which is a Catholic Convent. These facts clearly contradict the inference the Petitioner wishes to be drawn from paragraph 16 of the petition, which seeks to explain how the wife came to allege at all that she was a Catholic. The paragraph reads as follows:—

> "On or about the 17th August, 1944, the brother of the second Respondent, by name Antone Benjamin Antone, having proceeded to Lebanon, officially caused to be registered in the Lebanese "Office de Status Personnel et de Statistques", a change of community in respect of his sister and of her family from Syrian Orthodox to Syrian Catholic. (A certificate to this effect is attached herewith marked Exhibit 'C')".

All these facts would not of course prevent the wife from changing her faith on her marriage, and becoming a Greek Orthodox. I must at this stage mention that there had been no registration of change of community under the provisions of the Religious Community (Change) Ordinance, 1927. The Petitioner states that since her

marriage his wife never attended any Catholic services, but she did worship at the Greek Orthodox Church.

I concede that the fact that her children were baptized as Greek Orthodox, and that she herself, although a Catholic, was married in the Greek Orthodox Church, constitute strong evidence in support of the Petitioner's averment, but against that there is the affidavit of Monseigneur Haddah, Patriarchal Vicar of the Syriac Catholic Community in Jerusalem, which averred that all the second Respondent's family were Syriac Catholics, that she never changed her Syriac Catholic Community, whether before or after her said marriage, and that she is still registered in their Registers and considered a member of the Syriac Catholic Community.

We do not question the good faith of the High Ecclesiastics of either of these communities, but unfortunately we are confronted with a clear conflict of evidence on this vital issue. We do not find it necessary to state categorically that one is false and the other true. For the reasons we have given earlier, we lean towards that version which will enable this case to be determined in a Court other than one of the Religious Communities' Courts. It may well be, as the Religious Court has decided, that this woman is a worthless woman, who is incapable of looking after her children. If this be so, the Petitioner can still establish his case.

The decision of this Court is that the parties were of different religious communities and as the wife did not consent to the jurisdiction, the Religious Court has no jurisdiction.

The Court which is vested with jurisdiction is the Civil Court. In our opinion the Chief Execution Officer came to a correct decision. The Rule is therefore discharged, with inclusive costs of LP. 10.

Given this 26th day of February, 1946.

Chief Justice.

CRIMINAL APPEAL No. 26/46.

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

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

IN THE APPLICATION OF :—

Ahmad Abdul Muhdie Abu Jhaisheh. APPLICANT.

v.

The Attorney General. RESPONDENT.

Evidence of children — Children & Young Persons Act, 1933 — T. U. I. Ord., sec. 34(2) — Corroboration not required.

Application for leave to appeal from the judgment of the District Court, Jerusalem, dated 19th February, 1946, in Felony No. 245/45, whereby Applicant was convicted of housebreaking *contra* section 295(a) of the Criminal Code Ordinance, 1936, and sentenced to 9 months' imprisonment, refused:—

> If the judge, after being satisfied that a child understands the nature of an oath, swears him, the evidence of the child may be accepted without corroboration.
>
> (*A. M. A.*)

ANNOTATIONS: See the 1939 amendment to sec. 34(2) of the Ordinance and *cf.* note 2 to CR. A. 105/43 (1943, A. L. R. 754).

(*H. K.*)

FOR APPLICANT: S. Asal.

FOR RESPONDENT: Assistant Government Advocate — (Hazou).

JUDGMENT.

The only point of substance that emerges in this application is the fact that the Accused was convicted on the evidence of a single witness, that single witness being a child twelve years old. Mr. Asal has argued that as the witness was only twelve years old, she was a child and the statutory provisions of the Children and Young Persons Act of 1933 should have been applied, which are to the effect that her evidence must be corroborated. As to this we need only say that the Act does not apply to Palestine. The analogous provision in this country is section 34(2) of the Criminal Procedure (Trial Upon Information) Ordinance. The test is whether the person was too young to understand the nature of an oath. This is a question for the judge to decide. In this case the Judges decided that she was not too young and in fact they did swear her. Having been sworn, the Judges were quite entitled to accept her evidence and to convict the Accused upon it.

For these reasons the application for leave to appeal must be refused.

Given this 20th day of March, 1946.

Chief Justice.

CIVIL APPEAL No. 351/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Mustafa Asad Karm & an. APPELLANTS.

v.

Raji Isa Nuwaisser. RESPONDENT.

Oral evidence — Proof that signature was affixed by authority — Land Transfer Proclamation — Prescription, non-adverse possession — Date of delivery of judgment.

Appeal from the judgment of the Magistrate's Court of Jenin sitting as a Land Court dated 27.10.45, in Land Case No. 1/45, dismissed:—

Oral evidence is admissible to prove that a party's name to a contract was affixed with his authority.

(*A. M. A.*)

ANNOTATIONS:

1. See C. A. 155/44 (11, P. L. R. 204; 1944, A. L. R. 368) for the meaning of "written document" in Art. 80 of the Ottoman C. P. C.

2. On the admissibility of void or illegal documents in evidence *cf.* C. A. 446/44 (12, P. L. R. 225; 1945, A. L. R. 332) and note 2 in A. L. R.

3. A judgment "should be dated only at the time of its delivery": C. A. 63/45 (12, P. L. R. 518; 1945, A. L. R. 755 — penultimate paragraph).

(*H. K.*)

FOR APPELLANTS: B. Elia.

FOR RESPONDENT: Y. Hammoudeh.

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 27.10.45 (delivered on 28.10.45) of the learned Magistrate of Jenin in Land Case No. 1/45, declaring that the Respondent (original Plaintiff) is the owner of 5 out of 24 *kirats* in a plot of land known as Wady El Mu'allaqa, having an area of 52 *dunums* and bounded as follows:—

East: — Anin's lands.

West: — The garden of Isa Nuweisser.

North: — Ras Lahaf El Kharroub (Waste).

South: — Anin's land.

The Magistrate also gave orders for possession, non-interference, and registration.

Having heard Mr. George Elia for the Appellants we do not consider it necessary to call on Yahya Eff. Hammoudeh, advocate for the Respondent, to reply.

In the Magistrate's Court the case for the Respondent (Plaintiff) was based upon an agreement (Exhibit 2) dated 15th *Ramadan*, 1334 (corersponding to 1915 *A. D.*). The evidence showed that this agreement had actually been made in 1339 (corresponding to 1920 *A. D.*), but had been antedated to 1334.

It is admitted that the Respondent is not in possession of the land, and that since 1920 he has not had any share of the produce.

The Magistrate found that Exhibit 2 was a genuine document, and I can see no reason for upsetting that finding of fact. It is, however, admitted that the Appellants did not personally sign Exhibit 2, and Mr. Elia has submitted that whereas under Article 80 of the Ottoman Civil Procedure Code such an agreement is required to be in writing, verbal evidence could not be admitted to prove that the Appellants' names had been written upon the document with their consent. I am unable to agree with this submission. The Magistrate found that the Appellants had consented to the agreement and had authorised Mohammad El Kayed to put their names on it. In these circumstances the Appellants would clearly be bound by it.

Mr. Elia has further submitted that in view of the proclamation dated 18.11.1918 (see Bentwich Vol. 1 page 617), the agreement was one which was prohibited by law. The Land Transfer Ordinance came into force in September, 1920, and it has not been established whether Exhibit 2 was signed before or after the Ordinance came into force. But even if Exhibit 2 was signed while the proclamation dated 18.11.1918 was still in force, it is nevertheless admissible for the purpose of proving that on 15th of *Ramadan* 1334 (*i. e.* in 1920) the Appellants were admitting that they and the Respondents were co-owners. The Magistrate has held, and I agree with his finding, that the Appellants failed to prove that their possession was adverse to the Respondent. Exclusive possession is not necessarily adverse, and there was no evidence to prove adverse possession. In the circumstances it is clear that there was no prescription.

Mr. Elia has also submitted that the learned Magistrate ought not to have refused a request made by Subhi Eff. Hijab, advocate for the Appellants in the Court below, for the recalling of the Respondent's witnesses for further cross-examination. This request was made because Subhi Eff. had been absent at the hearing of 30.7.45. It appears from the Magistrate's note (at page seven of the typewritten record) that the Appellants had been offered an adjournment, and that they had left the matter to the discretion of the Magistrate who decided to proceed with the hearing. It also appears that the Appellants did actually cross-examine the Respondent's witnesses although very briefly. In these circumstances I am unable to find that the Magistrate erred in refusing the request of Subhi Eff.

In the result I find that the appeal fails, and I dismiss it with fixed costs in the sum of LP. 10.—.

I would observe that the judgment of the learned Magistrate should have been given only one date — the date of its delivery.

Delivered this 4th day of March, 1946.

British Puisne Judge.

Frumkin, J.: I agree.

Puisne Judge.

CIVIL APPEAL No. 374/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Hildegard Herzberg. APPELLANT.

v.

Shlomo Perlstein, in his capacity as administrator of the estate of Moshe Baum, deceased. RESPONDENT.

Patent ambiguity — Oral evidence to explain document — Arts. 80, 82 *Civil Procedure Code — Decisive oath, Mejelle Arts.* 1742, 1748 — *Interest.*

Appeal from the judgment of the District Court of Tel-Aviv, dated 5th November, 1945, in Civil Case No. 145/44, allowed:—

Oral evidence may be led to explain a document if there is no patent ambiguity.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C., at p. 460.

2. On latent and patent ambiguities see Halsbury, Vol. 10, pp. 276—7, subsec. 4.

3. *Cf.* C. A. D. C. Jm. 40/45 (1945, S. C. D. C. 389) and also notes to the judgment appealed from (*ibid.*, p. 460).

(*H. K.*)

FOR APPELLANT: Eliash and Reich.

FOR RESPONDENT: Hake.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Tel-Aviv, dismissing a claim by the Appellant against the

Respondent, the administrator of the estate of Moshe Baum, deceased.

The facts, shortly stated, are that the Appellant made the acquaintance of the deceased in September, 1942, later coming to be on friendly terms with him. Between October, 1942, and August, 1943, she lent him various sums amounting to LP. 731. The deceased gave her receipts for LP. 95 and, as security for repayment of loans, four promissory notes for a total sum of LP. 636. On 21st December, 1943, deceased asked her to hand back to him all the receipts and promissory notes in order that he might substitute for them one promissory note for the whole sum of LP. 731, which she did, the deceased undertaking to give her one single promissory note within a few days. In the meantime he gave her a provisional receipt in pencil on a slip of paper (Exhibit P. 11) which is in German, and is in the following terms:—

"1 Akcept	... ...	80	1 Promissory note 80
1 „	... ...	80	1 „ „ 80
1 „	... ...	251	1 „ „ 251
1 „	... ...	225	1 „ „ 225
Maschine	... ...	65	Machine 65
Baum	... ...	30	Baum 30
		731	731
die bestätige habe von Frau Herzb. erhalten zum unterz. alles.			which acknowledge I have received from Mrs. Herzb. for unders. all.
M. Baum.			M. Baum".

We believe that the above is a correct translation.

Shortly thereafter, the deceased went on a short visit to Jerusalem, where three days later, on 24th December, 1943, he was unfortunately killed in a street accident.

The learned Relieving President entirely believed the evidence of the Appellant but felt that he was precluded from giving judgment in her favour because Exhibit P. 11 was not a document which sufficiently complied with the requirements of Article 80, Ottoman Code of Civil Procedure. He considered that there was a patent ambiguity, in that P. 11 did not indicate the denomination of the figures, although he said that one can reasonably guess that they represent pounds.

We agree with the learned Relieving President that they represent pounds; but we go further and say that they could represent only pounds, as it is unlikely that a promissory note would be given for 80 mils. In Palestine the only currency is pounds and mils. There was therefore no patent ambiguity with regard to the denomination of the currency.

The learned Trial Judge then went on to say that, although he was satisfied that Exhibit P. 11 constituted a receipt, it gave no indication of the nature of the transaction to which it refers.

Here we must part company with the learned Trial Judge. We do not think that it is seriously disputed that the words *"zum unterz. alles"* are intended for *"unterzeichnen alles"*. The meaning and intention of these words is that the deceased had to "sign all together". In other words, he had to sign on one document an admission for all these figures. We therefore think that there was sufficient indication that it was, anyhow, not an acknowledgement of money owing to the deceased, and that it indicated the truth of the allegation made by the Appellant in her statement of claim. We do not think that there was any patent ambiguity such as would destroy her allegation, or as would point in another direction. Oral evidence, therefore, was sought to be led not to contradict, but to explain the document. For these reasons we think that oral evidence was admissible. As the learned Relieving President entirely believed the Plaintiff (Appellant) we think that judgment should be entered for her.

It is of interest to note that the deceased's representatives apparently did know something about the transaction. His widow gave evidence admitting having signed Exhibit P. 2. She deposed that its contents are "presumably true". Exhibit P. 2, which is a list of the assets and debts of the deceased and is signed by the widow, contains the following — "Promissory notes in the hands of various people in the total amount of LP. 1119" *etc.*

Because of the view which we take, we find it unnecessary to decide other matters argued before us, such as the question of whether Article 82 applies on the ground that the document was lost. We do not have to decide whether the document can be described as lost for the purposes of that Article, nor do we require to decide the question of the decisive oath. We would merely say that the attention of the learned Relieving President does not seem to have been attracted to the provisions of Article 1748 and 1742 of the *Mejelle*.

For the foregoing reasons the appeal is allowed, the judgment of the District Court is set aside and judgment entered for the Appellant for the sum of LP. 731, with costs here and below. Costs of this appeal will be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.—.

Delivered this 15th day of March, 1946.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

Note: This judgment was read out on 15th March 1946 by Mr. Justice Edwards sitting alone. Before he had completed delivery Mr. Scharf, for Dr. Eliash, for the Appellant, asked that the judgment carry interest at 9% from date of filing of the statement of claim to the date of payment. Mr. Justice Edwards then intimated that the matter would have to be adjourned to enable himself and Mr. Justice Frumkin to sit and hear parties' advocates. We have now to-day heard full arguments by Dr. Eliash for the Appellant and Mr. Meiri for Respondent. Having heard and considered the respective arguments of both those advocates, we direct that the judgment bear interest at 9% *per annum* from the date of filing of the statement of claim in the District Court to date of payment.

22nd day of March, 1946.

British Puisne Judge.

CIVIL APPEALS Nos. 213/44, 233—260/44, 262—263/44, 265—269/44.

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

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

IN THE APPEALS OF :—

Mohammed Hussein Ismail Suwwan & ors. APPELLANTS.

v.

The Palestine Jewish Colonization Association & ors. RESPONDENTS.

Birya settlement — "Assas" registration — Exchange — Whether it resulted in correction or addition on issue of new kushan — Land Code, Arts. 47, 103 — Subsequent cultivation — Kushan issued for greater area than actually possessed — Who should be made plaintiff in L. S. (R. 5).

Appeals from the decision of the Settlement Officer, Safad Settlement Area, dated the 4th January, 1944 in Cases Nos. 6, 9, 10, 11, 13, 14, 19 and 20/Byria, allowed and case remitted:—

Upon an exchange of land resulting in the issue of new (*bedl misl*) for old (*assas*) *kushans*, a greater area, than the grantee was formerly entitled to, cannot be included in the *kushans*.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 160/43 (11, P. L. R. 397; 1944, A. L. R. 651), referred to in C. A. 169/45 (13, P. L. R. 4; *ante*, p. 143) and in C. A. 306, 311 & 318/44 (*ante*, p. 211).

(*H. K.*)

FOR APPELLANTS: (in all appeals) — Cattan and S. Khadra.

FOR RESPONDENTS: (No. 1 in all appeals) — Eliash, Scharf and Feiglin.

Ben Shemesh for Respondent No. 4 (in C. A. 233/44).

The other Respondents in all the Appeals are absent — served.

JUDGMENT.

These appeals which have, by consent of parties, been consolidated, arise from a decision of the Land Settlement Officer, Safad, and concern the village lands of Birya. The facts of the case are set out in the decision of the Land Settlement Officer, a decision which extends to nearly 30 typewritten pages. Although the decision is long, and although the hearing before us occupied many days, we do not think that a lengthy judgment is called for because we think that the questions falling for decision can be answered very shortly.

The lands were originally registered in what were known as *"Assas"* registrations in 1284 (1867 *A. D.*). In 1311 (1893 *A. D.*) the Palestine Jewish Colonization Association, hereinafter referred to as PICA, purchased originally some of these registrations up to a total of 4½ out of 16½ *feddans*. The original *Assas* registrations were in *feddans*, each *feddan* equalling 40 *dunums*. These *feddans* were not spread over one locality. For instance 10 *dunums* might be in locality A, 10 *dunums* in locality B and 10 *dunums* in locality C. The original registration included localities in what are known as the lowlands or *"Kheit"*. Although there were separate registrations, the holdings were in *musha'* in spite of the fact that the registration were *mafruz*. As so often happened in Turkish times, the number of *dunums* stated in the title deeds represented less than the whole area which was purchased, the object of this procedure being to escape too heavy taxation. At the time when the PICA purchased in 1893 the Turkish Land Registry also issued them with *bedl misl kushans* in respect of an area of 5000 *dunums*. In 1923 an exchange occurred. Before this exchange the position was that the cultivated and cultivable lands extended to 2294 *dunums*, of this area the PICA had in her ownership 994 *dunums*. Considerable controversy centred round the date of a certain map Exhibit G. The Land Settlement Officer gave many

reasons for finding that it was made in 1923 and represented the condition of the land as at that time. While the matter is by no means certain, we are not prepared to differ from the Settlement Officer's conclusions. The area in *feddans,* assuming the original registration to have expanded to the cultivable areas, would have given the PICA 6½ *feddans*. PICA agreed to evacuate the lands in the Highlands in exchange for lands in the *"Kheit"* or lowlands, giving up two *dunums* in the Birya highlands for every *dunum* obtained in the lowlands. The Land Settlement Officer at p. 14 of his decision found that the PICA retained immediately after 1923 in the cultivable lands an area of 400 *dunums*. The PICA claim that the whole of the lands of Birya were registered and they also claim the balance which has not been proved to belong to the villagers. It is admitted that the PICA never had possession.

The first question which we wish to decide is whether the *bedl misl kushans* were merely a correction or an addition to the *Assas kushans*. The Land Settlement Officer held that all the lands of Birya were registered. Having carefully considered the respective arguments of parties' advocates and having regard to Articles 103 and 47 of the Ottoman Land Code, we are of opinion that it was never intended to give to the PICA uncultivable or waste land. We do not think that the PICA are entitled to a greater area than was shown to be cultivated. In other words, the *bedl misl* grant could not give PICA an area greater than the area of the cultivated land or land revived subsequently thereto. It is implicit from the decision of the Land Settlement Officer that there has been no substantial change in the way of cultivation since 1923. It may seem strange that title deeds were issued for 5000 *dunums* when it is clear that only 984 *dunums* were cultivated. Be that as it may, we think that the wording of Article 103 can lead us to no other conclusion than that the land to which the PICA are now entitled, having regard to the incidents of the exchange of 1923, is the 400 *dunums* already referred to.

For these reasons the decision of the Land Settlement Officer must be set aside. This, of course, does not conclude the matter. In view of our decision we find it unnecessary to deal with Exh. XI and Exh. T1, or with the interdiction of one Dilsi, or with the Land Transfer Regulations, 1940. We think that we should not leave the case without saying that, in our view, in the circumstances, the Land Settlement Officer should not have made the villagers the Plaintiffs. We refer to Rule 5, Land (Settlement of Title) Rules, Laws of Palestine, Vol. 3, p. 1804. The case is accordingly remitted to the Land Settlement

Officer to deal with the balance of the land in dispute in these appeals. The Land Settlement Officer will have to decide whether each of the Plaintiffs has established his claim to any of the land in dispute. The Respondents must pay the Appellants' costs, *viz.* one set of costs to be taxed on the lower scale to include an advocates' attendance fee of LP. 50.— (including all disbursements on all the consolidated appeals).

Delivered this 14th day of March, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 27/46.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Batya wife of Shimon Mizrahi. — APPELLANT.

v.

Attorney General. — RESPONDENT.

Summons — Failure by Magistrate to sign — M. C. P. R. 243 — *R.* 259 — *Curing defect — Appearance — Appeal by A. G. under sec.* 11(3)(*b*) *M. C. J. O. — "Facts proved", CR. A.* 10/44.

Appeal from the judgment of the District Court of Jerusalem in its appellate capacity dated 14th January, 1946, in Criminal Appeal No. 145/45 from the judgment of the Magistrate's Court in Criminal Case No. 12757/45 dated 3rd of December, 1945, dismissed:—

1. A summons should be signed. If not, the defect can probably not be cured by R. 259. But appearance cures the defect.

2. An appeal against an acquittal on the ground that the summons was defective, lies under sec. 11(3)(b) of the Magistrates' Courts Jurisdiction Ordinance.

(*A. M. A.*)

REFERRED TO: CR. A. 16/44 (11, P. L. R. 79; 1944, A. L. R. 125).

ANNOTATIONS :

1. On the first point *cf.* CR. D. C. Ja. 85/46 (1946, S. C. D. C. 350) and notes thereto.

2. On the second point *cf.* CR. A. D. C. Ja. 159/45 (1946, S. C. D. C. 232) and note 2, and CR. A. 201/45 (*ante*, p. 158) and notes.

(*H. K.*)

FOR APPELLANT: Rosenberg.

FOR RESPONDENT: Acting Crown Counsel — (Salant).

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem in its appellate capacity allowing an appeal from a judgment of one of the Magistrates of Jerusalem who had acquitted the present Appellant of a charge under section 326, sub-section (1) of the Criminal Code Ordinance 1936 on the ground that the summons issued under Rule 243 Sub-Rule (1) Magistrates' Court Procedure Rules 1940 had not been signed by the Magistrate.

The facts are that the Accused and her advocate appeared before the Magistrate on 14th November, 1945, and it appears from the Magistrate's record that the charge was then read over to her. She elected to be tried by the Magistrate and then pleaded not guilty and the case was adjourned for hearing on the 3rd December.

We have examined the charge sheet which is in Arabic and signed by an Inspector of Police and the Magistrate. It is therefore implicit that before he issued the summons the Magistrate had scrutinized the Police charge sheet which contained an application for the issue of process. The Magistrate, as we have said, signed the charge sheet, informing the Inspector of Police that he would hear the charge on 14th November, 1945, which he did. The charge which was read out to the Accused was a perfectly good charge sheet. We understand that it was read out in Arabic, a language which the Appellant understands and speaks.

When the case came on for trial on the 3rd December, 1945, the Accused's advocate submitted that because the summons had not been signed she ought to be acquitted. After hearing the Prosecutor and a reply by the present Appellant's advocate, the Magistrate accepted this submission and acquitted the Appellant.

The Attorney General then appealed to the District Court which held that, as the Accused had apparently before the Magistrate elected to be tried before him and replied to the charge by pleading not guilty, all she could have asked for was an adjournment. The District Court allowed the appeal and remitted the case to the Magistrate for trial. From that judgment the Appellant now, by leave, appeals to this Court.

The first ground of appeal is that the Attorney General had no right of appeal to the District Court under section 11, sub-section (3) Magistrates' Courts Jurisdiction Ordinance, 1939. Dr. Rosenberg has argued that there is no appeal against a judgment based on an error of procedure. Mr. Salant, on the other hand, argues that there is an

appeal under section 11(3)(b) on the ground that the law was wrongly applied to the facts.

Speaking for myself, I should have been inclined, had we been untrammelled by authority, to accept Dr. Rosenberg's argument because the term "facts proved" I understand to mean facts proved in evidence. (Criminal Appeal 16/44 Vol. 11, P. L. R. p. 80). It seems however that this Court has given the word "facts" used in section 11(3)(b) a very wide meaning. I take it that the facts proved are that a summons was issued unsigned, and it then becomes a question of law whether on those facts a conviction could at all follow. The first ground of appeal therefore fails.

The other ground of appeal is that, as the summons was not signed, all the proceedings were a nullity. We would, at the outset, say that we think that a summons must be signed and we much doubt whether if a summons is not signed the matter can be cured by Rule 259. We wish to emphasise the fact that in this case the charge sheet was properly signed and properly read out to the Accused. We quote from Stone's Justices' Manual (1944) 76th Edition, p. 192:—

> "The Defendant's appearance cures any irregularity in the service of the summons or the want of one (see R. *v.* Stone, 1 East, 639); and even the non-compliance with a statutory form. In R. *v.* Shaw, *ante*, p. 188, the rule of law was thus stated by Blackburn, J.: 'I think when a man appears before justices, and a charge is then made against him, if he has not been summoned he has good grounds for asking for an adjournment. If he waives that, and answers the charge, a conviction would be perfectly good against him, and the witnesses, if they swore falsely, would be liable to an indictment for perjury'. (See R. *v.* Fletcher, 35 J. P. 695). In R. *v.* Smith, L. R. 1 C. C. R. 110, it was held that if the Defendant appeared at the hearing, evidence, on a trial for perjury, of the information without proof of the summons (which is merely to bring the Defendant into Court) was sufficient, and a conviction for perjury was affirmed". ;

For the foregoing reasons we think that the District Court came to a correct conclusion and the appeal is accordingly dismissed.

Delivered this 14th day of March, 1946.

British Puisne Judge.

CRIMINAL APPEAL No. 23/46.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abraham ben Jacob Piker. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Plea of guilty, whether conviction should be recorded — T. U. I. Ord., sec. 33, CR. A. 76/43 — Compliance with sec. 47 — Admission of previous convictions — Duplicity — sec. 65.

Appeal from the judgment of the District Court of Tel-Aviv, dated 7th February, 1946, in Criminal Case No. 5/46, whereby Appellant was convicted of an offence of entering a dwelling-house with intent to steal therein, contrary to section 296 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment, dismissed but sentence reduced:—

The Court need not, after recording a plea of guilty, formally record the conviction.

(*A. M. A.*)

NOT FOLLOWED: CR. A. 76/43 (10, P. L. R. 375; 1943, A. L. R. 460).

ANNOTATIONS:

1. Note that CR. A. 76/43 (*supra*) concerned a case before the Magistrate's Court to which Rule 268(2) of the M. C. P. R. applied and not secs. 33 & 47 of the T. U. I. Ordinance.

Cf. CR. A. 153—5/45 (12, P. L. R. 447; 1945, A. L. R. 605) which is to the same effect as the ruling in this case.

2. On failure to comply with sec. 47(2) of the T. U. I. Ordinance *cf.* CR. A. 153—5/45 (*supra*) and note 2 in A. L. R.

3. On duplicity in the charge sheet *vide* CR. A. 210/45 (13, P. L. R. 16; *ante*, p. 7) and note 1.

4. On proof of previous convictions see CR. A. 153—5/45 (*supra*) and note 3 in A. L. R.

(*H. K.*)

FOR APPELLANT: Hausner.

FOR RESPONDENT: Acting Crown Counsel — (Salant).

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv whereby the Appellant was convicted of entering a dwelling house with intent to steal contrary to section 296 of the Criminal Code Ord-

inance. The first ground of appeal is that no conviction was recorded. Now, it is true that in Criminal Appeal No. 76 of 1943, P. L. R. Vol. 10, p. 377, this Court held that, even when a plea of guilty is recorded it is desirable, that more precise wording should be used to show that the Court has convicted. In other words, it would seem from the judgment in that case that this Court held that, when a plea of guilty is recorded, a formal conviction should be recorded. I was a member of the Court which decided Criminal Appeal 76/43 but I do not think that our attention was called to the provisions of section 33 of the Criminal Procedure (Trial Upon Information) Ordinance. In my view, it is unnecessary for a formal conviction to be recorded when the Accused has pleaded guilty because one then goes direct from section 33, sub-section (1) to section 47.

The next point of appeal is that section 47, sub-section 47(2) was not complied with. This seems to be admitted. We would again say for the benefit of judges of District Courts that it is essential that a note be made on the record that section 47, and particularly section 47(2), has been complied with. The next ground of appeal is that three previous convictions alleged against the Accused were not put to him nor was he asked whether he admitted them. Mr. Salant, who appeared before the District Court and who has also appeared before us, assures us that the learned trial judge did put the previous convictions to the Accused who admitted them. We have looked at the manuscript record of the learned Acting Relieving President and it seems that the words "Accused has three previous convictions admitted by the Accused" were words uttered by Mr. Salant. Mr. Salant, however, assures us that the Accused admitted them to the trial Judge. Here again we would say that it is essential that the Court should record words such as the following, namely: "The Court reads to the Accused the certificate of previous convictions alleged by the Prosecution and asks him whether he admits them. The Accused replies to each as follows ..." and so on.

Another ground of appeal is that the charge sheet was bad for duplicity in that in the particulars of the offence it was stated that the Accused entered a flat with intent to steal and did steal a lighter and a watch. Now the particulars of the offence are merely a narrative of what the Crown intends to prove. The actual offence with which he was charged appears quite clearly from the statement of offence, namely "entering a dwelling house with intent to steal therein, contrary to section 296 of the Criminal Code Ordinance". Whatever technical merit there might be in the objection we think that the proviso to section 65 covers the matter.

The Accused has admitted to us the truthfulness of the statement of previous convictions. The last conviction was on the 2nd October when he was sentenced to pay a fine of LP. 15.— or in default of payment to two months' imprisonment for possession of property under section 311. We are told that the Appellant is only 19 years of age.

As we are unaware what sentence the trial Court would have passed had section 47 been complied with, and had (and this is important) the Court recorded the plea in mitigation of penalty, we think that this is a case in which we can properly interfere with the sentence. The stolen property was not very considerable, namely, a lighter and watch, and the previous sentences passed were by no means severe. In the circumstances we think that we may properly reduce the sentence to one year's imprisonment to date from the date of conviction, namely 7th February, 1946.

Delivered this 13th day of March, 1946.

British Puisne Judge.

INCOME TAX APPEAL No. 11/45.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Mendel Scharf. APPELLANT.

v.

The Assessing Officer, Jerusalem. RESPONDENT.

Income Tax — Fees paid to Inn of Court by practising advocate — Whether deductible — Probability of increasing income — Money spent wholly or exclusively for the purpose of producing income, or capital expenditure — I. T. Ord., secs. 11(1), 13(*b*)(*d*) *— Income derived partly from professional gains and partly from employment — Expenditure on improvements — Wales (H. M. Inspector of Taxes) v. Graham, Henderson Shortt v. McIlgorm (Inspector of Taxes).*

Appeal against the Assessing Officer, Jerusalem, in Assessment No. I 927(606) dated 2.9.1945, dismissed:— ....

A practising advocate who joins an Inn of Court with the object of being called to the English Bar and, as a consequence, increasing his earnings, is not entitled to deduct the fees paid on registration from his assessable income.

(*A. M. A.*)

REFERRED TO: Wales (Inspector of Taxes) *v.* Graham, 24 Tax Cases, Part II. 75; Henderson Shortt *v.* McIlgorm (Inspector of Taxes), 1945, 1 All E. R. 391.

ANNOTATIONS: See the textbook passages cited and *cf.*, on sec. 11 of the Income Tax Ord., I. T. A. 5/44 (11, P. L. R. 362; 1944, A. L. R. 430) and C. A. 358/44 (12, P. L. R. 122; 1945, A. L. R. 222).

APPELLANT: In person.
FOR RESPONDENT: Wittkowski.

JUDGMENT.

The question for decision in this case is whether fees in the sum of LP. 109.120 mils paid by the Appellant on admission to Gray's Inn should be allowed to be deducted in assessing the Appellant's taxable income.

The Appellant has been practising as an advocate in Palestine for the last eight years, and I am satisfied on the evidence which he has led that when he is called to the English Bar there is a very reasonable probability that his prospects as an advocate will be materially improved. He will also then have the necessary qualification for appointment as a Notary Public under the provisions of the Notaries Public (Foreign Documents) Ordinance (Cap. 99), and as Notary Public he will be entitled to charge fees for his services. In other words it may be said that by paying the fees for admission to Gray's Inn the Appellant has made an investment which is likely to be profitable in the long run.

The question to be decided is whether the money so spent can be regarded for the purposes of sections 11(1) and 13(b) of the Income Tax Ordinance No. 23/41, as having been spent wholly and exclusively for the purpose of producing or acquiring the Appellant's income. Or is it, on the other hand, capital expenditure which he is not allowed to deduct?

Various cases have been referred to by the Appellant and by Mr. Wittkowski who has appeared on behalf of the Assessing Officer, but none of them can be said to be on all fours with the present case. There are advocates in Palestine who make good incomes although they are not Barristers, and it may be that the Appellant, even after he has become a member of the English Bar, will not make a larger income than some other advocates who have not been called. Can I then regard this expenditure as having been incurred wholly and exclusively for the purpose of producing the Appellant's income? It is obviously a perfectly voluntary expenditure and it is on a different

footing, I think, to expenditure incurred, for instance, in paying the wages of an extra clerk whose services are required to enable the Appellant to deal with the extra work of a growing practice. The Appellant could by working harder increase his income to just as great or perhaps even to a greater extent than he will merely by becoming a Barrister.

Having considered the matter I find myself unable to regard this expenditure as falling within sections 11(1) and 13(b). In my judgment it is capital expenditure. The Appellant has in effect made an investment which is likely to be profitable. He might in the same way enlarge his legal practice by becoming a doctor, or by becoming an expert in some branch of foreign law. But I do not think that it could be said that what he spent on his medical training, or on his training in foreign law, was wholly and exclusively laid out or expended for the purpose of acquiring his income. Such expenses are not normally and necessarily incurred by an advocate in Palestine for the purpose of acquiring his income as an advocate.

There is however another point from which the matter may be viewed. When the Appellant filled up his income tax return he showed his income under Item 2(a) and (b) of Part 1 of the form. He now submits that his income ought to be shown partly under Item 1 of the form — that is to say that his income is partly derived from the gains of a profession and partly from employment. The Appellant is not a partner in the firm in which he works, and although a part of his income is scaled on a percentage I find that that part too must be regarded as income derived from employment. So the position is that it is uncertain whether, after he has been called to the Bar, the Appellant will still derive his income from employment or whether he will derive it entirely from practising his profession independently as an advocate. He may decide to start a firm of his own. If he does so his income will all fall under Item 1 of Part 1 of the Schedule, as it will then be income derived directly from the exercise of his profession. The expenditure which he now wishes to deduct will in that case have been expenditure incurred not for the purpose of acquiring income of the present type, that is to say, income derived from employment, but for the purpose of enabling him to derive an income directly from the exercise of his profession. Putting it in other words it appears to me that what the Appellant is doing is that he is making a capital investment with a general view of improving his prospects. He can improve his prospects in various ways of which this is one, but I am unable to regard expenditure incurred for such a purpose as having

been incurred wholly and exclusively for the purpose of acquiring an income from employment. It is not necessary, in order that he may perform the duties of his present office and by so doing earn his income, that he should be called to the Bar. He can continue to earn his present income without being called to the Bar.

This expenditure is, I think, in some respects analogous to expenditure laid out upon improvements. The Appellant has incurred this expenditure for the purpose of improving his prospects, or for the purpose of improving his own qualifications and thereby improving his prospects of earning money. Section 13(d) of the Ordinance provides that the cost of any improvements is not deductable.

The case of Wales (H. M. Inspector of Taxes) *v.* Graham, Tax Cases, Vol. 24, Part II, page 75 has been referred to by Mr. Wittkowski. In that case the Respondent was until his retirement a divisional engineer to the London County Council. Candidates for such appointments had to be corporate members of the Institution of Civil Engineers or hold other approved qualifications, and while it was not specifically required that membership of the Institution should be continued after appointment, evidence was adduced that relinquishment of membership would render impossible the continued efficient discharge of the full duties of the office. Retention of membership of the Institution was dependent upon payment of an annual subscription. On appeal against an assessment to income tax under Schedule E the Respondent contended that a certain proportion of his annual subscription to the Institution should be allowed as a deduction from the assessment. The Crown contended that the amount claimed was not money expended wholly, exclusively and necessarily in the performance of the Respondent's duties; that it was not sufficient to show that the expense was necessarily incurred to secure, to retain or to obtain preferment in the office; and that a deduction was therefore inadmissible. It was held that the Respondent was not entitled to the deduction claimed.

In the present case it is not obligatory upon the Appellant to be called to the Bar, so I would say that he has even less claim to the deduction than the Respondent had in the case referred to.

In the case of Henderson Shortt *v.* McIlgorm (Inspector of Taxes) 1945, A. E. L. R., p. 391, the Appellant obtained the post of a secretary-accountant through an employment agency. On his appointment a fee of LP. 30 became payable to the agency, calculated at the agreed rate of 5% of the Appellant's remuneration for the first year. The Appellant claimed to deduct the sum of LP. 30 as an expense necessarily incurred within the meaning of Schedule E, R. 9, contending

that by having obtained the post through the agency he became liable to pay their fee, the amount of which depended on the salary actually earned, and that he was, therefore, necessarily obliged to incur and defray, out of the emoluments of his office, the money so expended. It was held that the money expended in order to obtain employment was not money spent in the performance of the duties attached to the employment within the meaning of Schedule E, R. 9.

In the present case the Appellant is not seeking to obtain employment, but he is seeking either to increase the income which he derives from his employment, or to obtain an increased income by practising his profession on his own account. In the same way as it was held that the money expended in order to obtain employment was not money spent in the performance of the duties attached to the employment, I would say that the money in this instance is spent for the purpose of improving the Appellant's prospects of making more money, and not wholly and exclusively for the purpose of acquiring his income. In Halsbury Second Edition, Volume 17, page 152, the following appears in para. 312:—

> "In order that trade expenses may properly be deducted, the amount expended must be wholly and exclusively laid out or expended for the purposes of the trade, *etc.*"

And at page 154, para. 315, the following appears:—

> "Expenses incurred with a view to setting up a trade or extending a trade, with a view to making a newly acquired asset suitable for use in a trade, are not allowable deductions, nor is the cost of improvements...".

At page 109 of the Law of Income Tax by Konstam (9th Edition) the following passage appears:—

> "As accretions of capital are not to be included in gross receipts, so expenditure for capital purposes must not be deducted from those receipts in order to ascertain net profits. Although expenditure may have been incurred wholly and exclusively for the purposes of the trade, it is yet not deductible when it is made, not only once for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade ... there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable, not to revenue, but to capital".

Other cases have been referred to, but I do not think it necessary to review them as in my judgment they afford no foundation for allowing the deduction claimed in this instance. In the result the appeal fails and I dismiss it.

The Respondent will have fixed costs in the sum of LP. 10 (ten).

Delivered this 1st day of March, 1946, in the presence of the Appellant in person and Mr. Levin for the Respondent.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 1/46.

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

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

IN THE APPLICATION OF :—

Eliezer Zabrovsky. APPLICANT.

v.

1. General Officer Commanding Palestine, representing the Commander in Chief, Middle East,

2. Inspector General of Police and Prisons. RESPONDENTS.

Application for leave to appeal to Privy Council from judgment of High Court.

Supreme Court sitting not as Court of Appeal but as High Court of Justice has no authority to entertain application for leave to appeal to Privy Council.

(*M. L.*)

ANNOTATIONS: See P. C. L. A. 22/43 (1943, A. L. R. 741; 10, P. L. R. 600) and notes thereto.

(*A. G.*)

FOR PETITIONER: Seligman.

FOR RESPONDENTS: Solicitor General — (Griffin).

ORDER.

This is an application for leave to appeal to the Privy Council against the judgment of this Court sitting as a High Court of Justice in Case No. 89/45. Mr. Seligman appeared for the Applicant. He brings his application under Article 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council. The Solicitor General, who appeared for the Respondents, confined his argument to a submission that this Court had no power to entertain the application. We have indicated in the

course of our judgment in the case that we did regard the question involved as one of great general importance. It follows that if we were satisfied that we were legally empowered to grant this application we would not hesitate to do so. But it appears to us that we have no authority to entertain the application. Article 2 of the Palestine (Appeal to Privy Council) Order-in-Council, defines "Court" as "the Supreme Court of Palestine sitting as a Court of Appeal". It must, in our opinion, follow that the discretion given to the Court under Article 3(b) only applies to cases determined by the Court sitting as a Court of Appeal, whereas 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 directly to the Privy Council for special leave.

In our opinion the application to this Court must be dismissed.

Given this 21st day of January, 1946.

Chief Justice.

CIVIL APPEAL No. 189/45.

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

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

IN THE APPEAL OF:—

Anton Elias Kaba. APPELLANT.

v.

Zakieh Suleiman Saikaly. RESPONDENT.

Action for separation in Orthodox Ecclesiastical Court — Dismissal of action for lack of jurisdiction — Decree of divorce issued by Orthodox Ecclesiastical Court in Damascus — District Court granting separation and alimony — Question of jurisdiction — Scope of Art. 64, Palestine Order in Council.

1. Jurisdiction in matters of personal status of members of a Religious Community who are foreigners vests in District Court.

2. Provision of Art. 64(ii), Palestine Order-in-Council (application of personal law), cannot be interpreted as conferring jurisdiction, in a matter concerning a foreign subject domiciled in Palestine to a Court in a foreign country.

3. Court of Appeal will not consider a point not raised in lower Court.

(*M. L.*)

ANNOTATIONS: On the third point see the following recent decisions: C. A. 162/41 (1941, S. C. J. 620; 8, P. L. R. 596; 10, Ct. L. R. 225); C. A. 386/43 (1944, A. L. R. 581; 11, P. L. R. 307); C. A. 120/44 (1944, A. L. R. 708); C. A. 138/44 (1944, A. L. R. 721); C. A. 276/44 (1944, A. L. R. 752); C. A. 302/44 (1944, A. L. R. 757).

(*A. G.*)

FOR APPELLANT: W. Salah and Hakim.

FOR RESPONDENT: A. Atalla.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa which made an order for judicial separation and an award of alimony against the Appellant. The facts are that the Appellant and Respondent who are husband and wife are Syrian subjects domiciled in Palestine, ordinarily resident in Haifa. The District Court so found and, in our opinion, those findings were fully justified by reason of the fact that the Appellant carries on business in Haifa; that he has a house there; he was married there and he has resided there for many years and he has a visa from the Immigration Department for permanent residence in this country. The marriage turned out unhappily and the Appellant brought an action in the Orthodox Ecclesiastical Court of Haifa against the Respondent claiming separation. That Court dismissed the action on the ground that it had no jurisdiction because they were foreigners. The Appellant then went to Damascus where he succeeded in getting the Orthodox Ecclesiastical Court to grant him a divorce. He now pleads this divorce as a defence to the Respodnent's counterclaim against him and he relies on sub-paragraph (ii) of Article 64 of the Order-in-Council. Expert evidence was called as to whether the divorce would be held valid in Syria according to the Syrian national law and the Ecclesiastical law of the Orthodox Church and evidence was further called to prove whether the divorce granted in Damascus would be held valid according to the Ecclesiastical law administered by the Religious Court at Haifa. It is not surprising that the evidence was conflicting, but, in our opinion, it is unnecessary to consider the effect of this purported divorce because we have come to the conclusion that this Court cannot recognise the proceedings in Damascus. At this point, I turn back to the stage when the Ecclesiastical Court of Haifa dismissed the action for want of jurisdiction. That decision *prima facie* was correct, the question arises who then had jurisdiction to deal with persons of Christian communities who do not come within the ambit of Article 54 of the Order-in-Council? The answer is to be found in Article 64 which clearly provides that the jurisdiction shall lie with

the District Court. Paragraphs (i) and (ii) of the Article which are the relevant parts read as follows:—

> "(i) Subject to the provisions of Article 54 of this Order, matters of personal status affecting foreigners other than Moslems in respect of whom Moslem Religious Courts have exclusive jurisdiction under Article 52 of this Order, shall be decided by the District Courts, which shall apply the personal law of the parties concerned in accordance with such regulations as may from time to time be made by the High Commissioner:
> Provided that the District Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage except in accordance with any Ordinance conferring such jurisdiction.
> (ii) The personal law of the foreigner concerned shall be the law of his nationality unless that law imports the law of his domicile, in which case the latter shall be applied".

The Appellant nails his case to paragraph (ii). He says his personal law has to be applied and if we accept the expert evidence of his witnesses, he is, according to his personal law, divorced. It is true that if the foreigners in Palestine apply to the Courts in regard to certain matters of personal status their personal law is applied. But the issue that arose here after the conclusion of Haifa proceedings was not a question of personal law. It was a question as to which Court had jurisdiction to seize the action which the Haifa Court had refused; clearly at that stage the Court which had jurisdiction was the Court specified in Article 64, *i. e.* the District Court. It seems to me inconceivable that paragraph (ii) should be interpreted so as to allow the Appellant completely to override the provisions of Article 64 of the Order-in-Council and himself to decide the question of jurisdiction by resorting to a Court in a different territory altogether.

It is incontestable that the Appellant is a member of a Christian Community living in Palestine. This being so, if he wishes to enforce his legal rights in this territory he must go to the Court provided by the law of this territory for the hearing of his claim. That Court was the District Court.

There remains for consideration the further question raised by Mr. Salah as to whether, according to the personal law which the Court was bound to apply, a decree of permanent separation could be pronounced. This point does not appear to have been taken in the lower Court; it is not touched upon in the very full judgment of the learned Relieving President. Sufficient evidence as to the personal law on the issue was not adduced to enable us to make a pronouncement one way or the other. Moreover, the learned Relieving President did not declare that the separation was to be permanent. Apart from the fact that it is within the power of the parties to bring the separation to

an end at any time, there may be provision in their personal law by which this separation could be terminated. If this is the case machinery is available for having that personal law applied.

For these reasons we have come to the conclusion that the District Court was right and the appeal must be dismissed with costs on the lower scale to include a sum of LP. 10.— for advocate's attendance fee.

Delivered this 17th day of January, 1946.

Chief Justice.

CRIMINAL APPEAL No. 4/46.

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

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

IN THE APPEAL OF:—

Markus Levin. APPELLANT.

v.

The Attorney General. RESPONDENT.

Confession — Evidence that it was made voluntarily — Statement from the dock — Irregularity not causing injustice.

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 23.11.1945, in Criminal Appeal No. 222/45, from the judgment of the Magistrate, Haifa, dated 23.10.45, in Criminal Case No. 13616/45, dismissed:—

1. So long as the Court is satisfied that a confession was freely and voluntarily made, it is not necessary that that fact be recorded in the written confession, or in the judgment itself.
2. The Court should not ask the prisoner any questions after he has offered to make a statement from the dock.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* CR. A. 154/43 (11, P. L. R. 1; 1944, A. L. R. 196).
2. As regards the right of the accused to make a statement from the dock when tried in a Magistrate's Court see CR. A. D .C. Jm. 126/45 (1946, S. C. D. C. 119) and notes thereto.

(*H. K.*)

FOR APPELLANT: Frank.

FOR RESPONDENT: Assistant Government Advocate — ('Akel).

JUDGMENT.

FitzGerald, C. J.: Two grounds of appeal have been advanced in this case. The first one was that the statement made by the prisoner

to the Police which was tendered in evidence did not record that the prisoner had been duly warned. Although this may be desirable, it is not a legal requirement. All that is necessary is that the Judge should satisfy himself that the prisoner had been cautioned. It has also been submitted that the Judge in his record of the case did not specifically state that he was satisfied that the confession was free and voluntary. Here again, although it might be desirable for the Judge to do so, it is not legally necessary. In this case there was the clear evidence of Mr. Collins, which is sufficient to satisfy the Court of Appeal that the Judge rightly came to the conclusion that the prisoner was duly warned.

The second ground of appeal was that the Appellant, who did not elect to give evidence, made a statement from the dock and was asked a material question by the Magistrate. As the prisoner did not submit himself as a witness he should not have been asked a question, but we are satisfied, as the District Court was, that the question did not prejudice the prisoner or in any way affect the conclusion to which the Court came.

For these reasons the appeal is dismissed.

Delivered this 20th day of March, 1946.

Chief Justice.

Frumkin, J.: I concur.

Puisne Judge.

CRIMINAL APPEAL No. 7/46.

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

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

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Panorama Hotel, Ltd. RESPONDENT.

Licensing — Licences under the Trades and Industries Ord., 1927 and Sale of Intoxicating Liquors Ord., 1935 — Public Entertainment Ord. — Conditions imposed in the Ord.

Appeal from the judgment of the District Court of Haifa, dated the 12th of December, 1945, in Criminal Appeal No. 219/45, from the judgment of the

Magistrate's Court of Haifa, dated the 26th of October, 1945, in Criminal Case No. 13723/45, allowed and case remitted:—

> Although the holder of a licence under the Public Entertainment Ordinance does not require a licence under the Trades and Industries (Regulation) Ordinance, his licence may be endorsed with conditions by the Director of Medical Services and the Inspector General of Police and Prisons, as though it had been issued under the latter Ordinance.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. 710.

2. On sec. 7 of the Trades & Industries (Regulation) Ord. *cf.* also CR. A. 159/43 (11, P. L. R. 69; 1944, A. L. R. 130) and H. C. 68/45 (12, P. L. R. 471; 1945, A. L. R. 824).

(*H. K.*)

FOR APPELLANT: Weinshall.

FOR RESPONDENT: No appearance.

JUDGMENT.

This is an appeal from the District Court of Haifa sitting in its appellate capacity from one of the Magistrates of Haifa. It concerns the question of the effect of the regulations of the Trades and Industries Ordinance, 1927, on the grant of a licence under the Sale of Intoxicating Liquors Ordinance, 1935. In giving judgment upholding the decision of the Magistrate the learned Relieving President said as follows:—

> "Sub-section 4(3) reads:—
> 'Where any person is the holder of a valid licence granted under the Public Entertainment Ordinance, 1935, it shall not be necessary for such a person to obtain a licence under this Ordinance for the premises in respect of which such licence was granted under the Public Entertainment Ordinance, 1935, but the provisions of this Ordinance shall apply to such person and to such premises as though a licence had been granted under this Ordinance'.
> I cannot think how the meaning of the Legislature could have been put in clearer language. It was obviously intended that a person whose premises were found fit for use under the new Public Entertainment Ordinance should not be troubled to have to obtain a licence under the Trades and Industries (Regulation) Ordinance".

We entirely agree with the learned Relieving President that the intention of the legislature was that the person should not be troubled to obtain a licence under the Trades and Industries (Regulation) Ordinance, because for all purposes of that Ordinance the licence which he had already obtained would be effective. We think, however, that the learned Relieving President did not appreciate fully the implications of section 7 of the Trades and Industries (Regulation) Ordinance.

The effect in our opinion is that even when a person has obtained a licence under the Trades and Industries (Regulation) Ordinance (and for the purpose of this case the licence which the Defendant had obtained took the place of a licence under the Trades and Industries (Regulation) Ordinance) he is not thereupon free to operate that licence. The legislature has stepped in and said in effect in section 7, "despite the fact that you have got your licence there is something which may be done to prevent you exercising the rights given to you under the licence; that something is the attachment of special conditions to your licence by a person other than the person authorised to issue the licence. Those are the conditions which the Director of Medical Services and the Inspector General of Police and Prisons can attach".

It follows that the Director of Medical Services was just as entitled to attach special conditions to this licence as if it had been issued under the Trades and Industries (Regulation) Ordinance.

The case is therefore remitted to the learned Magistrate to deal with in the light of this decision.

Delivered this 6th day of March, 1946.

Chief Justice.

CRIMINAL APPEAL No. 6/46.

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

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

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Salem Mayer. RESPONDENT.

Licensing — Conditions may not be imposed — Sale of Intoxicating Liquors Ord., secs. 15(*b*), 16.

Appeal from the judgment of the District Court of Haifa, dated the 5th December, 1945, in Criminal Appeal No. 220/45, from the judgment of the Magistrate's Court of Haifa, dated the 18th October, 1945, in Criminal Case No. 8995/45, dismissed:—

A licence under the Sale of Intoxicating Liquors Ordinance may either be granted or refused; the Board may not grant it subject to conditions.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. at p. 712.

2. *Cf.* CR. A. 7/46 (*ante*, p. 274) and notes.

(*H. K.*)

FOR APPELLANT: Weinshall.

FOR RESPONDENT: Gottschalk.

JUDGMENT.

This is an appeal by leave from the District Court of Haifa, sitting in its appellate capacity, from a case tried by one of the Magistrates of Haifa. It arises out of an interpretation of section 16 of the Sale of Intoxicating Liquors Ordinance. The question is whether in the issue of a licence there can be an endorsement of conditions other than those set out in section 16 of the Ordinance. Now the Board constituted under the Ordinance is a Statutory Board, and its functions are confined strictly to the authority given to it by the Ordinance. The function of the Board is to issue certificates which thereafter form the basis for the issue of a licence. What the Board is authorised to do is to issue a certificate, to refuse to issue a certificate, or to issue a certificate subject to conditions.

Dr. Weinshall has argued that as sub-section 6 of section 15 provides for an appeal to the High Commissioner against the inclusion of any conditions, it must be presumed that the Board can issue conditions other than those regulated by section 16. We are unable to agree with this interpretation. The section deals with the grant of certificates, and sub-section 6 merely provides for an appeal from that grant or refusal to grant.

We must now examine what that certificate can contain. It must be a certificate granting, or refusing a licence, or granting it subject to conditions. If the Board is not satisfied that the premises, or the Applicant himself, comply with the requirements of section 15(2), the proper course for it to follow is to refuse a licence altogether, but if it is satisfied that the premises and the Applicant do comply with the requirements of section 15(2), they can still refuse to grant a licence within certain limits, and in our opinion those limits are confined to the matters stipulated in section 16.

For these reasons we are of opinion that the Magistrate and the District Court came to a correct decision in law, and this appeal must be dismissed.

Delivered this 6th day of March, 1946.

Chief Justice.

CIVIL APPEAL No. 319/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Dr. Mohammad Sudki Malhass. APPELLANT.

v.

Yousef Ibrahim El Shqeeh. RESPONDENT.

Action under Art. 24, Magistrates Law for recovery of possession — Trespass alleged to have taken place 4 years ago.

Appeal from the judgment of the District Court of Nablus in its appellate capacity in Civil Appeal No. 15/45 dated 26.7.45 whereby the judgment of the Magistrate's Court of Nablus in Civil Case No. 307/45 dated 19.6.45 was confirmed, dismissed:—

1. Even under first part of Art. 24, Magistrates Law, alleged trespass must be recent.

2. A period of 4 years cannot be said to be recent.

(*M. L.*)

REFERRED TO: L. A. 58/33 (2, P. L. R. 187; 2, C. of J. 761); C. A. 200/42 (9, P. L. R. 776; 1942, S. C. J. 972); C. A. 190/41 (8, P. L. R. 485; 10, Ct. L. R. 170; 1941, S. C. J. 431).

ANNOTATIONS: See cases referred to (*supra*); see also C. A. 66/44 (11, P. L. R. 310; 1944, A. L. R. 590) and C. A. 135/44 (1945, A. L. R. 82) and annotations thereto.

(*A. G.*)

FOR APPELLANT: Zuei'ter.

FOR RESPONDENT: G. Salah.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Nablus dismissing an action by the present Appellant for recovery of possession under Article 24 of the Ottoman Magistrates Law. The Appellant himself who could rely only on a licence from the Turkish Government to cultivate part of *Jeftlik* land, Nablus District, produced a receipt for taxes as being a sanad for the purposes of Article 24. (See Land Appeal No. 58/33, P. L. R. Vol. 2, p. 187).

Adel Eff. Zu'eiter, advocate for the Appellant, informed us at the bar that the action was brought under the first part of Article 24. The alleged trespass by the Respondent took place in 1941, but the present

action was not brought until the 3rd May, 1945. It is clear that, even under the first part of Article 24, the alleged trespass must be recent. We refer to C. A. 200/42, P. L. R. Vol. 9, p. 776 and C. A. 190/41, P. L. R. Vol. 8, p. 485. It cannot be said that a period of four years is recent.

For these reasons the appeal is dismissed with fixed (inclusive) costs of LP. 10.—.

Delivered this 4th day of February, 1946.

British Puisne Judge.

PRIVY COUNCIL APPEAL No. 28/44.

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

BEFORE: Lord Porter, Lord Du Parcq and Sir John Beaumont.

IN THE APPEAL OF:—

S. Beninson & 2 ors. — APPELLANTS.

v.

G. Shiber. — RESPONDENT.

Usurious interest — Ottoman Law of Interest — Building contract coupled with loan, whether a transaction of "lending and borrowing" — Usurious Loans (Evidence) Ord. — Final settlement of accounts — Evasion of the law — Findings of fact — Interpretation of contract — Appropriation of payments — Mejelle 1775 *— Compound interest.*

Appeal from the judgment of the Supreme Court of Palestine sitting as a Court of Civil Appeal (Gordon-Smith, C. J. and Rose, J.) in C. A. 7/43, dated 16.7.43, allowed and judgment of the District Court (Bourke, R/P) restored:—

1. A building contract whereby the builder is to advance the money against payment of interest is a transaction of "lending and borrowing" within the meaning of Art. 6 of the Ottoman Law of Interest.

2. Usurious loans accounts may be reopened although the parties have purported to settle accounts.

3. Compound interest may be charged under Art. 5 of the Law of Interest only in reliance upon special agreement to that effect.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment appealed from (C. A. 7/43 is reported in 10, P. L. R. 395 and 1943, A. L. R. 623.

2. On re-opening of settled accounts see C. A. 41/45 (12, P. L. R. 477; 1945,

A. L. R. 649) and the passage from Halsbury therein quoted; *cf.* also note 2 in A. L .R. to the judgment under appeal.

3. For authorities on the point whether and when compound interest may be charged see C. A. 185/42 (1942, S. C. J. 923) and note 2.

4. As regards appropriation of payments and Art. 1775 of the *Mejelle* see H. C. 70/40 (7, P. L. R. 478; 1940, S. C. J. 409; 8, Ct. L. R .161) and note 2 in S. C. J.; *vide* also H. C. 47/45 (1945, A. L. R. 807).

(*H. K.*)

JUDGMENT.

Lord Du Parcq: The Appellants are the three daughters and sole heiresses of the late Mrs. Menucha Valero, widow of Jacob Valero. Mrs. Valero died on the 5th March, 1933. At the end of the year 1928 she had entered into an agreement with the Respondent, under which he was to build an apartment house for her, and to provide the necessary money to pay for its erection. The obligation which she then incurred had been met only in part at the time of her death and, during her lifetime, the original building contract was followed by a series of complicated transactions culminating in an agreement which purported to settle accounts finally between Mrs. Valero and the Respondent. In the result it is admitted by the Appellants that there is due to the Respondent the sum of LP. 1298.416. The Respondent claims a much larger sum, but in the District Court did not succeed in recovering more than the amount which was admittedly due. He appealed to the Supreme Court, where it was held that he was entitled to a total amount of LP. 4560.150, of which LP. 4500 was to carry interest at 9 per cent. from the 7th June, 1934. The appeal to His Majesty in Council is against this decision of the Supreme Court and the Appellants ask that the judgment of the District Court be restored.

The Appellants were sued both in their personal capacity and as heiresses of their deceased parents, " representing the estate of their said parents". In both Courts they were adjudged to be liable only in this latter capacity, and it is not now suggested that they are personally liable. Nor does any question now arise as to their indebtedness in the sum of LP. 60.150 which formed part of the sum awarded in each Court.

The Respondent founded his claim on the final agreement made with Mrs. Valero, the date of which was the 5th October, 1932. Mrs. Valero purported to make that agreement both in her personal capacity and as representative of the first-named Appellant, "as per general power of attorney executed by her in Jerusalem on the 14th March, 1930", and also of the other two Appellants. Nothing now turns on the question whether the Appellants are to be regarded as parties to

the agreement, and this is fortunate, since their Lordships have not before them either the original agreement or a complete copy of it. The exhibit with which their Lordships have been supplied is itself an incomplete copy, omitting the names of the parties who set their hands and seals to it as well as those of the witnesses who attested it. These are by no means immaterial omissions, and indeed the Respondent made a point of the fact that Mr. Rubin, an architect engaged by Mrs. Valero, was one of the witnesses. There would have been nothing in the record to establish this fact, or to call their Lordships' attention to it, had not one of the judges of the Supreme Court mentioned it in his judgment. Their Lordships have thought it right to refer to this matter in order to emphasize the importance of putting their Lordships' Board in possession of all relevant documents.

Although the action was brought on the agreement of the 5th October, 1932, it is necessary to narrate the earlier history of transactions between the Respondent and Mrs. Valero in order that the point on which the Supreme Court differed from the District Court may be appreciated. The story begins on the 28th December, 1928, when the agreement in writing to which reference has already been made was entered into between Mrs. Valero, purporting to act "on behalf of herself and on behalf of the heirs of the late Mr. J. H. A. Valero", (her deceased husband), and the Respondent, described therein as "the architect contractor". The agreement recited that Mrs. Valero was desirous of erecting a five story building on plot No. 12 situated on King George Avenue in Jerusalem in accordance with plans prepared by the Respondent, and that the Respondent had agreed to execute the work at a named price per square metre. It was agreed that certain further sums were to be paid for the Respondent's work as architect and for some extras which had already been agreed by way of departure from the original specification. The building was to be "complete and fit for habitation three months after *Moharrem* 1st, 1348", that is to say by a date in June, 1929. Any variations were to be "discussed with and approved by the proprietor or her representative" and such approval was to be given in writing, "or failing which shall be stated in the presence of two witnesses". A further provision which assumed some importance in the course of the hearing was that the majority of artisans and workmen engaged on the building by the architect contractor should be Arabs. Most important, however, for the purposes of the present dispute, were the provisions as to payment, which it seems desirable to set out fully. they are as follows:—

"3. The architect contractor shall find the money for the building

and charge the proprietor for same at the legal rate of 9 per cent. *per annum* on the total amount discounted in advance.

4. The interest on the total amount shall begin to function 7½ months preceding *Moharrem* 1st, 1348, or 1929, *i. e.* from October 23rd, 1928.

6. If the proprietor cannot pay all interests in advance, she shall give instead bills of exchange, the discount on which shall be charged to the proprietor. Bank discount rate shall be taken as a basis.

7. The plot No. 12 situated on King George Avenue on which the proposed five story building is to be erected and belonging to the said proprietor shall be mortgaged in whole with the architect contractor for a period not exceeding 5 years beginning from the date of this present contract with all and every structure erected on it in the future. No other mortgage shall be made on the said plot of land and buildings while the present mortgage holds good.

8. The said land and buildings shall be mortgaged with the architect contractor for a sum of LP. 10000.000 (ten thousand pounds) bearing yearly interest as stated above.

9. The balance left over after deducting the mortgage amount shall be given in bills payable one year from October 23rd, 1928, and the interest charged as mentioned in clause 6.

10. Should the proprietor fail to pay the first yearly interest on the amounts due, this shall *ipso facto* constitute a breach and cause the whole mortgage amounts to fall due.

15. The proprietor shall be at liberty to release the property from mortgage at any time during the five years and the architect contractor shall accept and effect such release immediately provided all amounts and interests whether covered by the mortgage, bills of exchange or any other outstanding accounts have been fully paid up.

20. All accounts shall be made out and bills signed together with the signing of this agreement.

21. The interest on any amounts paid up before maturity shall be refunded".

The work was begun, and when the ground floor had been partly built Mrs. Valero called in Mr. Rubin to act for her as "supervising architect". He gave evidence at the hearing in the District Court. The learned judge thought him an honest witness, and had "no hesitation in accepting his evidence". He said that the house was completed about the end of July, 1929. On the 7th June, 1929, a mortgage was executed in fulfilment of clause 8 of the agreement of the 28th December, 1928. The consideration was expressed to be the sum of LP. 10.000 paid by the Respondent to Mrs. Valero. On the same day a statement of account was drawn up after a discussion between the Respondent and Mr. Rubin. The accounts were agreed between them and the document was typed in the Respondent's office. It was produced at

the trial. It shows a net sum of LP. 12664.000 to be due to the Respondent for his work under the contract. From this the "mortgage amount" is deducted, leaving LP. 2,644.000. Particulars of four bills of exchange received from Mrs. Valero are then set out. One of them is stated to be for a total sum of LP. 2934.790, made up of "LP. 2664.000 plus 9 per cent discount plus Bank's commission" and to be due on the 23rd October, 1929. Of the other three, one is stated to be in respect of permit fees and, by the addition of "9 per cent discount plus Bank's commission", amounts to LP. 154.612; the next is for the "cost of white stones" which, with a like addition, amounts to LP. 35.138, and the last (due on the 7th December, 1929) is described as being:—

"Interest 9 per cent. discounted on LP. 10,000 for period October 23rd, 1928, to June 7th, 1929 (mortgage date)	LP. 596.000
The interest on and including LP. 596.000 from June 7th, 1929, to December 7th, 1929	LP. 624.080
Bank's commission ¼ per cent.	LP. 1.560
	LP. 625.640"

It is important to observe that, except for the reference to "cost of white stones", which was never very satisfactorily explained, there is nothing in this account to suggest that payment was due from Mrs. Valero for any extras, although a deduction is made in calculating the cost of the work for "allowance agreed upon for omission on terrace".

During the years 1928—1931 Mrs. Valero made payments to the Respondent which amounted, as the learned judge found, accepting the evidence of Mr .Rubin, to at least LP. 2560.393, in which sum is included the purchase price of another plot (No. 1) in King George Avenue which the Respondent bought from Mrs. Valero on the 22nd October, 1931, on the terms that the price should be set off against her debt.

On the date of this purchase, the 22nd October, 1931, the Respondent prepared a statement of interest alleged to be due to him which, although it has at its foot the words "The foregoing amounts have been checked, found correct and approved", was disavowed by the Respondent's counsel at the trial and was not alleged to have been the subject of any agreement. Its importance is that it shows that the Respondent's method of computing interest at 9% was to charge nine pounds as interest in respect of each ninety-one pounds lent, an arithmetical inexactitude much in his own favour, and also that he was (as is now

admitted) charging compound interest on bills of exchange given him by Mrs. Valero.

Their Lordships will not attempt the task, which on the materials available would be impossible of fulfilment, of setting out the details of the transactions between the parties. The number and amount of the bills of exchange given by Mrs. Valero cannot be stated with precision, and the payments in respect of those known to have been given cannot in every case be ascertained. It is not surprising in the circumstances that the parties, or at any rate the Respondent, thought it desirable to arrive at a final accounting. The agreement of the 5th October, 1932, on which the Respondent founded his action, was the result of this desire. How far it satisfactorily served its ostensible purpose is one of the questions in this case.

It recited (*inter alia*) that the Respondent had "invested" in the erection of an apartment house on King George Avenue "a sum amounting to LP. 12,700 more or less, as a loan to the estate" and that the estate had failed to pay "the interest" due to the Respondent "on said loan", so that the amount presently due to him was "over LP. 17,000". The trial judge thought that the figure "LP. 12,700 more or less", might be taken as the equivalent of the LP. 12,664 which had been agreed on the 7th June, 1929, and their Lordships are not disposed to differ from this view. The agreement further recited the execution of the mortgage for LP. 10,000 "bearing legal interest as security on the money advanced by him" (the Respondent) for the erection of the house, and the fact that the Respondent was now claiming "about LP. 7,500 over and above the LP. 10,000", and finally, that the parties had "now met and reached a final accounting amongst themselves". The terms of the agreement which followed these recitals provided for the sale by Mrs. Valero to the Respondent of the house which he had built for her at the purchase price of LP. 13,000. This sum was not to be paid over, but to be deducted from the total amount due to the Respondent. Mrs. Valero was given an option to repurchase the house which was to hold good "until the end of the year 1351 *A. H.*", that is, until a date in 1933. The effect of these provisions, according to the law of Palestine, was to create a mortgage in the form of a conditional sale, with the result that Mrs. Valero would not lose her right to redeem when the prescribed date was reached. After the LP. 13,000 had been applied to the purchase of the house it was agreed that the total sum due to the Respondent "inclusive of interest up to the 17th day of June, 1934", was LP. 4,500 and no more. To secure this sum Mrs. Valero undertook to execute a mortgage on certain lands near Romema, in Jerusalem, in favour of the Respondent. The interest

charged on the LP. 4,500 was to be 9% but the Respondent (in the words of the agreement) thereby declared that the interest had already been included in the mortgage and reckoned with as paid up to the 7th day of June, 1934. It was incumbent on Mrs. Valero to register this mortgage (an obligation which she failed to fulfil), and the Respondent was to advance her the sum of LP. 90 necessary for that purpose. The agreement conferred two benefits upon her, first, that she was to be entitled to collect the rent of the apartment house up to April, 1933, and secondly, that a number of specified promissory notes made by her, as well as other unspecified notes which she had made, should be redeemed by the Respondent and returned to her. The value of the latter benefit is questionable. The largest of the specified notes, one for LP. 2,700 due on the 1st September, 1932, had (as was admitted by counsel for the Respondent) already been fully satisfied and should have been delivered up at an earlier date. Of the remaining terms it will suffice to mention one, by which Mrs. Valero was to pay LP. 3,000 "as liquidated damages" in the event of any breach by her of any term in the contract. It will be convenient to say at once that both Courts in Palestine have held that this sum was in truth a penalty, and that the Respondent made no claim to it before their Lordships' Board.

After Mrs. Valero's death the Appellants made no payments to the Respondent but it was not until the 18th August, 1941, that he instituted proceedings against them. It is not for their Lordships to speculate as to the motives which may have prompted this delay. It is legitimate to observe, however, that if, as was alleged, the long lapse of time from the date of the agreement sued on made it difficult for the Respondent to preserve or to procure evidence, he had only himself to blame for this misfortune.

By his Statement of Claim the Respondent claimed (in addition to the sum of LP. 60.150 admittedly due and the sum which is now admitted to be a penalty) the capital sum of LP. 4,500 with interest thereon. By their defence the Appellants alleged that the sum of LP. 4,500 consisted "entirely of excessive and compound interest" and so was "not recoverable in law". They pleaded the agreement of the 28th December, 1928, and, after setting out the payments said to have been made by Mrs. Valero and the set off of LP. 13,000, alleged that on the 5th October, 1932, the sum of LP. 1238.266 was all that remained due to the Respondent and that this sum consisted wholly of interest, so that "no further interest could have accrued thereon". Finally, they prayed that the whole transaction might be re-opened and an account taken between the Respondent and the Appellants.

The Appellants were thus invoking the Ottoman Law of Interest, which fixes 9% *per annum* as the maximum rate of interest "for all ordinary and commercial debts". It further provides that if a higher rate be agreed the rate shall be reduced to 9% and so prevents parties from "contracting out" of the terms of the enactment. An article which might have been of importance if the Respondent's delay had been further prolonged forbids the recovery of interest exceeding the total capital amount of the debt. There is also an article (numbered 5) which (with an exception not material in this case) forbids the charging of compound interest, but this is subject to the proviso that "if the debtor has paid nothing on account for three years or if the creditor and debtor have agreed that the accumulated interest for three years shall be added to the capital, compound interest for three years, but not more, shall be added to the capital". Article 6 is of particular importance in this case. It was before their Lordships in two differing translations. That which was adopted both by the trial judge and by the Supreme Court, and was preferred by the Respondent, was made by two highly qualified persons, as appears from the judgment in Azem *v.* Rayis (1940) P. L. R. 199, at pp. 203—4, and for the purposes of this appeal their Lordships readily accept it. It is as follows:—

> "During the continuation of the transaction of lending and borrowing between the creditor and the debtor, whether the account was transferred or the deed of debt was renewed or changed, or not, claims for the reduction of usurious interest to its legal rate are hearable. But if the debt was paid in full and the relation between the creditor and the debtor was cut, then claims for the recovery of usurious interest are not hearable".

It must be added that the Usurious Loans (Evidence) Ordinance in force at all material times, an enactment passed in view of the Ottoman law of evidence, made it plain that the Court, when reviewing a money-lending transaction, was entitled to receive and act upon any evidence, oral or in writing, notwithstanding objections which, but for this Ordinance, might have been taken to it.

The learned Relieving President, who tried the case with conspicuous care and patience, accepted the Appellants' figures, held that the transaction between the parties was "a continuing transaction of lending and borrowing", and gave judgment for LP. 1298.416, made up of LP. 1238.266 and the further sum of LP. 60.150 admittedly due. The Supreme Court (Gordon-Smith, C. J., and Rose, J.), reversed this decision and gave judgment for the full amount of LP. 4,500 with interest as well as for the sum of LP. 60.150. They based their decision on two grounds, (1) that Article 6 was inapplicable to the transactions in

question, which they held not to be transactions of "lending and borrowing", (2) that the 1932 agreement constituted a settled account which could not be re-opened. With one exception, to which it will be necessary to refer later, neither of the learned judges dealt with any of the other questions which had been considered at the trial.

The reasons which the learned judges of the Supreme Court gave for their decision do not commend themselves to their Lordships. As to the first, it is, of course, true that where a building contract is concerned one does not normally expect the relationship of lender and borrower to exist between builder and building owner. It is, however, not less true that the parties to such a contract may so frame it as to create that relationship. In the present case the Respondent agreed to "find the money for the building" and Mrs. Valero was to pay him interest on the money so found. If a man finds money for another and expends it on that other's behalf and in accordance with his request, he is lending it although he never physically transfers it to the borrower. This may be true even where, as here, some of the money is due to the lender himself for his services. It is not neecssary in such a case, in order to constitute a loan, that money should be handed over by the lender to the borrower and by him returned to the lender as the reward for his services. The same result is arrived at if the parties, by the terms of their contract and by their course of dealing, have shown an intention that the moneys payable by the debtor should be provided or "found" by the creditor and treated as having been advanced by him. In their Lordships' opinion the whole course of dealing here is consistent with the relationship of lender and borrower having been established, and it is to be observed that the recitals of the 1932 agreement, which have already been quoted, refer to the Respondent's "loan to the estate" and to "the money advanced by him" for the erection of the house, and that the Respondent in his evidence spoke of the transaction in terms appropriate to a loan. Their Lordships are therefore of opinion that Article 6 is applicable to the transactions in question. It thus becomes unnecessary to express any opinion on the submission made on the Appellants' behalf that, even if Article 6 were not applicable, Articles 1, 3 and 5 would afford them a defence to the Respondent's claim.

As to the second ground of the Supreme Court's decision, their Lordships can find no good reason for thinking that by purporting to settle final accounts parties can evade the imperative provisions of the law. Whatever form an agreement between lender and borrower may take, if it is once suggested that excessive interest is being charged, and if the account is still open to review in accordance with Article 6, the

Court is entitled and indeed bound to investigate the transaction which the agreement purports to regulate or to close, and, if it be found that the performance of the agreement will result in excessive interest being paid, it is the duty of the Court to reduce the interest to the legal rate.

For these reasons their Lordships, with all respect to the judges of the Supreme Court, cannot agree with their reasons for setting aside the judgment of the trial judge. It remains to be considered whether that judgment can properly be attacked on other grounds. The Supreme Court did not think it necessary to deal with those points which would arise only if a view differing from their own were taken on appeal to His Majesty in Council, and their Lordships regret that they have not the advantage of knowing the views of the learned judges of that Court upon them. Their Lordships have had the benefit, however, of a full argument on all relevant matters from counsel for both parties.

It was submitted by counsel for the Respondent that, assuming the learned Judge to have been right in re-opening the transaction, he had erred in many particulars. One only of these was animadverted upon in the Supreme Court, and that only in the judgment of Rose, J. The trial Judge was naturally much impressed by the fact that, in the agreement sued on, no credit whatever was given for the payments which had been made by Mrs. Valero. The Respondent, whom the learned Judge regarded as an unsatisfactory and untrustworthy witness, explained this by saying that there were set off against these payments the cost of a number of "extras" which also were not referred to in the agreement, and also the increased cost of employing Jewish, instead of Arab, labour at Mrs. Valero's request. The judge did not believe the Respondent's evidence on this point. Rose, J., thought that a letter written by Mrs. Valero, which was put in evidence by the Respondent, showed that the Judge was wrong in taking the view that Mrs. Valero was not shown to have been under a liability for extras. Their Lordships have considered what weight should be attached to this letter which, though dated the 5th February, 1929, refers, curiously enough, to a plan dated the 5th March, 1929. It asks that variations marked on the plan should be carried out, and states that the difference in cost "shall constitute an extra". Having carefully read the Respondent's evidence, their Lordships are satisfied that, notwithstanding this letter, the Judge was amply justified in finding that the Respondent had no claim for extras. There was no satisfactory evidence to prove that the instructions contained in the letter had been carried out. The plan was not produced, and there was nothing to show the nature or extent of the alleged variations. Mr.

Rubin said that no claim in respect of extras was put forward when the 1932 agreement was made, and the fact that Mr. Rubin witnessed that agreement, to which great weight was attached by Rose, J., does not in their Lordships' opinion impair the value of his testimony. Mr. Rubin is an architect, not a lawyer or an accountant. The agreement was evidently drawn by a skilled hand, which was not Mr. Rubin's, and there is no evidence to suggest that at the time when it was executed Mrs. Valero had the benefit of any legal advice. As to the alleged charge for Jewish labour, there is nothing in the terms of the original agreement to justify such a charge, and the Respondent failed to satisfy the judge that he was ever authorised to make it. Moreover, the fact that the account prepared in June, 1929, when the building was almost completed, does not include the charges for extras and in respect of Jewish labour which it is now sought to maintain, seems to their Lordships strongly to support the view of the trial Judge. Their Lordships accordingly accept his finding that, apart from any question of interest, LP. 2560.393 fell to be deducted from the capital sum claimed by the Respondent.

A further complaint made on behalf of the Respondent was that the account put forward by the Appellants and accepted by the Judge appropriated Mrs. Valero's payments, not to interest, but to capital. In the absence of any appropriation by the debtor at the time of payment, it is no doubt true as a general rule that payments should be attributed in the first instance to interest. The present case, however, has some exceptional features. In their defence the Appellants pleaded that the payments amounting to LP. 2560.393 and the sum of LP. 13,000 "were appropriated and are hereby appropriated by the Defendants towards payment first of the principal and the balance towards payment of interest". When the parties agreed upon the issues to be submitted to the Court no issue dealing with this plea was framed. At the trial the Appellants' counsel relied on Article 1775 of the *Mejelle* which, he suggested, on its true interpretation allowed a debtor, even *ex post facto,* to appropriate payments to interest. This seems to their Lordships to be a questionable proposition, but they do not find it necessary to express any opinion upon it. It appears from the judgment of the learned Judge that the Respondent's counsel did not attack it in argument before him, and having regard to this fact and to the omission to frame any issue on the point, their Lordships think that it would be wrong to allow it to affect their decision now. Their Lordships are fortified in this view by the fact that the 1932 agreement recites that "the estate has failed to pay the interest due", and by the further fact that a number of the payments made on ac-

count are shown by the receipts exhibited to have been paid in respect of bills of exchange — all but one having been paid in respect of the bill for LP. 2934.790.

Reviewing the transaction as a whole, their Lordships have no doubt that both excessive and compound interest were charged. It was submitted on behalf of the Respondent that an addition of compound interest for three years to the capital sum advanced could be justified under Article 5 of the Law of Interest. This submission was founded on the 1932 contract, which was said to include, by necessary inference from its express terms, an agreement that accumulated interest for three years should be added to the capital. Their Lordships cannot accept this submission. What Article 5 requires is an express agreement for the addition of accumulated interst, stated in language which leaves no doubt as to a debtor's intention to accept an onerous, and *prima facie* unlawful, liability. Their Lordships are not satisfied that the 1932 contract expresses such an intention, and think that the Judge rightly rejected the Respondent's claim to compound interest.

Their Lordships do not think it necessary to deal with the remaining, and comparatively minor, criticisms to which the judgment was subjected. It may well be that if a further inquiry were ordered some slight adjustment of the figures would be made, not always necessarily in favour of the Respondent. It would be of no profit to either party to order such an inquiry, and their Lordships are satisfied that no injustice will be done by restoring the judgment of the District Court, without modification.

For the reasons given their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Supreme Court set aside, and the judgment of the District Court restored. The Respondent must pay the Appellants' costs of this appeal, and in the Supreme Court.

Delivered this 2nd day of May, 1946.

CIVIL APPEAL No. 7/46.

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

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

IN THE APPEAL OF :—

Lea Saher. APPELLANT.

v.

Abraham Rubinstein & an. RESPONDENTS.

C. P. R. 333 — *Preliminary objections — Seven days "prior to the hearing" — Period of lodging appeal exceeded — Court Fees Rules R.* 19(2), *effect of application for exemption of fees — C. P. R.* 323, 325, 326.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated the 2nd November, 1945, in C. A. 171/44 from the judgment of the Magistrate of Tel-Aviv in Civil Case No. 1141/44, dismissed:—

1. An adjourned date should not be reckoned when computing the seven days' notice "prior to the hearing" under R. 333.

2. An appeal is not lodged when an application is made for exemption from payment of Court Fees.

(*A. M. A.*)

ANNOTATIONS:

1. Note that Rule 333 requires notice of the intended objection to "have been served on the Appellant *through the Registry of the Court* at least seven days prior to the hearing ...".

A respondent may thus be prevented from raising a preliminary objection through no fault of his own in case the service is delayed in the Registry.

2. *Quaere* whether notice was necessary in this case? *Cf.* C. A. D. C. Ja. 138/44 (1946, S. C. D. C. 144); *vide* also C. A. 404/44 (12, P. L. R. 114; 1945, A. L. R. 124).

3. On the meaning of "lodging" an appeal see CR. A. 31/39 (6, P. L. R. 430; 1939, S. C. J. 372; 6, Ct. L. R. 103).

(*H. K.*)

FOR APPELLANT: Schifter.

FOR RESPONDENTS: No. 1 — Nochimovsky.
No. 2 — Not served.

JUDGMENT.

De Comarmond, J.: This is an appeal by leave from the judgment of the District Court of Tel-Aviv, in its appellate capacity.

On the case being called, the advocate for the first Respondent informed us that he had given notice of a preliminary objection and now wanted to formulate it.

The Appellant's advocate then stated that notice of the objection had been given less than seven days prior to the date originally fixed for hearing the appeal, namely, the 11th March, 1946, and that Rule 333 of the Civil Procedure Rules as amended in 1945 had therefore not been complied with.

The appeal was not heard on the 11th March because it was adjourned on the joint application of the parties, and more than seven days have now elapsed since notice of the objection was served. The question which falls to be decided is whether a notice under Rule 333(1) is not valid unless given at least seven days prior to the first date on

which a case is listed for hearing (even if it is not heard on that day).

We are of opinion that the words "prior to the hearing" in Rule 333(1) must be construed as meaning the date of actual hearing and not the date fixed for hearing.

We heard the learned advocates on the merits of the preliminary objection raised which is that the appeal was lodged after the prescribed time. The District Court granted leave to appeal on the 2nd December, 1945. On the 13th of the same month the would-be Appellant applied for an order exempting her from payment of the fees of appeal. On the 2nd January, 1946, exemption was granted by this Court and the appeal was finally lodged on the 11th January. It is not disputed that, had there not been an application for exemption of payment of fees, the last day for lodging the appeal would have been the 17th December, 1945. By virtue of Rule 323 of the Civil Procedure Rules, 1938, the period beginning on the 13th December, 1945 (when application for exemption was made) and ending on the 2nd January, 1946 (when such application was granted) is not reckoned in calculating the period prescribed for lodging the appeal. The last date for lodging was therefore the 7th January, 1946, and we have seen that the appeal was lodged on the 11th January.

The Appellant's advocate called attention to Rule 19(2) of the Court Fees Rules as enacted by the Court Fees (Amendment) Rules (No. 2), 1938, and submitted that the appeal was lodged when application was made on the 13th December, 1945, for exemption of fees. This contention is not sound because an appeal cannot be lodged unless Rule 326 is complied with. Rule 326 of the Civil Procedure Rules, as amended in 1945, provides that the notice of appeal must be accompanied by the bond described in Rule 325 or by an application to deposit money into Court or to give other securities in lieu of a bond. In the present instance, neither a bond nor an application under Rule 327 was filed on the 13th December, 1945, and it is abundantly clear from the Court file that the appeal was lodged on the 11th January, 1946.

The Appellant's advocate also submitted that Rule 323 provides that when exemption from fees is granted by the Court, a written notification of the decision must be given to the Applicant. We hold that a written notification is not necessary where (as in this case) the person applying for exemption is present or represented when the exemption is granted.

The preliminary objection therefore succeeds and the appeal is hereby dismissed with inclusive costs of ten pounds (LP. 10) to be paid by the Appellant to Respondent No. 1.

Delivered this 23rd day of May, 1946 in the presence of Dr. Hopp by delegation from Mr. Schifter for Appellant and Mr. Nochimovsky for Respondents.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

HIGH COURT No. 111/45.

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

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

IN THE APPLICATION OF:—

Wafic Ben Shihab Ed-Din ben Omar Tahboub Il Amawi. PETITIONER.

v.

Chief Execution Officer, Jerusalem & an. RESPONDENTS.

Respondent in High Court failing to file affidavit — Abortive last moment application to join.

Return to a rule *nisi* issued on the 2nd of January, 1946, directed to the 1st Respondent calling upon him to show cause why he should not execute the judgment of the Land Court dated 11th of January, 1945, and why his order dated the 27th day of November, 1945, should not be set aside; rule *nisi* made absolute:—

1. If no affidavit by Respondent, High Court as a rule will make order *nisi* absolute.

2. While High Court may on an *ex parte* motion before return day in exercise of its discretion under Rule 5, High Court Rules, order that a certain Respondent be served they will not entertain an application to join made at last moment when Petitioner is entitled to expect to have the rule *nisi* made absolute.

(*M. L.*)

DISTINGUISHED: H. C. 5/42 (11, Ct. L. R. 65; 9, P. L. R. 191; 1942, S. C. J. 161) and H. C. 71/45 (not reported).

ANNOTATIONS:

1. For authorities on affidavits in H. C. see H. C. 100/45 (1946, A. L. R. 113; 12 P. L. R. 570) and annotations.

2. In H. C. 71/45 (*supra*) the H. C. on an *ex parte* application by the third

party ordered without assigning reasons to issue to it summons for the return day.
(*A. G.*)

FOR PETITIONER: Goitein.

FOR RESPONDENTS: Absent — served.

ORDER.

Whatever may be the merits of the arguments advanced in regard to the issues which have already been determined, it is essential to appreciate the real nature of the application now before the Court. On the 2nd of January, 1946, this Honourable Court made an order *nisi* directing certain persons to show cause. They have not filed an affidavit, and the Petitioner would therefore normally be entitled to have the rule made absolute. Now, at the last moment, when as I said the Petitioner is entitled to expect to have the rule made absolute, Mr. Moghannam intervenes with a request that a certain Respondent be served under Rule 5 of the High Court Rules. Rule 5 vests the discretion in the Court. It has been exercised on previous occasions in High Court Case No. 5/42 and in High Court Case No. 71/45, but it will be observed that in those two cases a motion was made *ex parte* before the return date which is a very different procedure from that adopted to-day. This case has been dragging on for a considerable number of years. It has gone from Court to Court. Apart from the other reasons which would make us reluctant to exercise our discretion in favour of the Applicant, we find it very difficult to believe that he did not know that this order *nisi* had been issued.

The application to join is, therefore, refused and as no affidavit has been filed the rule is made absolute.

Given this 4th day of February, 1946.

Chief Justice.

CIVIL APPEAL No. 302/45.

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

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

IN THE APPEAL OF:—

Reuben Sheinzwit. APPELLANT.

v.

Muhammad Hussein Mizher & an. RESPONDENTS.

Statutory tenant under Cultivators (Protection) Ord. — Appeal from judgment of Land Court on appeal by leave from decision of Special Commission — Point not raised in lower Court — Meaning of "one year" in sec. 6(1), Cultivators (Protection) Ordinance.

Appeal from the judgment of the Land Court of Jaffa dated 25.7.45 in Land Appeal No. 3/43 sitting in its appellate capacity from a Special Commission appointed under sec. 19 of the Cultivators (Protection) Ord., allowed:—

1. An appeal lies as of right from a judgment of a Land Court on appeal by leave from a decision of a Special Commission under Cultivators (Special Commission) Appeal Rules, 1937.

2. (*Obiter*): Where Special Commission's decision is made known to parties, this is a good "notification" for purposes of Rule 2, Cultivators (Special Commission) Appeal Rules; no further service of decision is necessary.

3. Point that application for leave to appeal was out of time cannot be taken on appeal before Supreme Court if not raised in Court below.

4. "A period of not less than one year" in sec. 6(1), Cultivators (Protection) Ord. means a continuous period of not less than one year.

(*M. L.*)

REFERRED TO: C. A. 29/44 (11, P. L. R. 348, 1944 A. L. R. 644).

ANNOTATIONS:

1. On the first point see C. A. 29/44 (*supra*) and annotations in 1944 A. L. R.

2. On the question whether Court of appeal will listen to a point not raised in Court below see C. A. 140/41 (8, P. L. R. 579, 11 Ct. L. R. 20, 1941 S. C. J. 554), C. A. 162/41 (8, P. L. R. 596, 10 Ct. L. R. 225, 1941 S. C. J. 620) and annotations thereto in 1941 S. C. J., see also C. A. 180/42 (9, P. L. R. 745, 12 Ct. L. R. 250, 1942 S. C. J. 788) and C. A. 17/44 (11 P. L. R. 254, 1944 A. L. R. 381).

(*A. G.*)

FOR APPELLANT: Kolodny.

FOR RESPONDENTS: No. 1 — Served, not appeared.
No. 2 — Hawary.

JUDGMENT.

Shaw, J.: This is an appeal from a judgment dated 25.7.45 of the Land Court, Jaffa, in Land Appeal No. 3/43, sitting in its appellate capacity from the Special Commission at Ramleh appointed under section 19 of the Cultivators (Protection) Ordinance (Cap. 40).

The decision of the Special Commission was given on 20.9.43, and the Land Court, Jaffa, on 16.1.45, gave special leave to appeal by way of case stated from that decision on the following point of law:—

"Whether two or more periods each of less than one year's cultivation in two or more consecutive years may be added together to

constitute the period of 'not less than one year' prescribed by section 6(1) of the Cultivators (Protection) Ordinance".

Muhammad Eff. Hawary, advocate, who has appeared for the second Respondent, has raised two preliminary objections. In the first place he submits that there is no appeal from the Land Court in a case like this. He has referred to section 19(2) of the Ordinance and to the Cultivators (Special Commission) Appeal Rules, 1937 (Vol. 2, Laws of Palestine, 1937, p. 409), and he argues that there is no provision for such an appeal, and that it is clearly the intention of the legislature that there should be no appeal.

Mr. Kolodny, advocate for the Appellant, has referred to Civil Appeal No. 29/44 (11, P. L. R. p. 348) where it was held in the clearest terms that such an appeal does lie. Muhammad Eff. points out that the judgment in C. A. No. 29/44 does not make mention of the Cultivators (Special Commission) Appeal Rules, and he submits that those rules were evidently not considered in that case.

I am of opinion that the decision in C. A. No. 29/44 is applicable to this case, and I would therefore dismiss this preliminary objection.

The second preliminary objection put forward by Muhammad Eff. is that the appeal to the Land Court was out of time. The decision of the Special Commission was given apparently on 20.9.43, and application for leave to appeal was not made till 24.10.43. Muhammad Eff. submits that the decision of the Special Commission was made known to the parties on 20.9.43, and that the ten days' time allowed by Rule 2 of the Cultivators (Special Commission) Appeal Rules, 1937, had therefore expired before the appeal was filed.

It may be observed that the heading of the application for leave to appeal sets out that the decision was "served" on 21.10.43.

If the decision of the Special Commission was in fact, made known to the parties on 20.9.43 I am not prepared to say that that would not be a good "notification" for the purpose of Rule 2; that is to say, I would not be prepared to say that any further "service" of the decision would have been necessary. But in this instance I do not consider it necessary to enquire whether the decision was actually read to the parties on 20.9.43 because I find that the objection fails for this reason — that at the hearing on 24.7.45, when the parties appeared in the Land Court on the case stated, no point was taken as to the appeal being out of time. The Respondents, having failed to take this point then, must be taken to have waived it, and they cannot raise it now. The second objection, therefore, fails.

I now come to the main ground of appeal. Section 6(1) of the Ordinance provides that:—

> "No Court or judge or execution officer shall give any judgment or make any order for the eviction of a statutory tenant who has occupied and cultivated a holding for a period of not less than one year save in accordance with the following provisions...".

The Commission found that the two Respondents were statutory tenants, and that they had cultivated the parcels for the following periods:—

1st Respondent

19.11.39 — 19.7.40 In all parcels except parcel 22.
1.12.40 — 1.8.41 In all parcels claimed.
1.12.41 — 1.7.42 In all parcels claimed.

2nd Respondent

1.12.40 — 1.8.41 In all parcels claimed.
1.12.41 — 1.7.42 In all parcels claimed.

It may be observed that the Special Commission did not purport to deal with any question arising under section 6 of the Ordinance, and in the case stated they mentioned that:—

> "The Commission was further of the opinion that it had no jurisdiction over the point raised in section 6 of the Ordinance, but since this particular point was referred to it by the Court the Commission finds that the three interrupted periods of cultivation of less than one year each when added together constitute a period of more than one year".

In my judgment the Special Commission were correct in thinking that they were not required to deal with any question arising under section 6. The provisions of that section come into play when the question of evicting a statutory tenant arises. But, of course, one of the duties of the Special Commission is to decide as to the length of time that any statutory tenant has occupied and cultivated a holding (section 9(1)(b) of the Ordinance), and that decision was duly made.

However, the matter is now before us and I think it is better that we should give a decision.

In order to agree with the learned trial Judge I would have to read into section 6(1) the words "in the aggregate" after the word "year". I can see no justification for so doing. The Respondents occupied and cultivated the parcels (at any rate during the years 1940 and 1941) by virtue of written agreements covering prescribed periods. I find that they are bound by those agreements, and that they cannot be heard to say that they were in fact occupying and cultivating the parcels continuously during the whole of 1940 and 1941. Nor did the Special Commission so find.

In my judgment the words "a period of not less than one year" in section 6(1) mean a continuous period of not less than one year.

In the result I would allow this appeal, but in view of the fact that

the Appellant need not have taken the case to the Land Court I would not allow any costs.

Delivered this 4th day of February, 1946.

British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

CIVIL APPEALS Nos. 283 & 284/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF :—

Civil Appeal No. 283/45:—

Aharon Mihakashwili. APPELLANT.

v.

Meir Almaleh & 2 ors. RESPONDENTS.

Civil Appeal No. 284/45:—

Mordechai Mihakashwili. APPELLANT.

v.

Meir Almaleh & 2 ors. RESPONDENTS.

Oral evidence in proof of payment of key money — Liability of landlord and recipient to refund — Joint and several liability.

1. Payment of key money prohibited by sec. 7 Rent Restrictions (Dwelling Houses) Ordinance cannot be regarded as forming part of a lease nor is it customary to reduce it to writing; it can therefore be proved by oral evidence.

2. Person lending himself to transaction of lease against payment of key money and allowing himself to become a landlord *vis à vis* tenant makes himself liable to refund the key money in addition to recipient thereof.

3. Where both lessor and recipient of key money are liable to refund and there is an independent right of action against each of them for the full amount, their liability is joint and several.

(*M. L.*)

ANNOTATIONS :

1. For English (and Scottish) authorities on recovery of premiums see Blundell's Rent Restrictions Cases Nos. 29, Bell *v.* Steel; 190 Gourlay *v.* Kohertson; 254 Katsmann *v.* Barnett; 313 Mason, Herring and Brooks *v.* Harris; 390, Remington *v.* Larchin; 405, Rush *v.* Matthews; 449, Strathern *v.* Beaton.

See also the English and Empire Digest Vol. 31, p. 572 and 573, paras. 7199 and 7206.

2. On joint and several liability see: C. A. 44/28 (1, P. L. R. 328; 1 C. of J. 315); C. A. 204/37 (2, Ct. L. R. 153; 1937, S. C. J. (N. S.) 518; 4, P. L. R. 327); C. A. 183/38 (5, Ct. L. R. 17; 1938, S. C. J. II, 197; 5, P. L. R. 576); C. A. 152/42 (12, Ct. L. R. 218, 1942 S. C. J. 643).

3. For an instance of another attempt to circumvent the Rent Restrictions Ord. defeated by the Court see C. A. D. C. Jm. 14/44 (1944, S. C. D. C. 123).

(*A. G.*)

FOR APPELLANTS: Ben Ari and Hake.

FOR RESPONDENTS: Eliash and Samuel.

JUDGMENT.

Frumkin, J.: These are two consolidated appeals from a judgment of the District Court of Tel-Aviv confirming, in so far as the two Appellants are concerned, a judgment of the Magistrate's Court of Tel-Aviv for the refund of LP. 250 paid by the Respondent as so called key money in addition to rent for a flat under his occupation. The facts of this case are fully set out in the judgments of the Courts below and need only be referred to very shortly. The Respondent having newly arrived in the country and looking for premises, hired the flat in question after negotiations with the first Appellant who, together with his brother Moshe, who was a party in the Magistrate's Court and is not concerned in this appeal, are the registered owners of the flat. The LP. 250 in question were paid to the first Appellant through one Zikoshwili. The contract of lease however was made in the name of the second Appellant who is the father of the first Appellant and Moshe, the story being that the father took that flat on lease from his two sons and not being in need of it any longer let it to the Respondent. This story was not believed by the Courts below who held that this combination was only part of a well designed device to deprive the Respondent of the possibility of recovering the so-called key money. The Magistrate ordered the refund against both the two Appellants and Moshe. The District Court set aside the judgment against Moshe, and gave judgment against the two Appellants only who are now appealing to this Court.

This action is based on section 7 of the Rent Restrictions (Dwelling-Houses) Ordinance, 1940, which reads as follows:—

> "A person shall not, in consideration of the grant, renewal or continuance of a tenancy of any dwelling-house to which this Ordinance applies, require the payment of any fine, premium or other like sum in addition to the rent, and where any such payment has been made in respect of any such dwelling-house the amount shall be recoverable by the tenant by whom it was made from the landlord, and may without prejudice to any other method of recovery be deducted from any rent payable to the landlord".

On behalf of the first Appellant who, as will be remembered, is the person who negotiated with the Respondent and received the money, it has been argued that the payment could not be proved by oral evidence inasmuch as it is either a part-payment in respect of a lease the terms of which can only be proved by documentary evidence, or else it is in the nature of agreements which are customarily reduced to writing.

There is no substance in either of these submissions. Payment of key money prohibited by law cannot be regarded as forming part of a lease and is obviously not of the nature of payments customarily reduced to writing, and if at all it can only be proved by oral evidence.

Another ground of appeal taken on behalf of the first Appellant was the insufficiency of evidence. The Court heard the evidence of both the Respondent and his wife and the witness Zikoshwili through whom the payments were made. This evidence believed by the Court was quite sufficient to establish the claim. The Courts below were therefore right in ordering the first Appellant to refund the money which he has received without any legal foundation.

I will deal later with another ground of appeal advanced on behalf of the first Appellant as regards joint and several liability, and will now deal with the ground of appeal submitted on behalf of the second Appellant that he is not liable at all to refund this money as he was not the recipient thereof.

Now, as already intimated before, the father lent himself to this transaction in order to deprive the Respondent of his legal remedy of reclaiming the money, and there was evidence that he was fully aware of the transaction. He allowed himself to become a landlord *vis-à-vis* the Respondent, as under section 2 of the Ordinance "landlord" includes any person from time to time deriving title under the original landlord or tenant. Section 7 provides that any amount paid as fine, premium or other like sum in addition to the rent, which would include this particular payment of key money, shall be recoverable by the tenant from the landlord. Thus, in addition to the recipient of the money, the first Appellant made himself liable.

There remains the question of joint and several liability. No good

reason was adduced why, if both of the two Appellants are liable for the refund of the amount in question, they should share this liability between them and not be held responsible each for the full amount. There was an independent right of action against each of them. The father was liable as landlord and the son as the recipient, and, provided the Respondent does not collect more than the actual amount paid, each of the two Appellants must be held liable for the full amount. The judgment of the District Court is, therefore, confirmed and the appeal dismissed with costs on the lower scale to include LP. 15.— advocate's attendance fee for this hearing.

Shaw, J.: I concur.

Delivered this 26th day of February, 1946.

British Puisne Judge.

CIVIL APPEAL No. 16/46.

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

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

IN THE APPEAL OF:—

Hans Cohen. APPELLANT.

v.

Rachel Perel. RESPONDENT.

Forfeiture of deposit — Failure to complete — Absence of licences from competent authorities — Certificate of occupancy.

Appeal from the judgment of the District Court, Haifa, dated 21.12.45, in Civil Case No. 201/44, allowed:—

1. A purchaser of a house cannot rescind the contract before transfer on the ground that the building contains controlled materials which were used without a licence.

2. (*Obiter*): But where bye laws provide for a certificate of occupancy, the contract may be rescinded if the vendor fails to produce such a certificate.

(*A. M. A.*)

ANNOTATIONS: Compare C. A. 44/37 (1937, S. C. J. (N. S.) 355; 1, Ct. L. R. (N. S.) 81) and C. A. 95/39 (1939, S. C. J. 531; 7, Ct. L. R. 13) for authorities on similar questions.

(*H. K.*)

FOR APPELLANT: Eliash and Shimel.

FOR RESPONDENT: Amikam.

JUDGMENT.

This is an appeal from the District Court Haifa, who awarded the Respondent the sum of LP. 300 plus interest. The cause of action arose out of a contract which was Exhibit P. 1. Its terms were clear: the Appellant agreed to sell to the Respondent a house which he owned and which was occupied as a dwelling in the village of Nahariya in the Gallilee District. The price agreed upon was LP. 2,800 of which LP. 300 was to be paid at the time of making of the contract. By clause 8 of the contract it was clearly agreed that if the intended purchaser did not accept transfer of the property the LP. 300 should be forfeited to the vendor. The Respondent did not accept the transfer of the property and she claimed back the LP. 300. There was some dispute as to the place of meeting for the purpose of taking over the property, but it can be accepted that the Appellant was prepared to hand over the house to the Respondent at the appropriate Land Registry office on the 28th September, 1944, and he invited the Respondent to meet him for the purpose of delivery. Now the Respondent admits that she did not take over the property but she says she was justified in so refusing for the reason that the Defendant had not obtained the necessary licences to buy the materials with which the building was constructed and that he did not produce a certificate of occupancy. On this question of permits for building materials we would remark that the property already was occupied by another person who was not subjected to any interference by the Controller of Heavy Industries who was the authority for issuing the permits which the Respondent says were not obtained. It is also to be observed that there was no provision in the contract between the parties for the production of any of these permits. The Respondent called evidence to prove that they were not obtained. This evidence was contradictory, although it was clearly established that the Appellant did obtain some licences. The Court however found that he utilized some materials without a licence. The Appellant countered this by stating that he had those materials already in his possession. Now, even if the Appellant had used some materials for which he has not received a permit, it is difficult to see how Respondent could have been affected. The only penalty provided is the liability of the builder to a fine. Once the property has passed to the Respondent no penalty attached to her and we fail to appreciate why the omission should enable her to avoid her clear contractual obligations.

The other ground on which she refused to carry out the contract was that the Appellant did not produce a certificate of occupancy. As to

this it is true that in some towns in Palestine Town Planning Regulations provide that a house shall not be occupied without a certificate of occupancy from the appropriate authorities. Where this bye law is in force it might well be that if the purported vendor of a house was unable on account of the absence of this certificate of occupancy to give possession to the purported buyer the latter would be entitled to rescind the contract. But there is no such law or regulation in force in Nahariya; there was therefore no need for a certificate of occupancy, and in fact, as we have pointed out, this house has been occupied and occupied to the knowledge of the Respondent without such a certificate. We are of opinion therefore that the Respondent was not entitled to rescind this contract on the grounds that she advanced in the lower Court and the appeal must be allowed and the judgment of the District Court set aside and Respondent's action dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee, also award as to costs in the Court below to be rescinded.

Delivered this 25th day of June, 1946.

Chief Justice.

CRIMINAL APPEALS Nos. 60 & 62/46.

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

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

IN THE APPEAL OF :—

Criminal Appeal No. 60/46:—

Jum'a Abdul Hadi el Rawi. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Criminal Appeal No. 62/46:—

Abdel Hadi Khaled el Azzeh & 2 ors. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Probation and binding over — Effect on sentence in subsequent conviction.

Appeals from the judgment of the District Court, Jaffa, dated 15th May, 1946, in Criminal Case No. 192/45, whereby Appellants were convicted of robbery

contra sections 287 and 288(1) of the Criminal Code Ordinance, 1936, and sentenced Appellant (in Cr. App. No. 60/46) to seven years' imprisonment, and Appellants (in Cr. App. No. 62/46) to four, five and five years' imprisonment respectively; appeals dismissed subject to a variation of sentence:—

Binding over is not of the same effect, as regards the sentence in a subsequent conviction, as probation.

(*A. M. A.*)

FOR APPELLANTS: Cr. App. No. 60/46 — Gluckman & O. S. Barghouti.
Cr. App. No. 62/46 — Nakhleh.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

— — — — — — — — — —*

After hearing the learned advocates on the question of sentence we find no reason for reducing the sentences awarded by the Court below except in the case of Appellant Juma Abdel Hadi El Rawi. In his case it seems that the learned President misconceived the importance to be attached to the binding over of the offender for three years. It has been rightly pointed out that this Appellant was not placed on probation but was merely bound over. After weighing all the circumstances and comparing the sentence passed on him with the sentences passed on the other Appellants we find that it would be just to reduce the sentence of seven years' imprisonment to five years' imprisonment.

Delivered this 19th day of June, 1946.

British Puisne Judge.

ADMIRALTY No. 7/45.

IN THE SUPREME COURT SITTING AS A COURT OF ADMIRALTY.

BEFORE : Edwards, J.

IN THE APPEAL OF:—

Palestine Ship Repairs Co. Ltd. PLAINTIFF.

v.

The Ship El Fath. DEFENDANT.

Admiralty — Vice Admiralty Rules, 1883, *R.* 75, 112, 116 — *Juris-*

* Omitted as dealing with the facts only.

diction, repair of ship — Memorandum of appearance — Amendment of appearance — Waiver of jurisdiction — Vice Admiralty Rules, 1859, *R.* 37; 1883, *R.* 207; *Admiralty Courts Act,* 1861, *secs.* 4—5.

Motion for setting aside the writ of summons and all subsequent proceedings in Admiralty Case No. 7/45, dismissed:—

1. The memorandum of appearance in an admiralty action should disclose the person interested in the ship.

2. An unconditional appearance amounts to a waiver of jurisdiction.

(*A. M. A.*)

FOLLOWED: Ruling of Walton, J., dated 12.7.1907, quoted in Annual Practice, note "Owners of a Ship", *sub* O. 48A, R. 5 of the R. S. C. J.

ANNOTATIONS:

1. The Vice Admiralty Rules, 1883, are set out in Annotated Laws of Palestine, Vol. I, pp. 25 *et seq.*

2. On the jurisdiction of the Admiralty Court in Palestine see *o. c.*, pp. 4—5.

3. As regards the effect of an unconditional appearance in civil proceedings in Palestine *cf.* C. A. 154/40 (7, P. L. R. 467; 1940, S. C. J. 334; 8, Ct. L. R. 91). See, as to the effect in Admiralty actions, Halsbury, Vol. I, p. 116, para. 172.

(*H. K.*)

FOR PLAINTIFF: Unger.

FOR DEFENDANT: Ruthberg.

JUDGMENT.

This is a motion, presumably under Rule 75 of the Vice Admiralty Rules, 1883, for an order setting aside the writ of summons issued in this case and all subsequent proceedings on the ground that this Court has no jurisdiction to entertain the action, it being a claim for the repairing of a ship which was not under arrest of the Court at the time of the institution of the case.

At the hearing of the motion Dr. Unger, on behalf of the Plaintiff in the action, has raised two preliminary objections to this motion, the first being that the memorandum of appearance purported to be on behalf of the ship and did not reveal or disclose the name of any person interested in the ship. I think that this argument is sound, but it is also highly technical because the then advocate for the Plaintiff, Mr. Shapiro, on 10th August, 1945, signed a joint minute together with Mr. Ruthberg, advocate for the Defendants, agreeing to the release of the ship on certain terms.

Mr. Ruthberg has informed me at the Bar that the sole owner of the ship, who has instructed him, is one Mr. Leon Goldenberg, a resident of Cairo, and he asks that I should grant leave to amend the entry of appearance as was done by Walton, J., on 12th July, 1907 (see Annual Practice (1944) p. 888). I think that this request is

reasonable and the entry of appearance will, therefore, be amended to read: "enter appearance for Leon Goldenberg, resident of Cairo, owner of the ship El Fath, the Defendant in this action".

The next preliminary objection to my entertaining this motion is that, absolute or unconditional appearance having been entered, this amounts to a waiver to jurisdiction. (See Roscoe, Admiralty Practice (5th Edition) p. 284).

Mr. Ruthberg has replied that the Vice Admiralty Rules, 1883, contain no such rule as Rule 37 of the Admiralty Court Rules, 1859. Dr. Unger retaliates by citing Rule 207 of the Vice Admiralty Rules, 1883. In construing Rule 207, the practice of the Division of the High Court of Justice of England, in my view, must be the practice prevailing in England at the beginning of 1884. So far as I can gather, the practice at the beginning of 1884 must have been substantially as set out on page 284 of Roscoe. I think that this second preliminary objection to the motion succeeds; but I must here sound a note of warning. The question of jurisdiction under sections 4 and 5 of the Admiralty Courts Act, 1861, is one thing, and the question whether the Plaintiff is entitled to a particular remedy is another thing. While I dismiss this motion this will be without prejudice to the Defendants' raising all necessary defences when the case comes on for trial under Rules 112 and 116 of the Vice Admiralty Rules, 1883.

The motion is dismissed with costs.

Mr. Ruthberg undertakes to obtain and to file a power of attorney from Mr. Leon Goldenberg within six weeks.

Delivered this 1st day of February, 1946.

British Puisne Judge.

SPECIAL TRIBUNAL No. 3/45.

IN THE SPECIAL TRIBUNAL CONSTITUTED UNDER ARTICLE 55 OF THE PALESTINE ORDER IN COUNCIL.

BEFORE: FitzGerald, C. J., Shaw, J. and Chief Rabbi Herzog.

IN THE APPLICATION OF:—

Abraham Zwi Baranowicz. APPLICANT.

v.

Esther Rashel Baranovicz. RESPONDENT.

Will in civil form purporting to revoke an allegedly irrevocable previous

will in religious form — Meaning of "wills" in Art. 53, Palestine Order-in-Council — Question of jurisdiction.

Reference under Rule 354 of the Civil Procedure Rules, 1938, to decide which of the two Courts — the District Court of Tel-Aviv or the Rabbinical Court — has jurisdiction to entertain the action which is the subject-matter of this reference:—

1. Special Tribunal — not a Court within strict meaning of the term and therefore not bound by decisions of Court of Appeal, although it would not readily depart from principles laid down by that Court.

2. While generally expressions in Palestine Order-in-Council should be given their English meaning, yet where context otherwise requires one must depart from strict English meaning of the term.

3. "Wills" in Art. 53, Palestine Order-in-Council includes a will according to Jewish Law.

4. Where a member of a Religious Community made a will purporting to be irrevocable and later made a will in civil form purporting to revoke the previous will, it is for Religious Court to decide whether previous will still exists or has been revoked.

(*M. L.*)

REFERRED TO: C. A. 106/40 (7, P. L. R. 310; 1940, S. C. J. 229; 8, Ct. L. R. 51).

ANNOTATIONS:

1. On meaning attributed to expressions in the Palestine-Order-in-Council see H. C. 49/45 (1945, A. L. R. 659; 12, P. L. R. 426) and cases referred to therein.

2. On jurisdiction in matters of wills see C. A. 106/40 and annotations in 1940 S. C. J. 229; see also C. A. 131/42 (12, Ct. L. R. 257; 9, P. L. R. 152; 1942, S. C. J. 728).

3. On effect of authority of the Supreme Court judgments see CR. A. 160/44 (1945, A. L. R. 139) and annotations.

(*A. G.*)

FOR APPLICANT: Eliash.

FOR RESPONDENT: Goitein.

JUDGMENT.

This is an application under Rule 354 of the Civil Procedure Rules, which have been promulgated under section 8 of the Courts Ordinance to give effect to Article 55 of the Palestine Order-in-Council.

The facts are that the late Bluma Baranovicz made a will on the 2nd day of June, 1939. She made a subsequent will on the 15th day of January, 1943, by which, so it is alleged, she revoked her previous will. She died on the 8th August, 1943. In October, 1943, Abraham Baranowicz, the son of the deceased, petitioned the District Court of Tel-Aviv for probate of the second will. This probate was opposed by Esther Rachel Baranowicz, who sought to propound the first will in the Rabbinical Court.

The question now arises, which of the two Courts — the District Court of Tel-Aviv or the Rabbinical Court — has jurisdiction to entertain the action. The District Court adjourned the hearing of the case before it until the Rabbinical Court had given their decision on the will of 1939. Meanwhile the Rabbinical Court has confirmed the will of 1939.

Mr. Eliash contends that the Rabbinical Court had no jurisdiction, while Mr. Goitein says that it has. I myself should have thought that the matter was free from difficulty were it not for certain *dicta* in Civil Appeal No. 106/40.

To deal first with a point of procedure; it seems to me that this Special Tribunal is not a Court within the strict meaning of that term. It is not therefore, in my opinion, bound by decisions of the Court of Appeal, although I would not of course readily depart from principles laid down by that Court. Each case submitted to the Tribunal must, however, be decided on its merits. The difficulty to which I have referred arises out of the following passage in the judgment of the Court of Appeal in Civil Appeal No. 106/40:—

> "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 the testator, if he so wishes, to avoid the restrictions of his personal or religious law with regard to the disposition 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".

Mr. Eliash's argument was a twofold one. First, that the will of 1939 purported to be an irrevocable will, and while an irrevocable will is legal according to the Jewish Law, it is not, save in particular circumstances which do not arise here, permissible in English Law, and he argues that in the Order-in-Council expressions are to be given their English meaning. Therefore he says this so-called 1939 will was not a will. I agree that generally expressions in the Order-in-Council should be given their English meaning, but this is subject to the usual exception that where the context otherwise requires we must depart from the strict English meaning of a term. I come to the conclusion that it is clear from the context that the word "wills" in Article 53 of the Order-in-Council includes a will according to the Jewish Law.

His second line of argument was that the will of 1939 was revoked by the will made in 1943, as indeed it well could have been. It follows, he submits, that there was no will of 1939, there was only the

will of 1943, and taking his stand on Civil Appeal No. 106/40, he says that the jurisdiction is in the District Court.

For the purposes of reaching a decision in this Tribunal, I do not find it necessary to analyse the reasons which enabled the Court of Appeal to come to the conclusion to which it did, because it appears to me that the very question which Mr. Eliash himself presumes to determine, can in fact only be decided by the Rabbinical Court. That question is whether the 1939 will was in fact revoked. That is a question of law depending on whether there was a legal revocation. Now whatever arguments may centre round the quotation I have made from Civil Appeal No. 106/40, it is not contested by either party that the 1939 will, if it still exists, is a will within the exclusive jurisdiction of the Rabbinical Court, and the question whether it does exist as a will is a question to be determined by the Rabbinical Court. If the will is dead, as Mr. Eliash submits it is, it is for the Rabbinical Court so to pronounce.

I am therefore of the opinion that the Rabbinical Court had jurisdiction to entertain the action. Whether in the end they come to a correct conclusion can, of course, still be contested in the Rabbinical Court of Appeal.

We award LP. 15 inclusive costs to the Respondent.

Delivered this 14th day of March, 1946, in the presence of Mr. M. Eliash for the Applicant and Mr. Moyal for the Respondent.

Chief Justice.

I concur.

British Puisne Judge.

JUDGMENT.

I. Herzog, Chief Rabbi: The Order-in-Council grants the Rabbinical Courts exclusive jurisdiction in marriage, divorce and wills, *etc.* What this means in the case of marriage, for instance, is obvious, and has moreover been established by judgment of Court, *viz.* that the only authority to decide whether a marriage contracted by a Jew and a Jewess, who are members of the Jewish Community and are not foreigners, is valid or is not valid, are the Rabbinical Courts ratified by the Chief Rabbinate of Palestine and recognised as such by the Government. Thus such Jew and Jewess wishing to be married have no alternative but to be married in accordance with the law of Moses and Israel. The same ought obviously to apply to wills, *viz.* that a Jew as above described wishing to make dispositions of his estate by will, can only do so in the forms recognised by Jewish law as investing

his will with validity, and that the sole authority thus to establish the validity or otherwise of his will are the Rabbinical Courts as above defined.

The two judgments cited by Mr.Eliash whereby the alternative is granted to a Jew, who is not a foreigner and who is a member of the Community, wishing to avoid Jewish law, to have his will made in civil form (that is, even if not valid in Jewish law) confirmed by the District Court is, I hold, contradictory to the Order-in-Council granting exclusive jurisdiction to the Rabbinical Courts in wills and the interpretation of the Succession Ordinance, upon which those judgments purport to be based, must to my mind be unsound since by this interpretation the Succession Ordinance would upset His Majesty's Order-in-Council, which would of course be *ultra vires*.

Now what is the position in the issue before us? A will made by a Palestinian Jew, a member of the Community, has been declared by the Rabbinical Court in Tel-Aviv not only valid but also irrevocable by Jewish law. A later will described as made in civil form purporting to revoke the former will has been placed before the District Court for confirmation, and it is contended that the exclusive jurisdiction of the Rabbinical Courts in wills does not entitle them to rule effectively that a certain will is irrevocable. Hence the first will is revocable, and since the alternative is granted to Jews to have a will in civil form confirmed by the District Court, the first will is ruled out and the second will prevails if confirmed by the District Court, regardless of what Jewish law holds in this case. Why is it contended that Jewish law must be denied the power to rule that a given will is irrevocable? The contention is that the Order-in-Council when it speaks of wills has in mind the conception of a will at the basis of the English law of testation, and English law it is asserted excludes irrevocability from its idea of a will. Hence the Rabbinic jurisdiction does not apply to the extent of empowering the Rabbinical Courts to rule effectively that a given will is irrevocable. But it is obvious and it has been freely admitted that the Order-in-Council in speaking of marriage and divorce in connection with Palestinian Jews who are members of the Community, has only in mind what Jewish law deems marriage and divorce, and the same must apply to wills. Since the Rabbinical Courts are empowered to confirm a will as valid in Jewish law, they are equally empowered to rule upon the authority of Jewish law that a given will is not only valid but also irrevocable. The argument has been advanced that the analogy with marriage does not hold good. "The essential concept of marriage", it has been argued, "is the legal union of a man and a woman for the purport of joint conjugal life, whatever

the form of that marriage may be, whether it be one which English law recognises or one which it does not recognise, but irrevocability in the case of a will conflicts with the very essence of the will conception in English law". Revocability may be inherent in the English conception of a will, but it is not necessarily inherent in the will conception in the mind of all civilised humanity in the way in which the above definition of marriage is present in the mind of all civilised human beings. Jews are a people of the oldest civilisation, but irrevocability of wills in certain cases is part and parcel of Jewish law, as will be explained later. And since the Order-in-Council in legislating for Jews specifically, surely had nothing in mind but Jewish law, it must as in the case of marriage have meant wills under Jewish law *with all that that implies*.

Even if we grant that a Jew who is not a foreigner and who is a member of the Community has the alternative of having his will, good in civil form (though not valid in Jewish law), confirmed by the District Court, this would not at all warrant the inference that a will held in Jewish law to be irrevocable could be annulled by the confirmation by the District Court of a subsequent will purporting to revoke the former. What the above alternative can mean is only that if such a Jew wishes to dispose of his property by will, and does not want to run the risk of his will being declared not valid by the Rabbinical Courts owing to flaws from the Jewish legal viewpoint, he can make his will in the simple way possible by the civil law, and have it confirmed as valid by the District Court, but it cannot mean that when the Rabbinical Courts have ruled that a will made according to the requirements of Jewish law is by that law not only valid but also binding to the extent that no other will in civil form or in Jewish legal form can revoke it, the District Court can overrule that by the authority of English law, which holds that no will whatever is irrevocable. The above cited judgments could only have purported to add to Jewish law, that is, to invest with validity what in Jewish law is not valid owing to the absence of certain formalities, but they could not have aimed at destroying the power of Jewish law in a matter in which the Rabbinical Courts have been granted exclusive jurisdiction. Moreover, suppose that Jewish law had only been granted concurrent jurisdiction, would not that have warranted that the testator had signified by taking care to make his will in strict accordance with the requirements of Jewish law that he wanted his will to derive its validity from Jewish law and that he had thus become in as far as concerns the disposition of his estate (embraced by that will) after his death, bound by Jewish law whose sole authorised judiciary are the Rabbinical Courts?

How much more so is the case in view of the fact that the Order-in-Council actually vests the Rabbinical Courts with *exclusive* jurisdiction!

Even if we would grant that the Rabbinical Courts cannot on the basis of Jewish law deny validity in the case of a will good in civil form, they could still deny its validity, not on the ground that it is *per se* not valid in Jewish law, but on the ground that a previous will made in accordance with the requirements of Jewish law is invested by that law with irrevocability. Since the Rabbinical Courts are empowered to establish that a certain will is valid because Jewish law so rules, they are empowered by the authority of their jurisdiction to establish that a given will is irrevocable because Jewish law lays down that it is irrevocable.

The difference between Jewish and English law in respect of irrevocability, if we grant that in English law no will can be made irrevocable, issues from a fundamental difference between the two systems in regard to the power of testation. Jewish law draws a distinction between a will made by a person who is sick and bed-ridden, *Shechiv-Mera,* and one who is not in such a condition — *bari.* The former can make his will without any modes of legal transfer required for the validity of a gift and even by mere word of mouth, and he can revoke his will if he so wishes. The latter, generally speaking, can only make his will effective by the modes of legal transfer required for the validity of a gift, transferring the property to the donees in as far as concerns the *res,* substance, — already now, but reserving to himself the usufruct during his life-time, the latter to devolve to his donees upon his death when their title would attain totally both *de jure* and *de facto.* The formula essentially is: "I have transferred to ... by the required legal modes from today and after my death". This means — the substance from now and the usurfruct after his death. If he wishes to retain the power of revocation he can do so by inserting the condition: "provided that I do not retract". In the absence of such stipulation he has of his own free will divested himself of the power of revocation and thus the irrevocability of the will is not because of any stipulation to that effect but because he had already transferred his property to the donees by the legal modes of transfer. When the Order-in-Council conferred upon the Rabbinical Courts jurisdiction in wills it granted by implication the irrevocability of a will once it is irrevocable in Jewish law. In speaking of wills it envisages all instruments which a Jew who knows aught of Jewish law and practice would unhesitatingly describe as *tzawaah,* the term which in Jewish usage corresponds to the English will.

Conclusion.

The first will admitted by the Rabbinical Court in Tel-Aviv to be irrevocable is *prima facie* the only will, and the civil Courts are *ipso facto* precluded from dealing with any later will in any way whatsoever. The party opposing the first will can have recourse to the Rabbinical Court of Appeal in Jerusalem. This may upon examining the first will find that despite the ruling of the Court of First Instance it is not irrevocable, owing to certain internal indications, or to certain evidence proving that the testator had the intention of making it subject to revocation, and in that event it will proceed to examine the second will which the Rabbinical Court of Appeal may find to be valid in Jewish law, and hence confirm it or it may find that although not valid as a will the document amounts to a revocation of the first will and thus intestacy will result. The Rabbinical Court of Appeal may uphold the judgment of the Rabbinical Court of Tel-Aviv and there the matter will end. Whatever may be the result of the appeal before the Supreme Rabbinical Court in Jerusalem, if that takes place, it is absolutely clear to my mind that in this case there is no room for interference on the part of the Civil Courts. I therefore hold that the decision of the Special Tribunal must be that Jewish law in the present case must be allowed to take its course, without let or hindrance, through its authorised Courts.

7th *Adar I*, 5706.
February, the 8th, 1946.

ISAAC HERZOG
Chief Rabbi of the Holy Land.

CIVIL APPEALS Nos. 416—19 & 421/44.

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

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

IN THE APPEALS OF :—

C. AS. Nos. 416—419/44:—

Israel Meir Rapaport & ors. APPELLANTS.

v.

The Latin Patriarchate of Jerusalem & 46 others (as in the Statement of Appeal). RESPONDENTS.

Land Settlement — Prescriptive title — Document of title — In what circumstances it may be set aside — Prescriptive rights in musha cultivation — Musha explained — Admissions.

Appeals from the judgment of the Settlement Officer, Ramle Settlement Area, dated 6th July, 1944, in Case No. 7/Kfar Uria, allowed:—

There can be no acquisition of prescriptive title by *musha* cultivation.

(*A. M. A.*)

ANNOTATIONS:

1. It has been held in L. A. 121/26 (1, P. L. R. 234; 4, C. of J. 1271) that as regards the acquisition of prescriptive rights in *masha* lands a distinction must be drawn between villagers of the *masha* lands village and other persons.

Cf. also L. A. 17/36 (1937, S. C. J. (N. S.) 54; 1, Ct. L. R. 127) where L. A. 121/26 (*supra*) was distinguished.

2. For other authorities on *masha* lands see the note to C. A. 99/43 (1943, A. L. R. 239).

3. A registered title is not indefeasible: C. A. 160/43 (11, P. L. R. 397; 1944, A. L. R. 651); see also note 4 to that case in A. L. R. as regards the "strictest proof" required to upset a *kushan* and *cf.* C. A. 306, 311 & 318/44 (*ante*, p. 211).

(*H. K.*)

FOR APPELLANTS: *C. As. Nos.* 416—419/44 — A. Levin, Ben-Shemesh, Gavison & Miss Solomon.
C. A. No. 421/44 — Nakhleh & Germanus.

FOR RESPONDENTS: C. *As. Nos.* 416—419/44 — Nakhleh & Germanus.
C. A. No. 421/44 — A. Levin, Ben-Shemesh, Gavison & Miss Solomon.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from the decision of the Settlement Officer in the Ramle Settlement Area in Case No. 7/Kfar Uria. Before proceeding to analyse his judgment we express our appreciation of the thoroughness with which the Settlement Officer investigated the case. The fact that we differ from him on certain points of law does not detract from the ability with which he marshalled the facts. The case has been a protracted one involving weeks of hearing. It has already been once before this Court, but, as we shall show, the length of the proceedings was caused more by reason of the fact that it was a dispute between Arabs and Jews than because of any complicated legal issues. It was a contest between the Arab Village of Sara and the Jewish Village of Kfar Uria. Their boundaries adjoin and undoubtedly there may have been from time to time encroachments and counter encroachments. One fact appears to us to stand out clear and

that is that the land claimed by the Appellants is registered in the name of the Appellants, which registration can be traced back through their predecessors in title to some seventy years, *i. e.* to the registration of the 91 *kushans* in the Turkish year of 1293. This was so found by the learned Settlement Officer in paragraphs 2 and 18 of his judgment. It came to be registered by virtue of the following transactions: — The original registration was for 939 *dunams* to three persons Shukri Karmi, Nasri and Bulus, the sons of Bulus Karmi. Later, by virtue of proceedings before the *Mejlis Idara* in the Turkish year of 1318 which are recorded in Exhibit 23, it was established that the area was not 939 *dunams* but more nearly 5,000 *dunams*. In 1328 Turkish Year (1912) Jewish immigrants came and negotiated with the Karmis for purchase. They were shown Exhibit 23 which was evidence of the 91 *kushans* in the Turkish year of 1293. This was so found by shown a certificate of possession and a map. On this basis they paid cash and bought it in the name of four Jewish Ottoman subjects residing at Rehovoth. The land was registered in four separate plots. The *kushan* (Exhibit 11) which covers the disputed area in this case was in respect of 2690 *dunums*, the other *kushans* covered the remainder of the land dealt with in Exhibit 23. It is to be noted that the *Mukhtars* and Elders of Sara as well as the *Mejlis Idara* signed Exhibit 23. In the light of these facts it appears to us that there was only one conclusion possible, and that was the conclusion arrived at by the Settlement Officer that, at all events, the land was registered in the name of the Appellants and that the registration of the Respondents, did not cover this land.

At this stage the learned Settlement Officer had arrived at certain clear findings of fact, which were amply justified by the evidence, both documentary and oral, adduced before him. This being so, it seems to us that in order to conclude the case, he had only to enquire whether the Defendants had acquired a prescriptive title sufficient to defeat the registered title. Instead, he embarked on the highly dangerous task of examining the morals surrounding the execution of Exhibit 23. In his own words he wondered how much money had been paid to the *Mukhtars* for signing the exhibit. This was a pure speculation on his part. There was no evidence as to it. He found other flaws in the document itself which caused him to doubt its genuineness. Now, there may have been some grounds for the learned Settlement Officer's suspicions; but in a sense every document relating to land transactions during the Turkish regime can be regarded with suspicion. But if every document were to be rejected merely on this ground, the land position of this country would be more chaotic even

than it is. We do not say that a registered document could not be set aside. It could, but we would require very substantial grounds for doing so. The registration of this land goes back seventy years. It was exposed to scrutiny on several public occasions, yet its authenticity was not questioned. We think, therefore, that the Settlement Officer erred in rejecting it on grounds which, to our mind, fall far short of those which would be sufficient to nullify it. It follows that we hold that the Appellants have a valid registered title based on Exhibit 23.

We come now to examine how could the Appellants have forfeited this registered title and whether in fact they have forfeited it. The Respondents say that they had cultivated this land for a prescriptive period. They could not prove cultivation by individuals so they fell back on the theory that the land was held in *masha'a*. The Settlement Officer agreed with them and based his judgment in their favour on this view that prescriptive rights could be acquired under a *masha'a* title. The Settlement Officer realised that the land could not have been held in *masha'a* in the Turkish year 1313 because admittedly they sold half of the land to the Latin Patriarchate, and *masha'a* land is not capable of being sold. Nor could it have been *masha'a* in the Turkish year 1228 because in that year they had sold to the Karmi brothers. But the Settlement Officer concluded that they had acquired a *masha'a* title after that year. What is this system known as *masha'a?* It is a system of village rotation by which a man cultivates a plot for a season and he may not again return to that plot for 20 years or even for the whole of his life-time, in fact the probability is that it will be cultivated by a different person every season. Now, we take it that the underlying principle of prescription is that when a man has been so long in possession of land as to identify it with himself, the Courts will not permit anyone else to oust him from it. It appears to us that no such principle could apply to *masha'a* lands. In *masha'a* there can be no identification of any particular person with any particular area; there is no attachment between the person and the land claimed by prescription, and, although we do not deny that a *masha'a* title may be capable of registration, we are of opinion that *masha'a* owners cannot acquire a *masha'a* title against a registered owner by prescription.

There remains for consideration the claim of the Latin Patriarch of Jerusalem. He, of course, claims under the deed of Turkish year 1313 by which he bought half the land of the village of Sara and his title must succeed or fail by the title of Sara. That title having failed, we need only consider whether the Latin Patriarch has acquired a

prescriptive right. It is overwhelmingly clear from the evidence that the local representatives of the Patriarchate never doubted that the land to which he now lays claim was within the boundaries of Kfar Uria. The Vicar General of the Latin Patriarchate and Canon Grasiano Safia signed documents, which are exhibits and which constitute clear admissions that the land claimed was within the land of Kfar Uria. Over 20 years afterwards when both the Vicar General and Canon Safia are dead, the Latin Patriarchate felt compelled to reject their signature on the ground that the Vicar General was not authorised to sign for the Patriarch, and Canon Safia at the time was of weak intellect. We do not, for a moment, question this evidence of His Beautitude, the Latin Patriarch; but we must hold that the people of Kfar Uria were entitled to rest content on the admissions of the local representatives of the Patriarch as binding on the Patriarch to the extent at least that they would estop him from pleading that he had acquired prescriptive rights during the time prior to the admissions. After that time there was constant litigation involving the issue of ownership of this land which, in our view, was sufficient to interrupt prescription even if the Respondents had been in possession, on which point we are not at all satisfied. We need only note the proceedings before the *Mejlis Idara* in 1914, the case in the Magistrate's Court at Ramle in 1922, the execution proceedings in 1929 and finally land settlement in 1933.

It follows that in our opinion the learned Settlement Officer erred when he found that the people of Sara were in possession for themselves and the Latin Patriarch for a period exceeding ten years before the conflicting claims arose at settlement. Having failed to establish that possession it follows that the registration of all the land in dispute in the name of the second Appellant, who has withdrawn in favour of the first Appellant, must prevail and the judgment of the Land Settlement Officer is modified accordingly.

Delivered this 18th day of April, 1946, in presence of Mr. E. Gavison for the Appellants and Mr. Germanus for the Respondents.

Chief Justice.

Edwards, J.: I concur.

British Puisne Judge.

Having heard argument as to costs, we order as follows, namely:—

Each of the Appellants will receive costs to be taxed on the lower scale, to include in the case of Keren Kayemeth Leisrael (C. A. 419/44) an advocate's attendance fee at the hearing of LP. 25.— and in the case of each of the other Appellants and advocate's attendance fee at the hearing of LP. 10.—.

Chief Justice.

HIGH COURT No. 102/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE MATTER OF :—

The Registrar of Trade Marks. PETITIONER.

v.

County Perfumery Company Ltd. & an. RESPONDENTS.

Decisive factor in case of rival claims to trade mark — User outside Palestine of no effect — Registration of trade mark subject to alteration of colour scheme.

Reference by the Registrar of Trade Marks under section 17(b) of the Trade Marks Ordinance, 1938:—

1. In a case of rival claims to a trade mark extensive user in Palestine is decisive, not order in which the applications for registration were submitted, nor user elsewhere than in Palestine.

2. Court may, while deciding in favour of Petitioner for registration of a trade mark, attach condition that colour scheme shall be altered to satisfaction of Registrar, so as to eliminate risk of the Article being mistaken for one of another firm bearing a partly similar name as trade mark.

(*M. L.*)

REFERRED TO: H. C. 8 & 9/42 (1942, S. C. J. 196; 11, Ct. L. R. 154); H. C. 27/37 (1937, S. C. J. (N. S.) 160); C. A. 2/24 (1, P. L. R. 16; 5, C. of J. 1763); C. A. 110/33 (2, P. L. R. 101; 5, C. of J. 1773); Sebastian's Law of Trade Marks (8th Ed.) pp. 62, 63, 101 and 103; Halsbury (Hailsham Ed. Vol. 32, p. 646 Art. 953).

ANNOTATIONS: For Palestinian authorities on trade marks see the cases referred to in the judgment and the following cases: H. C. 104 & 105/36 (4, P. L. R. 4; 1, Ct. L .R. 169); H. C. 22/37 (1, Ct. L. R. 132); H. C. 13/38 (3, Ct. L. R. 155; 1938, 1 S. C. J. 187); H. C. 18/39 (6, Ct. L. R. 93; 1939, S.C.J. 385); H. C. 68 & 71/41 (1941, S. C. J. 387); H. C. 8 & 9/42 (11, Ct. L. R. 154; 1942, S. C. J. 196); H. C. 36/42 (9, P. L. R. 310; 12, Ct. L. R. 147; 1942, S. C. J. 335); H. C. 47/43 (10, P. L. R. 379; 1943, A. L. R. 404); H. C. 69/38 (5, Ct. L. R. 161; 1939, S. C. J. 12) and annotations in S. C. J.

(*A. G.*)

On the first point compare C. A. 15/29 (5, C. of J. 1769) and H. C. 84/36 (9, C. of J. 823) to which the attention of the Court was not drawn and which appear slightly to differ from the principle laid down in this decision.

FOR PETITIONER: Gavison.

FOR RESPONDENTS: No. 1 — Beirouti.
No. 2 — Badt.

ORDER.

Shaw, J.: The Administrator General in his capacity as Registrar of Trade Marks, is the formal Petitioner in this case. He has outlined the facts in his petition as follows:—

> "(i) On the 19th March, 1944, an application for the registration of a trade mark consisting of the word BRYLFIX was filed by County Perfumery Company Limited of North Circular Road, West Twyford, London, N. W., England and was given the number 6501 (Exhibit A). The mark for which registration is sought is applied to toilet preparations for the hair.
>
> The application was accepted for registration and advertised in Palestine *Gazette* No. 1377 of the 7th December, 1944 (Supplement No. 3).
>
> (ii) On the 5th March, 1945, opposition to the registration was lodged by Zamir Company of 9, Hagra Street, Tel-Aviv, who at the same time filed an application for the registration of a mark consisting of a label containing the word BRILFIX in prominent script (Exhibit B). The application, which is also in respect of toilet preparations for the hair, was given the No. 7011.
>
> (iii) On the 2nd October, 1945, the parties to the opposition were given a hearing when they were informed that, since the opposition was based on a mark for which extensive user had been claimed, the issue was one coming under section 17 of the Trade Marks Ordinance 1938 and that unless the parties could come to a satisfactory agreement the issue would be referred to this Court in accordance with sub-section (b) of section 17".

The advocates for the parties have put in a number of affidavits. Mr. Badt for the second Respondent, who opposes the registration, has stated that the first Respondent registered the trade mark "Brylcreem" in Palestine in 1934, and until 1944 that was the only trade mark which the first Respondent had registered. In 1944 the first Respondent applied for the registration of five other trade marks, namely — "Brylset", "Bryltone", "Brylfoam", "Brylshave", and "Brylfix".

In the present case we are concerned only with "Brylfix". The first Respondents applied for the registration of the fancy name "Brylfix" only. That is to say they applied for a trade mark to be registered without limitation of colour. The trade mark of the second Respondent, on the other hand, is a label bearing the fancy name "Brilfix" and other words together with the name of the second Respondent — Zamir Co. The name and some of the other words are in white, and the colours red, black and gold are used.

Mr. Badt has submitted that the essential part in each case is the word, and in view of the close similarity between 'Brylfix" and

"Brilfix" I consider that the two marks are sufficiently identical to cause misunderstanding.

It is admitted that the first person to apply for registration was the first Respondent. His application is dated 19.3.44 and it was advertised on 7.12.44, while the application of the second Respondent is dated 5.3.45, that is to say nearly a year later than that of the first Respondent but only three months after the advertisement of it.

Mr. Beiruti for the first Respondent does not allege user in Palestine of his client's mark, but the affidavit of Halim Saba (for first Respondent) shows that "Brylfix" has been registered in England since 1936. The affidavit of Michael Abrahami (for second Respondent) shows that he invented the name "Brilfix" in 1942 or 1943. He derived it from the words "Brilliantine" and "Fixative". He has sworn that he did not know of any other person using the word "Brilfix" or "Brylfix" for similar purposes: that the Zamir Co. have sold in Palestine, since Septembe 1943, through their distributors Nurit Co. Ltd. of 11 Israel Nagara Street, Tel-Aviv, "Brilfix" hair-cream products to the value of LP. 2000; that the "Brilfix" hair-cream of the Zamir Co. is a well known product on the Palestine market; and that there is hardly any perfumery shop or soap store in this country where "Brilfix" hair-cream is not sold. Similar evidence is contained in the affidavits of 30.4.45 of David Bergroth and of 29.4.45 of Siegfried Michels.

I find that the second Respondent has proved extensive user in Palestine of the trade mark "Brilfix" since September 1943. That is to say they have proved a user extending over a period of about six months before the application for the registration of "Brylfix" was lodged on 19.3.44.

Dr. Badt has referred to H. C. 8 and 9/42 — Apelbom, Vol. 1, p. 196, and H. C. 27/37 — Apelbom, p. 161. Mr. Beiruti has referred to C. A. 2/44 * — 1 P. L. R. 16, and to C. A. 110/33 — 2 P. L. R. 101.

Dr. Badt submits that it is the user in Palestine which is decisive, and that the first Respondent cannot base any claim on user in England. Mr. Beiruti on the other hand submits that his client can rely on user elsewhere than in Palestine, and that the second Respondent's "Brilfix" mark is an infringement of his client's "Brylcream" mark which has been in extensive use in Palestine since 1938 as proved by the affidavit dated 25.4.45 of Aba Weissadler. Mr. Beiruti draws attention to the similarity between the colours and general get-up of

---

* *Scil.*: 2/24.

the "Brilfix" trade mark and the general get-up of the "Brylcreem" trade mark.

The following appears at page 62 of Sebastian's Law of Trade Marks (5th Edition):—

> "The expression 'used as a trade mark' was much considered in the case of Richards *v.* Butcher, where Kay, J., said that 'user as a trade mark' means, not what the person who uses has in his own mind about it, not 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. That is the trade mark proper; and 'user as a trade mark' means, and must necessarily mean, the impressing of those words either upon the goods, or upon some wrapper or case containing the goods, in such a way that the public would necessarily understand those words to be, and alone to be, the trade mark of the person who uses them".

And at page 63 the following occurs:—

> "Moreover, it is not sufficient that there has been user on price lists, bill heads, or other trade documents; for user as a trade mark there must have been user on the goods themselves, or on the boxes or wrappers containing them, — though slight user is sufficient, unless the claim is for registration under the three-mark rule — and the user before August 13th, 1875, must have been within the United Kingdom; for foreign user or registration is immaterial, and the mere passage through England of marked goods, without any sale or exposure for sale, is not user of the mark".

And at pages 101 to 103 the following appears:—

> "There was at one time a doubt as to the circumstances under which one person could acquire a sufficient right in a trade mark to be entitled to restrain another from infringing it. The right to redress being treated as founded on the Defendant's fraud, it was thought that a plaintiff who claimed an injunction against a defendant ought to show that he (the Plaintiff) had acquired for the mark indicating his manufacture such a reputation as would raise a presumption that the Defendant in adopting a similar mark had done so with the intention of availing himself of that reputation to divert to himself the Plaintiff's custom, or at all events that the Plaintiff ought to show that he had used the mark long enough to render it probable that such a reputation had been acquired.
>
> But when it came to be recognised that there was a right of property in a trade mark, intentional fraud being unnecessary to justify restraint, it was at once seen that, as was stated by Romilly, M. R., 'the interference of a Court of Equity could not depend on the length of time the manufacturers had used it', but that 'from the time of their commencing the user of their trade mark they became entitled to the protection of the Court against any other persons using the same, so that purchasers might be induced to purchase the goods of other persons as theirs'. 'As soon as a trade mark

> has been so applied in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm, and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade mark belongs'. There must, however, have been a real user.
>
> Even, however, if user be established, extending over a considerable period, it does not follow that a title to the trade mark is made out; for if the user was fraudulent in its inception, and is still calculated to deceive, the user gives no right; and it has been held in America that if A. has been using a trade mark which was really the property of B., and then B. ceases to use it, A. cannot acquire any title to the mark by continuing to use it after B's discontinuance, on account of the wrongful inception of his user".

The following appears at page 646 of Halsbury (2nd edition) Article 953:—

> "Where the name chosen for the goods is a fancy one the Court will generally prevent others using it, provided that the Plaintiff can show a sufficient user".

I have found that the second Respondent has proved extensive user in Palestine for about six months. The first Respondent on the other hand does not allege any user at all in Palestine up to the present. And having considered the evidence I am unable to find that the user by the second Respondent in this country of the fancy name "Brilfix" was fraudulent. There is no evidence that the second Respondent knew of the user of the fancy name "Brylfix" in England, and although he must be taken to have known of the use by the first Respondent of the fancy name "Brylcreem" in this country, I do not think that he was under any legal duty to refrain from using the fancy name "Brilfix" in this country. I agree with Dr. Badt's submission that it is the user in Palestine that is decisive in this case.

Having however compared the "Brilfix" trade mark of the second Respondent with the "Brylcreem" trade mark of the first Respondent, I consider that although there is a substantial difference between them it is advisable, in order that illiterate or unobservant persons may not be led to think that the two Articles are produced by one and the same firm, that the second Respondent should alter the colour scheme of his "Brilfix" trade mark.

In the result I make the following order on this petition. — That the Registrar do refuse to register the "Brylfix" trade mark of the first Respondent, and that the Registrar do also refuse to register the "Brilfix" trade mark of the second Respondent until he shall have

altered the colour scheme to the satisfaction of the Registrar in such a way as to eliminate the risk of its being mistaken for the "Brylcreem" trade mark of the first Respondent. Each party will bear its own costs.

Given this 8th day of February, 1946, in the presence of Mr. I. Gavison for Petitioner and Messrs. Beirouti & Badt for Respondents.

British Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 401/45.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

El Haj Issa Bsissu. APPELLANT.

v.

Hussein Omar Dajani. RESPONDENT.

Plaintiff's allegations of damages to leased premises and refusal to pay rent denied in statement of defence — Allegedly uncontradicted evidence — Scope of sec. 6 Evidence Ord.

Appeal from the judgment of the District Court of Jerusalem, dated 9th November, 1945, dismissed:—

Denial in statement of defence of Plaintiff's averment is sufficient contradiction for purpose of sec. 6, Evidence Ordinance and judgment cannot be entered for Plaintiff, if his statement is not corroborated by material evidence.

(*M. L.*)

REFERRED TO: C. A. 85/40 (7, P. L .R. 304, 8 Ct. L. R. 62, 1940 S. C. J. 474).

ANNOTATIONS: See case referred to *supra*.

For District Court cases on this point see C. A. D. C. T. A. 278/38 (1939, T. A. 70); C. A. D. C. T. A. 166/43 (1944, S. C. D. C. 5); C. A. D. C. T. A. 220/44 (1945, S. C. D. C. 138); C. A. D. C. T. A. 28/45 (*ibid.*, p. 492) but see also C. C. 7/43 (*ibid.*, p. 596); C. A. 113/42 (1942, Haifa Rep. 93) and C. C. 138/44 (1946, S. C. D. C. 264).

(*A. G.*)

FOR APPELLANT: Bisseiso.

FOR RESPONDENT: Nazzal.

JUDGMENT.

This is an appeal from the judgment dated 9.11.45 of the District Court, Jerusalem, in C. A. 38/45, setting aside a judgment dated 9.6.45 of the Magistrate's Court, Jerusalem, in C. C. 1716/44.

Dr. Bisseisso, for the Appellant who is the landlord of certain premises occupied by the Respondent by virtue of a lease beginning on 1st *Moharram* 1363, has submitted that the District Court erred in holding that there was no corroboration of the Appellant's evidence in regard to whether the Respondent refused to pay rent and damaged the leased premises. In his statement of defence the Respondent had denied late tender of the rent, and he had also denied having damaged the premises. So there was a sufficient contradiction of the Appellant's evidence for the purpose of section 6 of the Evidence Ordinance (Cap. 54). In this connection we would refer to C. A. 85/40 (7, P. L. R. 304) in which case the following passage appears in the judgment (see page 309):—

> "As to the question of evidence being uncontradicted, we think that that means that it must be either denied in pleadings or that it must be contradicted by other evidence and that a mere statement by counsel that evidence is not accepted is not sufficient to contradict it".

Having heard the submissions of Dr. Bisseisso we agree with the District Court's finding that there was, apart from the statement of the Appellant himself, no material evidence corroborating what he had stated on these two points.

In the circumstances we do not consider it to be necessary to call on the Respondent's advocate to reply.

The appeal is dismissed, with fixed costs in the sum of LP. 10. (ten pounds).

Delivered this 4th day of March, 1946.

British Puisne Judge.

CIVIL APPEAL No. 274/45.

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

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

David Joseph Bugayer. — APPELLANT.

v.

Hertha Bugayer, née Horowitz & an. — RESPONDENTS.

Action in District Court by stateless Jewess against husband, a Palestinian Jew, for order to divorce her and for alimony pending divorce — Jurisdiction of District Court — Scope of Arts. 64 and 65, Palestine Order-in-Council.

Appeal from the judgment of the District Court of Tel-Aviv, dated 2nd July, 1945, in Civil Case No. 77/45, allowed:—

1. Art. 64(1), Palestine Order in Council, empowering District Court to decide matters of personal status applies only if both parties are foreigners, but not if one of the parties is not a foreigner.

2. Order of District Court compelling a husband to divorce his wife amounts to decree of dissolution of marriage, hence outside jurisdiction of District Court.

3. (*Per* Frumkin, J.) A Rabbinical Court is not precluded from pronouncing a decree of dissolution of marriage of persons over whom it has jurisdiction and can therefore also make an order leading to the dissolution.

(*M. L.*)

REFERRED TO: Volkenberg *v.* Volkenberg C. A. 22/34 (2, P. L. R. 365, 8 C. of J. 588).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945 S. C. D. C. at p. 210.

2. For cases on Article 64(1) of the Palestine Order-in-Council see: C. A. 9/40 (7 P. L. R. 228, 7 Ct. L. R. 173, 1940 S. C. J. 492); C. A. 11/41 (8 P. L. R. 241, 11 Ct. L. R. 238, 1941 S. C. J. 230); C. A. 274/44 (1945, A. L. R. 293, 11 P. L. R. 639); C. A. 71/44 (1944, A. L. R. 460, 11 P. L. R. 381); M .A. 20/43 (1943, A. L. R. 12, 10 P. L. R. 124); C. A. 234/45 (1946, A. L. R. 337).

(*A. G.*)

FOR APPELLANT: Hake.

FOR RESPONDENTS: Silberg.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, in Civil Case No. 77/45. The Appellant and the second Respondent were the Defendants in the Court below, and the first Respondent was the Plaintiff.

In the Court below, the Plaintiff (now first Respondent) prayed for an order of judicial separation against her husband (now the Appellant) and also prayed that her husband be ordered to divorce her by delivering to her a deed of divorce (*ghet*), in accordance with the provisions of the Jewish Religious Law; there was also an application for payment of alimony at the rate of LP. 50 *per mensem*, and other subsidiary prayers which need not be considered for the purposes of this appeal.

At the beginning of the hearing before the District Court, the Plaintiff withdrew her claim against the second Defendant (now second

Respondent). The first Defendant (now Appellant) did not appear and was not represented at the hearing of the case before the District Court.

The learned District Court Judge granted an order of judicial separation, ordered the first Defendant (now Appellant) to deliver to his wife a deed of divorce (*ghet*), and further ordered payment of alimony at the rate of LP. 8 per month as from the 1st March, 1945, until the delivery of the deed of divorce.

The husband has appealed against this decision on six grounds. The first ground of appeal was not pressed, and need not be considered. The second, third and fourth grounds of appeal read as follows:—

> "2. The District Court had no jurisdiction to entertain the claim and/or issue the order for divorce and/or order payment of alimony *in terrorem* or at all.
>
> 3. The District Court had no jurisdiction or power to issue an order in the nature of a mandatory injunction, in matters of personal status, and in all the circumstances of the case should not have issued such order.
>
> 4. The District Court misapplied and misinterpreted the substance and effect of the Jewish Law in the matter in question".

It is necessary to explain that the Appellant and his wife belong to the Jewish faith (and presumably to the Jewish Community in Palestine); the wife, however, is not a Palestinian citizen. She did not acquire Palestinian citizenship on marriage because the marriage took place in 1943, *i. e.* after Article 12 of the Palestinian Citizenship Order, 1925, had been replaced by Article 6 of the Palestinian Citizenship (Amendment) Order, 1939. Under the new Article 12, a woman does not automatically acquire Palestinian citizenship on marriage to a Palestinian, but the High Commissioner may grant her a certificate of naturalization on application.

Before proceeding further I deem fit to point out that had the original Article 12 of the Palestinian Citizenship Order, 1925, been still in force, the wife in this case would have acquired Palestinian citizenship at the time of marriage, and the Rabbinical Courts would have had exclusive jurisdiction in matters of divorce and alimony between husband and wife. It does seem regrettable that the amendment of Article 12 of the Order of 1925 has had the result (perhaps unforeseen) of placing the wife of a Palestinian citizen at a disadvantage as regards divorce and similar matters, when she happens not to have acquired Palestinian citizenship; in such cases Article 65 of the Palestine Order-in-Council, 1922, does not help.

I will now proceed to examine whether the District Court had jurisdiction to entertain the wife's application for judicial separation and

for an "order to divorce in accordance with the provisions of the Jewish Religious Law". Article 47 of the Palestine Order-in-Council, 1922, does in general terms give jurisdiction to District Courts in matters of personal status, but the provisions of the said Article are subject to those of Articles 52, 53, 54 and 64 of the same Order.

Article 64(i) empowers District Courts to decide matters of personal status affecting *foreigners* (other than Moslems), but the proviso to this first paragraph lays down that the said Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage "until an Ordinance is passed conferring such jurisdiction".

I am of opinion that in the present case the first requirement of Article 64(i) was not satisfied, because one of the parties is not a foreigner. Furthermore, I have grave doubts as to whether the District Court has jurisdiction, derived from Article 64(i), to grant an order compelling a man to divorce his wife. It seems to me to be merely a play on words to state that such an order does not amount to a dissolution of marriage when it, in fact, amounts to a decision that the wife is entitled to a divorce and that the husband has to comply with the Court's decision or be punished for contempt of Court. One danger of such an order is that the husband has to proceed under his personal law, which may or may not allow divorce or which may, as in the present case, provide only for divorce by mutual consent. (See Volkenberg *v.* Volkenberg, P. L. R. 1934—35 at pages 365—369).

I have therefore reached the conclusion that the District Court had no jurisdiction under Article 64(i) to order the husband to divorce, and I need not consider the question of alimony granted pending completion of the divorce.

In my view the appeal should be allowed and the order of the District Court rescinded, and I order accordingly.

As regards costs, I consider that the nature of the case is such that Appellant is not entitled to his costs.

Delivered this 7th day of March, 1946.

British Puisne Judge.

Frumkin, J.: This case reveals a new class of persons who, owing to the complicated divorce laws of this country, are at a loss to find a tribunal competent to grant relief in matters of marriage or divorce. This complication has been created by the Palestine Citizenship (Amendment) Order-in-Council, 1939. If, until the promulgation of this amending Order, a woman married to a Palestinian citizen could have sought relief in a matter of divorce from Religious Courts in this country, Article 12 of the said Order, as amended, deprives her of such

relief, if prior to her marriage she was not a Palestinian and had not since her marriage secured, by application to the High Commissioner, the grant of a certificate of naturalization.

The facts of this case are shortly as follows: The Respondent, a stateless Jewess, was in 1943 married to the Appellant, who is a Palestinian Jew. The marriage was an unhappy one, and apparently the only remedy was to seek for a dissolution of the marriage.

Because of the amended law, just stated, the Respondent could not avail herself of the process of the Rabbinical Court, and brought an action before the District Court of Tel-Aviv asking to order her husband to give her a *"ghet"*. The case was undefended. Evidence was brought to show that under Jewish Law the circumstances are such that a Rabbinical Court would have ordered the husband to divorce his wife. The learned Relieving President in the Court below was satisfied with that evidence. While realising the difficulties, he followed the liberal line adopted by these Courts and particularly endorsed the view set out in Civil Appeal No. 12/42, not to lose sight of given hardships and to try while construing the law, to give it the most liberal interpretation possible. He accordingly granted the prayer and ordered the Defendant forthwith to give the Plaintiff a divorce by the delivery to her of a deed of divorce (*"ghet"*) in accordance with the provisions of Jewish Religious Law. He also ordered payment of alimony.

The husband who had chosen not to defend his case in the Court below, is now appealing from this judgment.

There can be one short-cut to this appeal. Under Article 64 of the Palestine Order-in-Council the District Courts have no jurisdiction to pronounce a decree of dissolution of marriage. On behalf of the Respondent it was ingenuously argued both in the Court below and in this Court that she is not in fact asking for a dissolution of marriage, but merely for an order to compell the Appellant to consent voluntarily to divorce his wife. But if such an order would not directly amount to a decree of dissolution of marriage, it certainly would lead to it under threat of the husband involving himself, among other things, in responsibilities arising out of contempt of Court. This could have disposed of the appeal. The District Courts, having no jurisdiction to pronounce a decree of dissolution of marriage, could not give an order leading to it.

But I would not like to have the matter left at that, inasmuch as the learned Relieving President thought that he was following the lines expressed by this Court, and particularly by me, in coming to the conclusion to which he came.

Now it is true that under Jewish law, as more fully outlined in my judgment in Volkenberg *v.* Volkenberg (C. A. 22/34), divorce is an act of consent, and a Religious Court having jurisdiction in matters of divorce does not pronounce a divorce but only orders the husband, in appropriate cases, to divorce his wife, and notwithstanding such an order there is no divorce and no dissolution of marriage unless and until the husband has, by his own free will, granted the divorce in the form prescribed by law.

But there are three relevant factors to bear in mind:—

(a) A Rabbinical Court is not precluded from pronouncing a decree of dissolution of marriage of persons over whom it has jurisdiction, and can therefore also make an order leading to the dissolution.

(b) And this is even more important: Such an order issued by the Rabbinical Court is based not on secular power, but on its religious authority and the use of moral, religious and social pressure referred to in the judgment just cited, is the pressure felt by an observant person disobeying a command based on sacred law emanating from a body exercising religious authority, as is in the nature of things a Religious Court. And:—

(c) Whether or not a husband could be ordered to divorce his wife is a matter of Jewish Law which is not so simple as to be decided upon the basis of the evidence of an expert witness.

Consequently it would be far-fetched to vest a Civil Court with the power to give an order tending to force a person to dissolve a religious marriage.

I fully agree that this is a very unfortunate state of affairs, but with all the sympathy for the wife who cannot seek a relief from either the District Court — because of lack of jurisdiction, or from the Rabbinical Court — because she is not yet a Palestinian, the judgment of the learned Relieving President cannot be upheld.

For these reasons the appeal is allowed. In the circumstances and as the Appellant allowed the case to go against him undefended in the Court below, he will not be awarded any costs.

Delivered this 7th day of March, 1946.

Puisne Judge.

CIVIL APPEAL No. 243/45.

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

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPLICATION OF :—

Mrs. Edith Vincent née Abraham. APPLICANT.

v.

Giuseppe Vincenti. RESPONDENT.

Action for custody of children — Refusal of application for interim order for custody — Order and decree — Court of Appeal declining to grant leave to appeal.

Application for leave to appeal from the order of the District Court of Tel-Aviv in Motion No. 153/45 (C. C. No. 114/45) dated 4th June, 1945, refused:—

1. In an action for custody of children decision refusing (or granting) order for custody *pendente lite* is an order, not a decree and can be appealed against only by leave.

2. Court of appeal may refuse leave to appeal from a decision on an application for an *interim* order if of opinion that this might unduly prolong litigation.

(*M. L.*)

ANNOTATIONS: On orders and decrees see: C. A. 279/42 (1943, A. L. R. 88, 10 P. L. R. 96 and annotations thereto in A .L. R.; C. A. 66/43 (1943, A. L. R. 95); C. A. 243/42 (1943, A. L. R. 254, 10 P. L. R. 21); M. A. 56/43 (1943, A. L. R. 520, 10 P. L. R. 465) and annotations thereto in A. L. R.; C. A. 174/43 (1943, A. L. R. 531, 10 P. L .R. 402); C. A. 366, 7/43 (1944, A. L. R. 100, 11 P. L. R. 85); C. A. 124/44 (1944, A. L. R. 199, 11 P. L. R. 153) and annotations in A. L. R.; C. A. 369/43 (1944, A. L. R. 412, 11 P. L. R. 277); C. A. 334/43 (1944, A. L. R. 420, 11 P. L. R. 292); C. A. 121/44 (1944, A. L. R. 785, 11 P. L. R. 508) and annotations in A. L. R.; C. A. 282/44 (1945, A. L. R. 111, 11 P. L. R. 584); C. A. 230/44 (1945, A. L. R. 211, 11 P. L. R. 586).

(*A. G.*)

FOR APPLICANT: Steif.

FOR RESPONDENT: Cattan.

JUDGMENT.

This is an application for leave to appeal from an order of the District Court of Tel-Aviv, refusing an application made by the present Applicant for *interim* custody of children pending the hearing of an action which she had raised against the Respondent for custody of these children. The learned acting Relieving President refused to

grant leave to appeal apparently because he considered that an appeal lay as of right, holding that the order which he had made was in fact a decree. With this reasoning of the learned Relieving President we are unable to agree. As he had not yet heard the action (he having merely dealt with an application for custody *pendente lite*) his decision of the 4th of June, 1945, was merely an order and we accordingly think that the matter properly comes under the second paragraph of Rule 317 Civil Procedure Rules 1938.

To turn now to the question whether we ought to grant leave to appeal, we think that it would not be advantageous to either party unduly to prolong this litigation. We think that the main action should be heard as soon as possible when all matters falling for decision including the question of jurisdiction will be heard. We accordingly refuse leave to appeal. We understand that there is still pending before the District Court an application by the present Respondent under Rule 21(a). Nothing that we have said to-day is intended to prevent the District Court from hearing any matter raised under Rule 21(a) or under any other of the Civil Procedure Rules incidental to the hearing of the main action. There will be no costs of this appeal.

Delivered this 21st day of March, 1946.

British Puisne Judge.

CIVIL APPEAL No. 212/44.

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

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

IN THE APPEAL OF:—

Nayef Hussein Ahmed el Mi'ari & 6 ors. APPELLANTS.

v.

The Palestine Jewish Colonisation Association. RESPONDENTS.

Land settlement — L. S. Officer taking cognizance of findings in other Proceedings.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated 28th March, 1944, in case No. 4/Dahirya el Fouqa, dismissed:—

In Land Settlement Proceedings the Land Settlement Officer may, in deciding a case, take cognizance of issues determined in connection with the same land but between different parties.

(*A. M. A.*)

ANNOTATIONS: *Cf.* H. C. 111/43 (11, P. L. R. 3; 1944, A. L. R. 30) and cases therein cited.

(*H. K.*)

FOR APPELLANTS: S. El-Khadra.

FOR RESPONDENTS: Eliash.

JUDGMENT.

This case concerns land settlement operations at Dahirya el Fauqa in the Safad sub-district. There was, as often happens at settlement operations, more than one case in which title to the same land was in issue. One ground of appeal was that the Settlement Officer was not entitled to take into consideration findings arrived at in another case in the same area, to which the Appellants were not parties. Generally speaking, this is quite correct, but where we are dealing with settlement proceedings, and a Settlement Officer has after exhaustive enquiries come to a definite finding of fact on the question as to whether or not the area was registered, we see no reason why he should not take cognizance of that fact in another case where the same issues have been raised.

Originally the Appellants claimed this land by registration. However, in cases 1/Jabal Kana'an and 5/Qudeiriya, the Settlement Officer made a definite finding of fact that all this land was registered in the name of the Respondents. That finding of fact is not now contested by the Appellant, but he seeks to defeat that registration by claiming possession. The Settlement Officer considered this issue, and in the course of his judgment it is clear that he took into account the evidence adduced before him in 1/Jabal Kana'an and 5/Qudeiriya. The Appellant objected to this. We see no reason why in the circumstances the Settlement Officer should not have weighed the evidence he had heard in 5/Qudeiriya case against the evidence as to possession adduced before him in this case. But apart from the fact that the evidence in 5/Qudeiriya case in favour of Respondents far outweighs the evidence adduced by the Appellants in this case, the Appellants' evidence by itself falls far short of that which would be sufficient to defeat a registered title.

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

Delivered this 1st day of April, 1946.

Chief Justice.

CIVIL APPEAL No. 269/45.

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

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

IN THE APPEAL OF :—

Abdul Kader el Muzaffar. APPELLANT.

v.

Mohammad Daoud Haddad. RESPONDENT.

Offer of rent by tenant — Landlord replying by letter that he intends to sue for eviction — Withdrawal of action for eviction — Deposit of rent in Bank in which the landlord has an account.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated 29.6.45, in Civil Appeal No. 9/45, from the judgment of the Magistrate, Jaffa, dated 6.12.44 in Civil Case No. 1489/43, dismissed:—

1. A letter by lessor in reply to tender of rent that he intends to take an action for eviction is a clear indication that he wished to terminate the lease and that he would not accept any further offer of rent.

2. Where lessor by withdrawal of action for eviction indicates his willingness to receive the rent, onus is thrown back on tenant to offer the rent.

3. While tender of rent to any institution or individual selected by lessee cannot be regarded as tender to person entitled to it, deposit of rent in Bank in which the lessor has an account may in certain circumstances be regarded as legal tender.

(*M. L.*)

REFERRED TO: C. A. 330/45 (13, P. L. R. 54, 1946 A. L. R. 92).

ANNOTATIONS: See case referred to (*supra*) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANT: A. Levin.

FOR RESPONDENT: Elia.

JUDGMENT.

In cases arising out of the Rent Restrictions Ordinance, it is of course desirable to bear in mind that the landlord is just as much entitled to enforce eviction within the ambit of the Ordinance, as the tenant is entitled to the protection in his tenancy which is afforded by the Ordinance.

The case originally arose out of a claim on the part of the landlord to evict the tenant on the grounds of misuse of the premises and damage caused to the premises. When the original action on these lines was instituted, the landlord wrote to the tenant a letter which is Exhibit "A". It is, in our view, an important document. The gist of

that letter, which was a reply to the tender of rent, was that the landlord proposed to take an action for eviction based on the alleged damage to which I have referred. To use the words in C. A. No. 330/45 we think that this letter was a clear indication that the lessor wished to terminate this lease. It also seems to us a clear indication that the lessor would not have accepted any rent that was tendered after that date. The same principle therefore applies here as was applied in that appeal, which is embodied in this extract from the judgment:—

> "We see no reason why the lessee should then have gone through the empty gesture of offering rent, which it must have been abundantly plain to the lessor that he was always prepared to offer".

Later on the landlord receded from that position and he indicated by the withdrawal of his action that he might be prepared to receive the rent, which, undoubtedly, as Mr. Levin has argued, threw the onus back again on the tenant to offer the rent. The date of the withdrawal of the action was the 16th September. On the same date the tenant tendered the rent to the Arab Bank in Jaffa. The issue appears to us now to revolve round the question as to whether this was a tender of rent. The Arab Bank again on the same day, *i. e.* 16th September, wrote a letter to the Appellant informing him that the rent was deposited in the Bank and that it was available for him. Mr. Levin has argued that the tender of rent to any institution or individual selected by the lessee cannot be regarded as a tender to the person who is entitled to it. We quite agree, but we must investigate the circumstances because it may be that they are such as to constitute a sufficient tender of the rent. In this connection the reply of the landlord to the Bank is of importance. That reply clearly indicates not only that he had an account at the Bank, but that he was prepared to have the money deposited in the Bank as a fulfilment of the obligation pending a decision in the eviction case.

For these reasons we have come to the conclusion that the payment to the Arab Bank in the circumstances in which it was paid, was a legal tender of the rent due to the landlord. Since the Court found in favour of the Respondent on the misuse and damage to the premises issue, the only issue remaining was whether there was or was not a tender of rent.

Having decided that this was a tender of rent, it follows that this appeal must fail, with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 9th day of April, 1946.

Chief Justice.

CIVIL APPEAL No. 26/46.

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

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

IN THE APPEAL OF:—

Ahmad Mahmoud Abu Dayyeh. APPELLANT.

v.

Keren Kayemeth Leisrael Ltd. & an. RESPONDENTS.

Awlawiyeh — Jurisdiction of District and Land Courts — L. C. Ord., sec. 3(b) — Land Code, Art. 41 — Rights in rem and in personam — Rights in or over land.

Appeal from the judgment of the Land Court, Nablus, dated 18th January, 1946, in Land Case No. 42/43, allowed:—

The Land Court is solely competent to deal with actions for *awlawiyeh*.

(*A. M. A.*)

ANNOTATIONS:

1. The position is different in respect of claims for specific performance; see C. A. 97/44 (1945, A. L. R. 14) and note 1 thereto.

2. For authorities on the exclusive jurisdiction of Land Courts see note 3 in A. L. R. to C. A. 279/42 (10, P. L. R. 96; 1943, A. L. R. 88).

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENTS: No. 1 — Eliash & Ben Shemesh.
No. 2 — A. Levin.

JUDGMENT.

This is an appeal from the judgment of the President of the District Court at Nablus. It concerns a claim for "*awlawiyeh*" under Article 41 of the Land Code. The question in issue both in the lower Court and in this Court, is one of jurisdiction only, and it is whether claims arising under Article 41 should be preferred in the District Court or in the Land Court.

We may remark that it is common ground that ever since the promulgation of the Land Courts Ordinance twenty-six years ago, every reported case of *awlawiyeh,* except one, has been determined by the Land Courts. It is also to be noted that several of these cases have been confirmed by the Court of Appeal, where the jurisdiction of the Land Courts was never questioned. The Land Court at Nablus decided that the District Court was the proper Court because, as it held, in

order to bring a claim within the jursidiction of the Land Court, there must be a genuine dispute as to the ownership of the land.

With all respect to the learned Relieving President, we are unable to agree that the jurisdiction of the Land Court is restricted in this manner; to hold that it was, would appear to us completely to overlook the provisions of section 3(b) of the Land Courts Ordinance. Not only does that sub-section deal with dispute as to ownership, but it goes on to confer jurisdiction in any dispute as to rights in or over land. This however does not conclude the matter, because we must now consider whether the claim of *awlawiya* is a claim in or over land.

Mr. Eliash suggests that a claim of *awlawiya* does not fall within the ambit of this provision, for the reason, as he argues, that a right to *awlawiya* is a right *in personam*, and not a right *in rem*. Article 41 of the Land Code provides that the owner of an undivided share in State land cannot transfer his share by way of gift or in consideration of payment without leave of the persons jointly interested. It appears to us that this is a clog permanently attaching to this undivided share of land. In other words, this piece of land has attached to it an element of non-transferability save with the consent of the co-owner. We are unable to accept Mr. Eliash's argument that his right to dispose of this land is not interfered with. There is a very distinct *veto* on his right to dispose in that he cannot do so without the consent of the person entitled to claim *awlawiya*. This is, in our opinion, an encumbrance permanently attaching to that share while it remains undivided.

Turning now to Mr. Levin's argument. He has submitted the proposition that a right in or over land must be what he calls an immediate proprietory right, as distinct from a right which is not exercisable until a future date. Even if this be accepted as a correct statement of law, it appears to us that Article 41 does give the co-owner an immediate proprietory right, seeing that it confers upon him a right to ensure that this land shall not be transferred to any other person without his consent, a right to insist that any purchaser shall be a person approved of by him. This immediately circumscribes, and greatly circumscribes, the exercise of full ownership by the owner of an undivided share.

For these reasons we are of opinion that the Court which had jurisdiction in this matter was the Land Court, and the appeal must be allowed; Appellant to get the fees paid on this appeal with an advocate's attendance fee of LP. 10.

Delivered this 15th day of April, 1946.

Chief Justice.

CIVIL APPEAL No. 234/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Ursula Tennenbaum. APPELLANT.

v.

Joseph Tennenbaum. RESPONDENT.

Religious marriage between foreigners whose respective national laws do not recognise religious marriage — Jurisdiction in matters of personal status where one of parties not registered in Jewish Community — Effect of marriage certificate issued by Rabbinical Court in respect of a Jewish couple.

Appeal from the judgment of the District Court of Tel-Aviv, given on 22nd of June, 1945, in Civil Case No. 302/45, dismissed:—

1. Rabbinical Courts have no jurisdiction over Jews, even if they are Palestinian citizens, unless both parties concerned are technically members of the Jewish Community, District Court in exercising its residuary jurisdiction can entertain an action of this nature.

2. In case of a Jew of Palestinian citizenship to whom Jewish law applies a marriage certificate issued by a Rabbinical Court that he was duly married to a Jewess cannot in absence of proof of *mala fides* be questioned by a Civil Court.

(*M. L.*)

REFERRED TO: C. A. 158/37 (4, P. L. R. 373, 2 Ct. L. R. 201, 1937 S. C. J.

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945 S. C. D. C. at p. 431.

2. For cases on Art. 64(1) of the Pal. Order in Council see C. A. 274/45 (*ante*, p. 324) and annotations thereto.

3. On point 1 see C. A. 81/45 (1945, A. L. R. 482) and annotations, see also H. C. 40/45 (13, P. L. R. 72, 1946, A. L. R. 245).

4. On point 2 see case referred to in the judgment.

(*A. G.*)

FOR APPELLANT: Silberg and Levi.

RESPONDENT: Absent — served.

JUDGMENT.

Frumkin, J.: The Appellant in this case is a Jewess of German origin, who on the 1st of March, 1940, when of German nationality, married the Respondent, a Jew, then of Czechoslovak nationality. The marriage

was solemnised under Jewish law and a certificate of marriage (Exhibit P/1) was issued by the Chief Rabbinate of Tel Aviv dated 6th of March, 1940. Prior to that marriage the Respondent was married to another woman whom he had divorced before the 1st of March, 1940. Both, the latter marriage and the divorce were effected under Jewish law.

It seems that the validity of the divorce was questioned owing to the fact that Czechoslovak law, to which the Respondent was then subject, did not recognise a divorce effected under Jewish law. The Respondent thereupon became a Palestinian citizen, divorced his first wife again and on the 14th of May, 1941, again entered into some form of a marriage with the Appellant and a fresh certificate of marriage was then issued by the office of the Chief Rabbinate of Tel Aviv dated the 15th of May, 1941 (Ex. D/1) certifying that the Appellant was married to the Respondent.

On the 4th of July 1941 Appellant became a Palestinian citizen by naturalisation.

During the interval that elapsed between the two marriages a son was born to the parties.

The matrimonial relations between the parties were unhappy from the start, and the present proceedings were on the 10th of August 1943 brought before the District Court of Tel Aviv by the Appellant as Plaintiff seeking a decree of nullity of the marriage. After protracted proceedings, in which the Respondent sought to obstruct the process of the law by avoiding service and contesting the local jurisdiction of the District Court of Tel Aviv, a considered and lengthy judgment was delivered dismissing the action. The District Court held that the law applicable is Jewish law because at the time when the action was brought the parties were Palestinian citizens and therefore came to the conclusion that under Jewish law the first marriage was valid and the second invalid. Hence this appeal.

The facts relevant to this appeal are: (a) that at the time of the first marriage the Appellant was of German, and the Respondent of Czechoslovak, nationality; (b) that at the time of the issue of the second marriage certificate, the Respondent was a Palestinian; (c) that at the time of the lodging of the present action both parties were Palestinians.

At the hearing of this appeal the Respondent was not present or represented, although duly served, and in his absence the matter of jurisdiction was raised by the Court and argued by counsel for Appellant, the point raised being whether the District Court has jurisdiction to issue a decree of nullity of marriage, since it is clear that as

regards foreign subjects, it has no such jurisdiction under the proviso of section 64(1) of the Palestine Order-in-Council, 1922, and that as regards Palestinian subjects it has no such jurisdiction since matters of marriage and divorce, under which a declaration of nullity of marriage would fall, are within the exclusive jurisdiction of the respective Religious Courts. It appears, however, that the parties or either of them at one time or another were not technically members of the Jewish community, and under the unfortunate state of the law the Rabbinical Courts have no jurisdiction over Jews, even if they are Palestinian citizens unless both the parties concerned are technically members of the Jewish community. This being the case, a District Court in exercising its residuary jurisdiction is not precluded from entertaining an action of this nature.

The next point to decide is, which is the law applicable. There is no question that the law applicable is the law governing the parties at the time of the marriage. In the case of the first marriage, this is either Czechoslovak or German law. Evidence was led to prove that neither of these laws recognise a religious divorce made abroad, and therefore at the time of the first marriage between the parties the Respondent must be considered to have been still married to his first wife. His first marriage to the Appellant was therefore a bigamous one and was accordingly invalid.

It would be very unfortunate for the Appellant if I were to hold that this is the present state of affairs, because she would then be in an awkward position. Her marriage is a nullity insofar as the Civil law is concerned, but insofar as the religious law is concerned, to which law she is now subject as a Palestinian Jewess, she is duly and validly married to the Respondent.

No Civil Court can for religious purposes annul a religious marriage, and counsel for the Appellant is fully aware that, even if he succeeds in his case, under religious law the Appellant will never be able to remarry as long as she has not obtained a religious divorce from her husband. It was no doubt to avoid such a difficult position that the second divorce and marriage were planned and executed after the husband had assumed Palestinian nationality.

We thus come to the second marriage, or rather, to the position created by the second certificate of marriage. This certificate has been attacked on behalf of the Appellant on the ground that it does not represent the true state of affairs, no marriage was celebrated on the 14th of May, 1941, in spite of what that certificate recites, inasmuch as the couple were already previously married on the 1st of March, 1940 and no religious ceremony took place on the second occasion.

The District Court went at great length into what constitutes a marriage under Jewish law and came to the conclusion that this second certificate has no validity. Now, on the same principle governing the first marriage, the law applicable as regards the second marriage certificate is Jewish law, because the husband was at that time a Palestinian subject. There is no doubt that what was intended by the Rabbinical Office in issuing that certificate was a validation of the first marriage in case it should in any way be affected because of the foreign nationality of the husband at the time of the divorce of his first wife.

A similar point was dealt with in C. A. 158/37 (4 P. L. R. 373) where the parties were married under Jewish law in Germany and it was proved that the German law did not regard such a marriage as valid. After they assumed Palestinian citizenship they appeared before the Rabbinical Court of Tel Aviv, which declared the parties married in accordance with the Mosaic law and the law of Israel. When the decision of the Rabbinical Court came to be considered by this Court, Manning, J., held that:—

> "The proper construction is that the parties had been married in accordance with the law of the community and that no further formalities would be of any further avail to validate what was already valid in the eyes of that law".

The Court thereupon held that the parties were husband and wife and the result of the proceedings was a decree accordingly.

In the present case, had the parties appeared before the Rabbinical Court and had the Rabbinical Court, instead of issuing a certificate of marriage, issued a judgment to the effect that the marriage celebrated in March 1940 was valid under Jewish law, I would have no hesitation, following the case I have cited, in upholding such a judgment, and the question arises whether the same consideration should not also apply to what took place on the 14th of May, 1941. I do not think that the case is in essence much different. What the parties did was to go before the Rabbinical Office demanding a declaration which corresponded to the facts and to the law at that time, namely, that they are validly married. They did not go before the Rabbinical Court as there was no need for it, the parties then being in agreement that there existed between them a marriage valid under Jewish law. Just as a Civil Court on the authority of the judgment cited could accept a judgment of a Rabbinical Court to the effect that a ceremony previously performed by the Rabbinical authorities was a proper and valid marriage ceremony it should, in the absence of any proof of *mala fides*, accept an authoritative statement to the same effect. The Chief Rabbinate of Tel Aviv is an institution duly recognised by law, competent

to issue certificates of marriage, and it is not for a Civil Court to question the validity of such a certificate and to enquire whether or not a fresh ceremony and a new sanctification were or were not required. No *mala fides* were suggested. The certificate was procured by mutual consent. The responsibility falls on the Rabbinical authorities issuing or authorising the issue of such certificate, and what we have before us is a statement of fact that the parties were duly married to one another. And this certificate was issued at the time when the Respondent was a Palestinian subject and when Jewish Law applied. It follows that whatever be the position at the time of the issue of the first certificate, there was certainly in existence a valid marriage at the time of the issue of the second certificate and the Appellant cannot succeed in her claim for a decree of nullity of marriage.

As I have had to observe in a recent case, this is an unfortunate state of affairs. What this woman is really seeking is a divorce from her husband. Being advised that there is no Court from which she can obtain this relief because her husband has opted out of the Jewish community and thus ousted the jurisdiction of the Rabbinical Court, the only Court which in the ordinary course of events would have had jurisdiction in such a case, she has resorted to this extreme remedy of claiming a decree of nullity, notwithstanding the fact that in the event of her succeeding she would undermine her own legal status as married woman and bastardise her child. It is to be supposed that a woman must have suffered enormously before she will have been compelled to take such steps. Yet in spite of that desperate attempt the conclusion to which I have come to is that she has got no remedy.

Let us for a moment postulate the case with the present positions reversed. If in the very same circumstances as in the present case an unscrupulous husband upon the law I have set out would seek to desert his wife and his child and to rid himself of their legal claims upon him, — any Court of law would certainly have considered it as contrary to natural justice. The law should not be different when the husband is the Plaintiff than it is when the wife is the Plaintiff.

This is an unfortunate state of affairs which can only be remedied, at least as regards future cases, by the Legislature. But the mills of Legislation in Palestine, at least in this aspect, grind very slowly. When an amendment of the law was introduced in 1939, rather than removing existing disabilities, a new disability was created by the change in the law that an alien woman does not by marrying a Palestinian acquire Palestine citizenship. But even if legislation were forthcoming to introduce civil marriages and divorces in this country, Jews religiously observant will still be in great difficulty if the present

condition is to prevail, namely that the Jewish Religious Court will continue to have no jurisdiction over Palestinian Jews if one of the parties has opted out of the Jewish community. And I venture to take this opportunity to call the attention of the spiritual leaders of the Jewish community in this country to this anomaly. I mean Community in the broad sense of the word and not in the technical sense, both the *Knesseth Israel* and the *Agudath Israel*. I would invite them to put their heads together once more to see whether they cannot find a solution whereby there should be in this country one set of Courts with exclusive jurisdiction over any member of the Jewish faith. Whatever be the position relating to technical membership of the religious community so far as franchise, taxation, *etc.* are concerned, people should not be in a position to oust the jurisdiction of the Rabbinical Court by merely opting out of the community, leaving women and children without remedy and without legal status.

In the result the appeal is dismissed. There will be no order for costs.

Given this 18th day of April in the presence of Dr. Silberg for Appellant.

Puisne Judge.

Edwards, J.: I agree that the appeal should be dismissed.

I must not be taken as agreeing with all the reasoning in the judgment of my brother Frumkin. In particular, I doubt the correctness of the statement that no Civil Court can annul a religious marriage. This seems to me to be stated in too broad terms. I think that there have been cases where a Civil Court has declared that a purported religious ceremony did not have the effect, owing to certain reasons, of making the parties married. The main reason for my agreeing that this appeal ought to be dismissed is, as my brother Frumkin has pointed out, that there was in existence a valid marriage at the time of the issue of the second certificate, at a time when the Respondent was a Palestinian subject to whom Jewish Law applied.

I understand that my brother Frumkin feels strongly that the law should be altered so that there may be one tribunal having exclusive jurisdiction over members of the Jewish faith who are Palestinians, at any rate, as regards certain aspects of life and relationships of persons. Speaking for myself, I prefer to express no opinion as to the desirability or otherwise of any contemplated change in the law.

I agree that the appeal be dismissed without costs.

British Puisne Judge.

CRIMINAL APPEAL No. 47/46.

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

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

IN THE APPEAL OF :—

Muhammad Abdul Fattah el Moghrabi. APPELLANT.

v.

The Attorney General. RESPONDENT.

False evidence — Evidence Ord. sec. 4(1) — Plea of guilty made without understanding charge — Element missing — No evidence on oath — T. U. I. Ord., sec. 16(2) — Probation, sec. 16 Juvenile Offenders Ord.

Appeal from the judgment of the District Court, Haifa, dated 2nd February, 1946, in Misdemeanour Case No. 66/46, whereby Appellant was convicted of giving false evidence *contra* section 4 of the Criminal Procedure (Evidence) (Amendment) Ordinance, 1944, and sentenced to three years to be served in the Reformatory School; appeal allowed:—

> Even though the Accused has pleaded guilty to the charge, if the elements of the offence are not established and the Accused did not appreciate the nature of the plea, the conviction may be set aside on appeal.
>
> (*A. M. A.*)

ANNOTATIONS: On appeals after a plea of guilty see note 1 to CR. A. D. C. Jm. 134/45 (1946, S. C. D. C. 584).

(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa whereby the Appellant was convicted of an offence against section 4(1) of the Criminal Procedure (Evidence) Ordinance as amended in 1944, and was sentenced to three years' detention in a reformatory for males.

Several grounds of appeal have been put forward to the effect that the Appellant did not understand the word "guilty" when he pleaded to the charge, and that the elements of the offence were not established. At the hearing of the appeal Mr. Hooton, Crown Counsel, informed the Court that he had reached the conclusion that the conviction was wrong because section 4(1) of the Criminal Procedure (Evidence) Ordinance lays down that a person charged under that sub-section

must have given evidence on oath. In this case the Appellant did not give evidence on oath on account of his age. Our attention has been drawn to section 16(2) of the Criminal Procedure (Trial Upon Information) Ordinance, as amended by Ordinance No. 31/44, and we agree with Mr. Hooton that that sub-section only applies in respect of the offence of perjury and not of the offence with which the Appellant was charged.

We have therefore reached the conclusion that the conviction should be quashed. The Court below had ordered detention in a reformatory, and the order is therefore rescinded.

After taking cognizance of the report of the Probation Officer it seems to us that the proper authorities should investigate whether section 16 of the Juvenile Offenders Ordinance, 1937, should not be resorted to in order to place Appellant under proper care.

Delivered this 1st day of May, 1946.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 14/45.

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

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

IN THE APPLICATION OF :—

Fuad Haidar & 2 ors. all in their capacity as heirs of Mrs. Raoufa bint Sayyid Abdul Majid Malakha. APPLICANTS.

v.

Abdul Raouf El Haj Abdul Rahman Abu Laban, *Mutawalli* over the *Waqf* of Hajjeh Raquieh bint el Haj Muhammad Malakha & an. RESPONDENTS.

Application to C. A. for stay of execution.

Application to stay the execution of the judgment dated 20.3.45 of the Supreme Court sitting as a Court of Civil Appeal in Civil Appeal 165/44 and further that a provisional stay of execution be granted pending the hearing of this application,

Where Court of Appeal granted execution of judgment subject to certain conditions and judgment debtor says one of conditions has not been complied with he must go to Execution Officer, not to Supreme Court.

(*M. L.*)

ANNOTATIONS: The Supreme Court judgment in question (C. A. 165/44) is reported in 1945, A. L. R. 228.

(*A. G.*)

FOR APPLICANTS: Yifrach.

FOR RESPONDENTS: *Ex parte.*

ORDER.

This is an application for a provisional stay of execution on the ground that Respondent has not complied with one of the conditions upon which execution was granted. In my opinion Appellant must 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.

Application dismissed.

Given this 2nd day of May, 1946.

A/British Puisne Judge.

CRIMINAL APPEAL No. 54/46.

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

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

IN THE APPEAL OF:—

Stamatios Skaroulis & an. — APPELLANTS.

v.

The Attorney General. — PROSECUTOR.

Confessions — "Judges Rules", accused shown statement of co-accused — Interpreter reading the statement — Explanation of words by interpreter — Presence of police while statement is interpreted — Different statements — Statement made without charge — Statement not read in Court — Retraction of confession, CR. A. 132/41 — "Common sense test" — Caution — Alteration of resolution to kill — Onus of proof.

Appeal from the judgment of the Court of Criminal Assize, sitting at Jaffa, dated the 13th April, 1946, in Criminal Assize Case No. 7/46, whereby Appellants were convicted of murder *contra* section 214(b) of the Criminal Code Ordinance, 1936, and sentenced the first Appellant to death and the second Appellant to be detained during the High Commissioner's pleasure; appeals dismissed:—

1. An accused who has been cautioned may be shown a statement made by another accused, whether the latter has or not been charged.

2. Although the earlier statement should not, in such cases, be read by the police, it may be read by a police officer acting as interpreter.

3. It is not desirable for other police officers to be present during the interpretation.

4. Although a confession should be read in Court, failure to do so is not material where its contents have been made known to the Court and to the Accused.

5. If it is established that the Accused resolved to commit the offence, charged and that the offence was committed, the onus lies on him to establish that he changed his mind.

(*A. M. A.*)

REFERRED TO: CR. A. 132/41 (8, P. L. R. 506; 1941, S. C. J. 626; 11, Ct. L. R. 147).

ANNOTATIONS:

1. For another authority on Rule 8 of the Judges Rules see CR. A. 91/42 (9, P. L. R. 406; 1942, S. C. J. 376; 12, Ct. L. R. 61).

2. On the requirements of a proper caution *cf.* note 1 in A. L. R. to CR. A. 176/45 (12, P. L. R. 497; *ante*, p. 56).

3. For the common sense tests to be applied before convicting on an uncorroborated confession see note 2 to CR. A. 54/43 (1943, A. L. R. 235); see also CR. A. 102/44 (1944, A. L. R. 510) and note.

4. See the observations in CR. Ass. 44/45 (12, P. L. R. 569; *ante*, p. 189) to the effect that extra judicial confessions should be discouraged and that confessions should be recorded by Magistrates.

(*H. K.*)

FOR APPELLANTS: No. 1 — Cattan.
No. 2 — Nasr.

FOR RESPONDENT: Crown Counsels — (Rigby and Southworth).

JUDGMENT.

In this case the two Accused were convicted on their own confessions, and on their confessions only. It is therefore the duty of the Court to scrutinise with the utmost rigour the evidence dealing with those confessions, and to assure itself that the requirements of the law in regard to their admissibility were strictly adhered to, and that the confessions were in fact evidence of the commission of the offence of which the Accused were convicted. Mr. Cattan who appeared for the first Accused, argued that the confessions were inadmissible on several grounds which we proceed to deal with *seriatim*.

His first ground was that the Accused should not have been shown the statements of the second Accused and the person who originally was the third Accused, before his own statement had been taken. The showing of the statement of one co-accused to another co-accused is governed by Rule 8 of the Judges Rules, which is as follows:—

> "When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered".

Now in the first place it is clear from Exhibit 9 which was the statement of the first Accused, that he had himself been charged and cautioned before he was shown the other statement. We cannot discover anything in Rule 8 of the Judges Rules to sustain Mr. Cattan's contention that the statement should only be shown after the person to whom it was being shown had himself made a statement; indeed it seems to us that the primary object of showing the statement was to enable him to frame a statement of his own in reply. He further argued that it was improper to read statements of the other two Accused during the course of taking the statement of the first Accused; again we see nothing in the Judges Rules to prohibit it. But apart from this, we cannot see from the evidence that in fact this procedure was adopted. It is clear from Exhibit 9 that after the first Accused had been cautioned he made a statement which was in itself a complete statement; immediately after but not, as counsel suggests, during the making of that statement, he was shown the statement made by the other Accused. The next point was that the reading and explanation of the purport of the statement by the interpreter Vastardis, contravened Rule 8 of the Judges Rules, which provides that the statement should be furnished by the Police but not read out by them. It must be emphasized that in this case Vastardis was present as an interpreter. It is true that he also happened to be a military policeman, but he was not acting in the capacity of policeman contemplated by Rule 8. In regard to his alleged explanation of the various words, all we have to say is that it is common in all interpretations. The interpreter interprets a word which is not thoroughly understood, he therefore explains its meaning. There was clear evidence that both Accused were illiterate, there was also evidence, although it was contradictory, that each asked for the statement to be read out to them. At all events, in the case of illiterate persons there would be no object in handing them statements which they could not read, unless provision were made for interpreting what was in them to the illiterate. We are therefore of the opinion that neither the interpretation nor the explanation by the interpreter contravened Rule 8 of the Judges Rules. Mr. Cattan's next point was that the presence of the Police contravened Rule 8 of the Judges Rules, in that their presence was in fact tantamount to

inviting a reply. It can be conceded that it would have been more desirable had the Police gone out of the room and left the interpreter alone with the Accused, but so far from their presence inviting a reply it emerges from the evidence that in fact their presence must have had the opposite effect as during the course of the interpretation, the Police repeatedly instructed the interpreter to caution the Accused that they need not reply or say anything.

The next point made was that in fact the second Accused made two statements, and the first Accused was only shown one of them. It is quite true, as Mr. Cattan has argued, that part of a statement of a co-accused cannot be taken away from its context and shown to the other Accused, the whole statement must be tendered. We see no reason, however, why a previous statement, which had not in any way implicated the Accused and which had nothing whatever to do with him, should necessarily be shown to him. Moreover, the second statement was complete in itself. It did not require any explanation from the first statement and in these circumstances, we consider that failure to tender the first with the second statement was not an infringement of the rule.

The next point was that the original third Accused (who was acquitted) had not been charged when his statement was taken, which statement was later shown to the first Accused. It is true that Rule 8 of the Judges Rules refers to statements of persons charged, but apart altogether from Rule 8 of the Judges Rules, we know of no law which prevents the Police from tendering to an accused person a statement of a charge made against him by another person. It is true that there are cases to the effect that one accused should not be confronted with another accused for the purpose of trapping him into making a statement. But the tendering of this statement could not in our opinion be interpreted as a confrontation within the meaning of the principles laid down in those cases, and we see no substance in the objection.

The next point was a highly technical one. It was that the statements were not read out in Court. Now, admittedly the usual procedure is to read out the statement as it is tendered, and ruled as admissible, but it is clear from pages 77 and 78 of the record that the document, *i. e.* the written statement, together with all that it contained, was made an exhibit in the case. Counsel for the Accused then asked for an adjournment so that it could be thoroughly interpreted to his clients. This permission was given, counsel came back to Court and said he was satisfied that everything had been done that should be done in the interests of his clients. The object of reading a state-

ment is to ensure that everyone concerned is acquainted with its contents. It is abundantly clear that everyone in the Court from the Judges down to the Accused, had read the statement time and again, and were acquainted with every word of it, so we consider there is no substance in the objection.

Another point made was that the confessions were retracted, and that the tests to be applied in such cases following the decision of Criminal Appeal 132/41 had not been applied. It seems to us the only principle established by that case was the common sense one that a Court should not accept confessions blind. The judges should apply their mind to the probability of the happening of the events dealt with in the confessions. Here we have the Accused's own evidence, that they were actually present at the killing and took part in the killing. That in itself abundantly satisfied the requirements of Criminal Appeal 132/41. It was also argued that the Accused were not properly cautioned. As to this, there is a clear evidence of the Exhibits 8 and 9 together with the evidence of Vastardis and Mr. Turner. Against this there is only the vague statement of the Accused that they had not properly understood. On this point it is clear from page 76 of the record that the Judges applied their minds to the issue. They state in their ruling that having considered the evidence of both sides, they believed the evidence which had been given by the prosecution witnesses, and that they found that the statements were free and voluntary. We are of opinion that this conclusion of the trial Court was reasonable, and amply justified by the evidence, and we see no reason for interfering with it.

Mr. Nasr for the second Accused associated himself with the arguments of Mr. Cattan with regard to the confessions, which he says also applied to the confession taken from his client. We have already disposed of these objections. He adds further, that even admitting the confession (Exhibit 8) which was the confession of the second Accused, it does not incriminate him in the murder. He concedes that sometime previous to the killing his client was a party to an agreement to kill, but he argues that if a person after an agreement changes his mind and takes no part in the killing, he cannot be convicted merely because he made the agreement. We agree, but the onus is on the Accused to show that in fact he did change his mind and did not take part in the killing. Now according to his own statement, on the very night of the murder, the first and third Accused, who it was alleged were the other parties to the agreement to kill, came to his house and asked him to go with them. He went, but he says he was still afraid. The question arises, why was he afraid? The inference that he was

afraid because they were going to give effect to the agreement, appears to us to be a reasonable inference, indeed an irresistible one, especially in view of the fact that he actually did go, and that he performed his part of the agreement which was to lure the victim to the spot. He explains that his meeting with the victim and being on the spot with him was a coincidence. It appears to us that the Court were right, in view of all circumstances, in regarding this coincidence as beyond the bounds of possibility. It is true that one episode can be argued in Accused's favour. It is established by the evidence that both the second Accused and the victim were homosexualists, and it is equally clear that immediately before the murder the second Accused had performed a homosexual act with the victim. This undoubtedly deserved the comment of counsel that it disclosed a frame of mind inconsistent with an intent to murder, but it is a question of psychology. On his own showing, the Accused was a depraved young man and the surprise which might be caused by this act of his, would not in our opinion be sufficient to outweigh the clear evidence of his connection with the crime of killing.

We arrive at the conclusion that the Court rightly admitted the confessions in evidence, and we are of opinion that the facts in the confession fully justify the conclusion, that the killing of Paraschos Kharandanis amounted to murder on the part of first and second Accused within the meaning of section 214 of the Criminal Code Ordinance.

The appeal of both Accused is therefore dismissed.

Given this 14th day of May, 1946.

Chief Justice.

CRIMINAL APPEAL No. 51/46.

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

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

IN THE APPEAL OF :—

Mahmoud El Hussary & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Complainant's absence — Whether charge may be heard — M. C. P. R.

264 — *"Shall" (dismiss the charge) — R. 269 — May v. Beeley — Autrefois acquit.*

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity dated the 31st January, 1946, in Criminal Appeal No. 159/45 from the judgment of the Magistrate's Court, Jaffa, dated the 27th October, 1945, in Criminal Case No. 5817/45, dismissed:—

1. If the complainant does not appear the Magistrate can follow no other course than either dismiss the charge or adjourn the proceedings.
2. If he purports to acquit the Accused after plea such an "acquittal" will not support a plea of *autrefois acquit.*

(*A. M. A.*)

REFERRED TO: May *v.* Beeley, 1910, 2 K. B. 722, 79 L. J. (K. B.) 852, 102 L. T. 326.

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C. 232.
2. See the notes to the judgment appealed from and *vide* also Halsbury, Vol. 21, p. 608, para. 1055.

(*H. K.*)

FOR APPELLANTS: B. Azar.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

Curry, A/J.: This is an appeal from the judgment of the President of the District Court of Jaffa sitting in its appellate capacity. The facts of the case have already been set out in detail in the judgment of the Magistrate and the learned President and we do not propose to state them again here. The only point in this appeal is whether if the complainant or some person properly representing him having had notice of the hearing of the charge fails to appear, the Court can proceed to hear the charge or whether it must dismiss it or adjourn the hearing for a subsequent date. The rule applicable is Rule 264 of the Magistrates' Courts Procedure Rules. That rule says that in such circumstances "the Court shall dismiss the charge unless for some reason it shall think it proper to adjourn the hearing of the case until some other date upon such terms as it thinks fit". There has been considerable argument as to whether "shall" is preemptory or directory. We do not think it very much matters. In our opinion that rule only gives the Court two options. It may either adjourn the case or it may dismiss it. Further it is to be noted that the Magistrate was not in a position to comply with Rule 269 as neither the complainant nor the witnesses were present. The dismissal of the charge is in the nature of a non suit, and the complainant may prefer the charge again. It gives the Court no power to hear the case by charging the Accused and proceeding to take his plea and give judgment.

In our opinion this is clear from Note (i) at page 76 of Stone's Justices Manual. We have been referred to the case of May *v.* Beeley to which that note refers. But if one refers to the full report of that case in 2 K. B. 1910 p. 722, it appears to be of no assistance to the Appellant, but on the contrary by inference it appears to us to be against him. In that case Beeley who was the Superintendent of Police preferred the information. At the hearing he did not appear nor was he represented, but a Police Sergeant who was a witness in the case and who appears to have been acting under the instructions of the Chief Constable of the County who was present, proceeded to conduct the case. It is clear that the Justices were under the impression that he was either the complainant or acting for the complainant, and it was only at a later stage in the proceedings after several witnesses had been heard that the Defendant enquired the name of this police officer and the Justices then realised that in fact he was not the complainant. They thereupon announced that the case was adjourned, but the solicitor for the Defendant asked that the case should proceed and they agreed to that request. The Court of Appeal merely held that as the offer to adjourn had been declined by the Appellant's solicitor neither the absence of the Respondent nor the fact that the police officer conducted the examination of the witnesses for the prosecution invalidated the conviction. In other words, the Appeal Court held that although neither the complainant nor his proper representative was present, as the case had been started by another police officer and the Defendant had requested that the case should proceed, under those circumstances, they could not object on appeal.

We agree with the learned President that in this case the Magistrate was wrong in charging the Accused and taking their plea in view of the absence of the complainant or his representative, and he should either have dismissed the complaint or adjourned the case; although he in fact did take their plea of not guilty and then proceeded to discharge the Accused, that discharge would not support a plea of *"autrefois acquit"* in the subsequent proceedings; apart from the fact that the Magistrate had no power to acquit as he had no power to hear the charge in the first proceedings it is to be noted that he did actually order the action to be dismissed.

The appeal is accordingly dismissed.

Delivered this 27th day of May, 1946, in the presence of Mr. Mogannam for Appellants and Mr. Hooton for Respondent.

A/British Puisne Judge.

CIVIL APPEAL No. 366/45.

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

BEFORE: Edwards and De Comarmond, JJ.

IN THE APPEAL OF:—

Moshe Isak. APPELLANT.

v.

Marcus Margoshes. RESPONDENT.

Breach of contract — Damages and forfeiture of deposit — Damages and penalty — Mejelle 269, 278, 281 — *Minimising the damages — Estoppel.*

Appeal from the judgment of the District Court of Tel-Aviv, dated 28.10.46, in Civil Case No. 123/44, dismissed subject to a variation:—

1. If the purchaser is given the right to pick fruit this constitutes delivery under Art. 269 of the *Mejelle*, for the purpose of the vendor's lien (Art. 278) which is deemed to be lost under Art. 281.

2. Circumstances in which a contract is deemed to have been repudiated by one party, considered.

(*A. M. A.*)

ANNOTATIONS: On the second point *cf.* C. A. 90/43 (10, P. L. R. 225; 1943, A. L. R. 326) and note 2 in A. L. R,. and C. A. 202/43 (11, P. L. R. 21; 1944, A. L. R. 219).

(*H. K.*)

FOR APPELLANT: Gratch.

FOR RESPONDENT: Manor (Spindel).

JUDGMENT.

De Comarmond, J.: This is an appeal from a judgment of the District Court of Tel Aviv delivered on the 28th October, 1945. The learned judge dismissed with costs an action brought by the Plaintiff (now Appellant) for the refund of a sum of LP. 429.900 which was part of a larger sum paid by the Plaintiff to the Defendant (now Respondent) under the terms of an agreement for the sale by the latter to the former of the produce of an orange grove. Plaintiff also claimed LP. 10 as being expenditure incurred by him as a result of Defendant's alleged breach of contract.

The two parties signed a contract on the 27th February, 1944, concerning the sale by the Respondent to the Appellant of the produce of a grove of orange trees. This contract was in lieu and stead of a

previous one made in October, 1943, in respect of the same oranges. The purchaser (now Appellant) having failed to fulfil his undertakings under the first contract, a new agreement was arrived at and was embodied in the contract dated the 27th February, 1944. The new contract provided for the payment by the purchaser of LP. 725 for the whole crop. The purchaser having already paid LP. 400 during the existence of the first contract, it was stipulated that he would pay the balance, *i. e.* LP. 325, as follows: LP. 100 on the day new contract was signed, LP. 100 by means of a cheque to be cashed on the 7th March, 1944, and LP. 125 on the 12th March, 1944. The cheque was duly met and therefore there remained only a balance of LP. 125 payable on the 12th March.

We are of opinion that the relevant provisions of the contract with regard to this outstanding balance were that, if the sum was not duly paid, interest at the rate of 9% would be payable; furthermore, the vendor was given the right to sell so much of the fruit as would realise an amount sufficient to cover the balance due. In order to ensure the exercise of the last mentioned right, it was stipulated that the purchaser was bound to leave untouched the crop on half the area of the grove until he had completed payment.

It is common ground that the purchaser failed to pay the LP. 125 on the 12th March.

In view of the fact that the purchaser had been granted until the 13th May, 1944, to pick the fruit, we are of opinion that as from the 12th March the vendor had the choice of the following remedies: (a) to sue for the LP. 125 plus interest and prohibit picking on half of the area of the grove until payment or (b) to sell enough fruit to realise the balance still due to him.

On the 14th March, the purchaser sent a vehicle to the orange grove to load a small quantity of oranges (about 8 or 9 tons) which had already been picked. It is not disputed that one half the area of the grove was still untouched. In the circumstances we agree with the learned District Court Judge that the vendor (now Respondent) was not justified in preventing the purchaser from taking away the load of oranges on the 14th March. Counsel for the Respondent has submitted that the retention by his client of the small load of oranges was justified. He bases his argument, not on the terms of the contract, but on Article 278 of the *Mejelle* which lays down that in the case of a sale for immediate payment the vendor has a right of retaining the thing sold until the price is fully paid by the purchaser. Counsel for Respondent has suggested that as soon as an instalment fell due, the vendor's right of retention came into effect irrespective of the terms

of the contract which were only designed to prevent the purchaser from picking all the crop prior to the due date of the final instalment.

This reasoning is ingenious but we hold that it is not sound. Our view is that the purchaser was given the right by the vendor to pick the fruit without any restriction on one-half of the area of the orchard. This constitutes delivery by virtue of Article 269 of the *Mejelle*, and where there has been delivery by the vendor without payment of price, the vendor loses his right of retention by virtue of Article 281 of the *Mejelle*.

The only issue of importance in this case is whether the vendor's refusal to let the purchaser carry away 8 or 9 tons of fruit on the 14th March constituted a breach of contract of such nature as to entitle the purchaser to treat the contract as repudiated. The Appellant does not rely solely on the incident at the grove but also on the fact that he had a discussion with the Respondent on the same evening when, according to him, Respondent definitely refused to let him go on with the picking unless the balance due was first paid. There are two versions to this episode: Appellant's version is that he went to the Respondent's residence and handed to him a letter written by the Appellant's advocate, Mr. Gratch, and a discussion then took place at the end of which the Respondent definitely refused to allow any further delivery of oranges until the money still due had been paid. The Respondent's version is that there was a discussion at the end of which the Appellant produced the advocate's letter and left. Now, Mr. Gratch's letter (Exhibit P/2) was to the effect that the Respondent had no right to prevent the Appellant from picking and carrying away fruit from the grove and the letter ended with a warning that, unless instructions were given to allow Appellant to pick or carry away the fruit in accordance with the provisions of the contract, it would be deemed that a breach of contract had been committed.

This letter is clearly in the nature of a last warning and does not purport to treat the incident which had taken place at the grove on the same morning as constituting a breach of contract. The Appellant's contention is that the Respondent rejected the warning contained in the letter and steadfastly refused to allow him to continue picking and carrying away oranges. The Appellant stated in evidence that at the end of the discussion he informed Respondent that he would sue for a refund of the money already paid by him.

The learned Judge accepted the Respondent's version that the Appellant handed him the advocate's letter at the end of the discussion above referred to, and we find no reason whatsoever to disagree with this finding.

On the day following the 14th March, both parties consulted their respective advocates and it appears that the two advocates had a conversation on the telephone. It is not clear what was the outcome of the intervention of the two learned gentlemen. What is certain is that the Appellant wrote to Respondent, and the latter's advocate wrote to Appellant: the letters probably crossing. Appellant's letter was to the effect that Respondent having definitely refused to allow more oranges to be picked and carried away, the contract was at an end and Appellant therefore requested the refund of LP. 426.750, and the payment of LP. 10 compensation for expenditure incurred. Respondent's advocate, on the other hand, clearly conveyed to the Appellant that, subject to Respondent's rights to claim the LP. 125 before Court or to recover the said sum by the sale of part of the crop, the Respondent would not interfere in any way with the picking and carrying away of the fruit. It might also be mentioned that Respondent's advocate mated in his letter that the due date for the payment of the LP. 125 stponed for eight days. In another letter dated 17th March d to the Appellant, Respondent's advocate again stressed that picking could be proceeded with.

of opinion that after receiving Respondent's decision on the llant had no reasonable ground to consider that Respondent ting in prohibiting the picking and carrying away of the sum up on this point, we consider that the incident which ce at the grove on the 14th was not by itself of such a nature ntitle the Appellant to treat the contract as avoided. We hold, ever, that the Respondent was wrong to prohibit the removal of the small load of oranges on the 14th and this entitles the Appellant to claim compensation for the useless expenditure he had incurred on that day (which he values at LP. 10.—).

There remains one more issue to consider and this is whether the Appellant could rightly complain against the Respondent selling for LP. 200 the remaining portion of the crop (which Appellant failed to gather). This transaction is explained in a letter dated the 6th April, 1944, written by Respondent's advocate and addressed to Appellant. Suffice it to say that this letter, together with oral evidence given before the lower Court, shows that the Respondent was amply justified in selling the remainder of the crop and that he acted for the best. It is idle on the part of Appellant to urge that Respondent should only have sold fruit to cover the amount still due *i. e.* LP. 125. Had Respondent allowed part of the crop to go to waste, it is probable that Appellant would have blamed him. As it is, we are satisfied that the Respondent acted in the best interest of both parties and that

Appellant should be grateful for the LP. 75 which he received as his share of the LP. 200 after deduction of the LP. 125 due to Respondent. As a matter of fact, the Appellant accepted the money but stated that he was crediting it to himself on the strength of the claim he was making against Respondent: the Appellant had no right to do this and, strictly viewed, his action might have been deemed to estop him from going on with his claim. The point, however, was not raised by Defendant in the Court below and we need not say more about it.

On the whole, therefore, we agree with the decision of the learned District Court Judge except as regards the claim of LP. 10 which, we consider, was justified.

The decision appealed against is therefore set aside and judgment is entered in favour of Plaintiff in the Court below in the sum of ten pounds (LP. 10). We do not consider that the Appellant deserves costs either in the Court below or on appeal and we so order.

Delivered on the 29th of March, 1946, in the presence of Mr. M. Gratch for the Appellant and in the absence of the Respondent.

British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 393/45.

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

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

IN THE APPEAL OF:—

The Attorney General. — APPELLANT.

v.

Ahmad Hasan Hamdouni. — RESPONDENT.

Forfeiture of bond — Bond under Release on Bail Ord., sec. 8(3), 13(3) *and Arrest and Searches Ord. (sec.* 9(4)).

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 10.11.45, in Civil Appeal No. 21/45 from the judgment of the Magistrate's Court of Affuleh dated 26.1.45, allowed:—

The Magistrate has no discretion to forfeit part only of a bond given under the Arrest and Searches Ordinance. He has that discretion in respect of bonds under the Release on Bail Ord.

(*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 138/45 (12, P. L. R. 548; *ante*, p. 141) and note in A. L. R.; *vide* also C. A. D. C. Jm. 76/46 (1946, S. C. D. C. 177).

(*H. K.*)

FOR APPELLANT: Asst. Government Advocate — (Pinhassowitz).
RESPONDENT: Absent — served.

JUDGMENT.

This is an appeal from a decision of the District Court of Haifa sitting in its appellate capacity. The matter before the said District Court was an appeal from a judgment of the Magistrate's Court of Affuleh in a claim made by the Attorney General against the present Respondent. The claim was for the sum of LP. 20 and was based on two bonds of LP. 10 each signed by the Defendant (now Respondent). The condition of each of those bonds was that the person named therein had "to appear at every time and place at which he would be requested to appear by any police officer or officer of a Court to answer to the charge to be then made against him and thereafter when required until the termination of the proceedings against him". It was established before the learned Magistrate that the condition of the bonds had not been fulfilled. The Defendant appeared and admitted that he had signed the bonds. He did not raise any question as to his indebtedness and only mentioned that he had looked for the two parties and failed to find them. The Defendant also mentioned that the alleged offence was one of possession of cigarettes. The learned Magistrate gave judgment for the Plaintiff for half the amount claimed, that is LP. 10, and he quoted section 8(3) of the Criminal Procedure (Release on Bail) Ordinance. He granted costs and advocate's fees.

On appeal, the District Court of Haifa maintained the Magistrate's decision and stated that under section 9(4) of the Criminal Procedure (Arrests and Searches) Ordinance Cap. 33 a Magistrate is empowered to forfeit all or any part of the amounts of the bond and even to refuse such forfeiture. The Court also referred to section 13(3) of the Criminal Procedure (Release on Bail) Ordinance, 1944, which allows forfeiture of part of the amount mentioned in the bond. We wish to point out that in the present case the bond was given under the Criminal Procedure (Arrests and Searches) Ordinance and not under the Criminal Procedure (Release on Bail) Ordinance. It is quite clear to us that the claim before the Magistrate's Court was a civil claim and we agree with Appellant's contention that the Magistrate had no discretion to reduce the amount in which the Respondent was indebted by virtue of the bonds he had signed. Having reached this decision it is not necessary for us to examine more closely section 9(4)

of the Criminal Procedure (Arrests and Searches) Ordinance and to give a decision on the meaning of the words "shall have power to declare the said bond to be forfeited" which occur therein. The appeal is allowed, the judgments of both of the Courts below are reversed, and judgment will be entered for the Plaintiff in the sum of LP. 20. We allow Appellant LP. 5 inclusive costs.

Delivered this 2nd day of April, 1946.

British Puisne Judge.

CIVIL APPEAL No. 229/45.

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

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

IN THE APPEAL OF:—

Mudeer el-Awqaf el-A'm. APPELLANT.

v.

The Government of Palestine. RESPONDENT.

Holy Places — Claim to a shrine by Mudeer el Awqaf — Palestine (Holy Places) O. in C., Art. 2 — L. (S. of T.) Procedure Rules, R. 4, L. S. Ord., secs. 11(1), 29 — Qadi as assessor.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated 16th of May, 1945, in case No. 6/Esh-Sheikh Bureik, dismissed:—

A claim by the *Mudeer Awqaf* to a shrine does not come within the Holy Places Order-in-Council.

(*A. M. A.*)

ANNOTATIONS:

1. On Holy Places *cf.* annotations in S. C. J. to C. A. 28/40 (7, P. L. R. 242; 1940, S. C. J. 148; 8, Ct. L. R. 77); see also C. A. 324/44 (1944, A. L. R. 744) and note 1.

2. On the proper procedure in settlement proceedings see C. A. 185/43 (1943, A. L. R. 538); *cf.*, as to the effect of sec. 29 of the Land (S. of T.) Ordinance, C. A. 95—97 & 138/40 (1940, S. C. J. 294; 8, Ct. L. R. 116) and C. A. 70/41 (1941, S. C. J. 470; 10, Ct. L. R. 48).

3. As regards the necessity of inviting the *Kadi sheri* see C. A. 124/43 (12, P. L. R. 68; 1945, A. L. R. 36) and note 1 in A. L. R.

(*H. K.*)

FOR APPELLANT: A. Khamra.

FOR RESPONDENT: Assistant Government Advocate — (Pinhasovitz).

JUDGMENT.

This is an appeal from the decision of the Settlement Officer in the Haifa Settlement Area, refusing a revision of the Schedule of Rights in regard to Block 11402 in Case No. 6/Esh-Sheikh Bureik. The Settlement Officer in his refusal was apparently influenced by two main considerations. The first was that no reason was adduced for the failure to claim an interest at the proper times; the second was that he was not entitled to register the *Mudir el-Awkaf* as a *miri* owner. Now, the Appellant claims that this is a most important question, that it concerns the rights of Moslems to Moslem shrines, a right which we take it no one would be prepared to dispute. But if this was regarded as so important a question of principle as the Appellant would have us believe, it is at least strange that no steps whatsoever were taken to claim it at the proper time at settlement. It is argued that the Settlement Officer was wrong on three grounds. The first one was that this claim of the Supreme Moslem Council was a claim to a holy site and as such the Court had no jurisdiction to entertain it; it should have been submitted to the High Commissioner under the provisions of the Palestine (Holy Places) Order-in-Council. It seems to us that this argument entirely misconceives the effect of the Holy Places Order-in-Council. It can be admitted indeed that all Moslem shrines are holy to all Moslems, but it does not necessarily follow that they are holy places within the meaning of the Palestine (Holy Places) Order-in-Council. In this connection, we invite attention to the fact that Article 2 of the Order-in-Council refers to "the Holy Places" in Palestine and not to a holy place in Palestine. We are satisfied that there was not even a *prima facie* case for argument that this was a holy place within the meaning of the Order-in-Council. There was, therefore, no need to submit the question to the High Commissioner.

The second ground of appeal is that Rule 4 of the Land (Settlement of Title) Procedure Rules, was not followed. In regard to this it will suffice to say that section 29 of the Land (Settlement of Title) Ordinance absolves the Government from the obligation to submit a prior form of statement of claim.

The next ground was the failure of the Land Settlement Officer to invite the *Qadi* to sit in accordance with the provisions of section 11(1) of the Land (Settlement of Title) Ordinance. Here again we observe that no application was made at settlement for the appointment of a *Qadi* as assessor. We do not say that such an application on the part of the Appellant was in law necessary, but if he failed to make the

application before the Settlement Officer this Court will not, generally speaking, upset the finding merely on this technical ground.

Turning now to the merits of the case: — We accept the finding of the Land Settlement Officer that the lands of this village are registered as *miri* property of the Keren Kayemeth Leisrael. The Keren Kayemeth Leisrael have, as was only to be expected, renounced their rights to this Moslem shrine. The shrine was not claimed by the Supreme Moslem Council at settlement nor is there any evidence on the record that the shrine was the subject matter of a *wakf* and was registered in the name of the Supreme Moslem Council. We are of opinion, therefore, that the Settlement Officer took the correct course when he registered it in the Schedule of Rights in the name of the Government of Palestine. If an important question of political or religious principle is involved as the Appellant alleges, there is no reason why the Government of Palestine should not, should it see fit to do so, transfer the registration of this building to the Supreme Moslem Council. For the reason which we have given we see no reason to interfere with the decision of the Settlement Officer. The appeal must, therefore, be dismissed. No costs.

Delivered this 9th day of April, 1946.

Chief Justice.

CIVIL APPEAL No. 316/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Nouri Yousef Dia Abaza, & 2 ors. APPELLANTS.

v.

Mohammad Ali Osman Salem & an. RESPONDENTS.

Mudet Safar — Mejelle, Arts. 1663—4, *L. C. Art.* 20 — *Place of sojourn to be specified — Presumption against death.*

Appeal from the decision of the Settlement Officer, Haifa, dated 27.7.45 in Case No. 11/Um El Shaouf, partly allowed:—

To support a defence of *mudet safar* it is necessary to specify the country where the owner is alleged to be residing, so that the distance may be ascertained.

(*A. M. A.*)

ANNOTATIONS :

1. *Cf.* C. A. 231/45 (13, P. L. R. 10; *ante*, p. 95) and note 1 in A. L. R.

2. On the effect of admissions made by advocates see Annotated Laws of Palestine, Vol. 1, pp. 185—6, heading *"Admissions"*.

(*H. K.*)

FOR APPELLANTS: No. 1 — A. R. Nahawi.
Nos. 2 & 3 — Elia.

FOR RESPONDENTS: Y. Hammudeh.

JUDGMENT.

This is an appeal from the decision of the Settlement Officer, Haifa, dated 27th July, 1945, whereby he dismissed the Appellants' claim for the following parcels in dispute:—

12054/3, 9, 22, 50, 65 & 67
12055/4, 15, 46, & 61
12056/8, 45 & 95
12057/21, 60, 62, 75, 77 & 88
12058/20
12059/1
12060/3, 26, 58, 70 & 90
12061/44, 6, 37 & 54
12062/7 & 30.

1. The Appellants allege that the parcels in dispute devolved upon them from their mother Fatmeh *bint* Hafez Othman Nouri, and they further assert that the land from which these parcels evolved was originally the property of Mahmoud Muhammad Salem who is the principal testator of Respondents, and that after his death it passed to his children Muhammad and Amneh in equal shares. Muhammad transferred his share to his mother Fatmeh in the Land Registry, *vide* Exhibits 4 and 5. The Appellants allege that Amneh has also sold her share outside the Land Registry to Fatmeh (*vide* Exhibit 7) and that since her death they became the owners of these lands.

2. The Respondents' defence is that they had been in possession of the lands in dispute for the prescriptive period and, in accordance with section 20 of the Land Law, the Appellants are estopped from claiming it.

3. The Appellants aver that Respondents were in possession of these lands as their tenants up to the year 1935 after which they failed to pay them rent and to acknowledge their ownership. The Respondents denied this alleged tenancy.

4. The Settlement Officer heard the evidence of both sides on this

question of tenancy, and in conclusion he dismissed the Appellants' claim.

5. The Appellants' advocate submitted that the Settlement Officer erred in dismissing the claim, which the first Appellant (who has been absent since 1917) had brought through his guardian in his capacity as an heir of his mother Fatmeh who died in 1916 as, in accordance with Moslem Law, he (first Appellant) is presumed to be alive. It is submitted that if absent no prescription runs against him because absence is an excuse under Article 20 of the Ottoman Land Law and Article 1663 of the *Mejelle*.

6. It is true that absence on a journey (*muddet-i-safar*) under Article 1663 of the *Mejelle* estops prescription, and it is also correct according to the Moslem Law that the first Appellant is presumed to be alive. But before such an excuse can be accepted it is necessary to specify the place where that person had been staying during the period of absence in order to ascertain whether the distance is sufficient for the purposes of Article 1664. Otherwise there is no excuse. In this case the Appellants' advocate did not specify the place of abode of the first Appellant during his absence, and consequently the distance cannot be ascertained.

7. The Appellants further allege that the Settlement Officer erred in holding that the claims of Appellants Nos. 2 and 3 were barred by lapse of time because the Respondents were in possession as tenants.

8. The Settlement Officer heard the evidence of both parties and was satisfied that the Appellants failed to prove the alleged tenancy, and we see no reason to interfere with this conclusion.

9. The Appellants' attorney further argues that the Respondents' advocate admitted before the Settlement Officer at the last hearing that Defendants (Respondents) claimed no right in Khallat el Amur, Abbadeh el Zeitoun, and el Sakraneh, and he submits therefore that the Settlement Officer erred in dismissing the Appellants' claim in respect of these four localities.

10. The Respondents' attorney agreed that in fact there was such an admission, but he says that it was made by mistake and was due to a misunderstanding arising from the fact that these localities are known by different names. He further states that one of his clients subsequently submitted to the Settlement Officer an application and a *mazbata* asking for the rectification of this mistake, and that this application was granted by the Settlement Officer.

11. On reading this application, which appears to have been accepted by the Settlement Officer, we find that it excluded el Abbadeh

land which according to the Respondents belongs to one Ahmed el Mahmoud. In other words the Respondents did not claim that they are in possession of that land and it was therefore incumbent upon the Settlement Officer to decide the claim in respect of that land. For these reasons, and as we do not know if there were other claims in respect of the el Abbadeh land, we dismiss the appeal in respect of the lands in dispute with the exception of el Abbadeh in respect of which the appeal is allowed. The case is remitted to the Settlement Officer to hear any claim in respect of that land. The Respondents will have their costs on the lower scale to include an advocate's attendance fee of LP. 10.—.

Delivered in open Court this 18th day of April, 1946, in the presence of Mrs. Rubinstein (by delegation from Mr. Georges Elia for 2nd and 3rd Appellants (No appearance for 1st Appellant), and in the presence of Mr. George Salah (by delegation from Mr. Hamoudeh) for Respondents.

British Puisne Judge.

CRIMINAL APPEAL No. 59/46.

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:—

Nimeh Awwad el Khoury. APPELLANT.

v.

Attorney General. RESPONDENT.

Bigamy — C. C. O., sec. 181 — R. v. Allan, R. v. Robinson — Validity of ceremony.

Appeal from the judgment of the District Court, Haifa, dated the 11th May, 1946, in Criminal Case No. 63/46, whereby Appellant was convicted of Bigamy contrary to section 181 of the Criminal Code Ordinance, 1936, and sentenced to 18 months' imprisonment, dismissed but sentence reduced:—

To support a conviction for bigamy it is not necessary that the ceremony of marriage in respect of which the Accused is charged should constitute a lawful marriage, though not every fantastic form of marriage would constitute an offence.

(*A. M. A.*)

FOLLOWED: R. *v.* Allan, 1872, L. R. 1 C. C. R. 367, 41 L. J. (M. C.) 97, 26 L. T. 664; R. *v.* Robinson, 1938, 1 All E. R. 301, 26 CR. A. R. 129 C. C. A.

ANNOTATIONS:

1. See Halsbury, Vol. 9, p. 390, para. 658 and footnote (*s*).

2. *Vide* also CR. A. 85/38 (6, P. L. R. 34; 1939, S. C. J. 15; 5, Ct. L. R. 125) and CR. A. 11/40 (7, P. L. R. 147; 1940, S. C. J. 368; 7, Ct. L. R. 118).

(*H. K.*)

FOR APPELLANT: Koussa.

FOR RESPONDENT: Crown Counsel — (Southworth).

JUDGMENT.

This was a prosecution for bigamy under section 181 of the Criminal Code Ordinance. The Accused was convicted by the District Court. His appeal to this Court falls under two heads, one concerning facts, and the other law.

Now the facts as alleged by the prosecution were that a ceremony of marriage between the Accused and the girl brought as prosecution witness, was performed according to the rites of the Orthodox Church in a house at Nazareth. This was denied by the Accused. However, the trial Court accepted the very definite evidence of witnesses who said they were present when this purported ceremony took place. The witnesses included a priest of the Orthodox Church who, according to the rites of that Church and the law of this territory, was entitled insofar as members of the Orthodox Community were concerned, to perform the ceremony of marriage. The allegations of fact as to what took place in this house at Nazareth as alleged by the prosecution were accepted by the trial Court. It was purely a question of weighing the credibility of the witnesses for the prosecution against that of those for the defence, and on these findings of fact we see no reason for interference with the trial Court.

We come now to the more important point, that is the application of the law to these facts. It was established in the case of Rex *v.* Allan and the case of Rex *v.* Robinson that in fact it is immaterial in a prosecution for bigamy whether the second marriage was in fact a lawful marriage; but this general principle is qualified by the following extract from the judgment of Cockburn, C. J., in the Allan Case: "We must not be understood to mean that every fantastic form of marriage to which parties might think it proper to resort or that a marriage ceremony performed by an unauthorised person or in an unauthorised place would be a marrying within the meaning of the section".

We have now to enquire whether this marriage was performed by an unauthorised person in an unauthorised place or whether it was fantastic. It is not denied by the defence that the person who per-

formed the marriage was a priest of the Orthodox Church and as such he was capable of performing the ceremony of marriage. It seems to be admitted by the Accused, and in any case we find as a matter of law, that there is nothing in the law of the Orthodox Church or in the law of this territory to prevent a marriage which is performed according to the rites of the Orthodox Church from being performed in a private house. There remains the question whether this was a fantastic form of marriage. Here it appears to us that the test is whether if everything which the celebrator of the marriage purported to have done were in fact done, it would constitute a lawful marriage. Now the only elements that the Accused suggested were absent from this ceremony were two, one that there was no consent of the Spiritual Head and the other that there was no document of divorce. These elements, it is to be observed, are conditions precedent to the marriage. In regard to these it is unnecessary for us to enquire whether in fact according to the religious law their fulfilment was necessary because we consider that the law on this point is made clear in the case of Rex *v.* Robinson. To quote from the judgment of Hewart, L. C. J.:—

> "It has been proved here that the condition precedent has not been complied with. The effect was to make the ceremony invalid. The further question remains whether notwithstanding the invalidity the offence of bigamy has been committed. I think that it is quite immaterial that the Accused had not fulfilled that condition. He has gone through the ceremony of marriage".

It is to be observed that the fulfilment of the condition precedent does not in itself go to the root of the actual ceremony. Here the same principle applies. The marriage, except for the non-fulfilment of these conditions precedent was a legitimate form of ceremony according to the rites of the Orthodox Church. It follows that the appeal must be dismissed.

We reduce the sentence to one of 6 months to date from the date of this conviction.

Delivered this 26th day of June, 1946.

Chief Justice.

CRIMINAL APPEAL No. 69/46.

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

BEFORE: FitzGerald, C. J., De Comarmond and Abdul Hadi, JJ.

IN THE APPLICATION OF —

Ahmad Mahmoud Shaqbou'a. APPLICANT.

v.

Attorney General. RESPONDENT.

Defence (Emerg.) Reg. 143(d) — Being in possession of NAAFI cigarettes — Reasonable excuse — Knowledge — CR. A. 185/42.

Application for leave to appeal from the judgment of the District Court, Haifa, dated the 16th of May, 1946, in Criminal Case No. 103/46, whereby Applicant was convicted of an offence *contra* Regulation 143(d) of the Defence Emergency Regulations, 1945, and sentenced to pay a fine of LP. 15.— or in default to three months' imprisonment; appeal dismissed:—

Reasonable excuse for being in possession of NAAFI property may not be established by the sole evidence of the Accused unless the Court believes his story.

(*A. M. A.*)

REFERRED TO: CR. A. 185/42 (1942, S. C. J. 834).

ANNOTATIONS: On the defence of reasonable explanation *cf.* Misd. D. C. Ja. 56/45 (1945, S. C. D. C. 693) and CR. A. 176/45 (12, P. L. R. 497; *ante*, p. 56) and notes in A. L. R. and S. C. D. C.

(*H. K.*)

FOR APPLICANT: N. Abu el-Sha'ar.

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

JUDGMENT.

This was an application for leave to appeal and, in accordance with the usual practice, we heard arguments and dealt with the case as if leave had been granted.

The Appellant was charged under regulation 143(d) of the Defence (Emergency) Regulations, 1945, with being in unlawful possession of cigarettes imported into Palestine for the use of the Navy, Army and Air Force Institutes.

The aforementioned regulation provides that any person who, without lawful authority or reasonable excuse, the burden of proof of which shall lie upon him, has in his possession chattels imported into Palestine for the use of the N.A.A.F.I. shall be guilty of an offence against the regulations aforesaid. It is, therefore, not necessary for the prosecution to prove that the possession was unlawful or that the chattels have been illegally obtained. The mere fact of a person being found in possession of N.A.A.F.I. property renders such person liable to be punished, if he fails to give a reasonable excuse or to establish that he was in possession by lawful authority.

In the present case, the Appellant who was a police constable was found in possession of three unopened packages each containing 50 packets of 10 cigarettes. There was no indication on the packages that

they were N.A.A.F.I. property and there was no evidence to the effect that the appearance of these packages was different from that of packages in common use in the trade. The small packets of cigarettes did, however, bear the words "N.A.A.F.I. Stores" and "For H. M. Forces" so that any person opening the packages would immediately become aware of the fact that the cigarettes were not ordinary duty-paid cigarettes to be found on the market.

The facts of the case are quite simple. The Appellant who had been out on duty was seen to return to the police station with a basket and a suitcase; Inspector Hargreaves asked him what he had in the suitcase and he replied "my clothes"; he was asked to open the suitcase and the three packages were found inside it; on being asked about these packages by the Inspector the Appellant stated they contained cigarettes. The Appellant did not then and there give any explanation as to how he had obtained possession of the packages, and the Inspector did not question him but confiscated the packages which were still unopened. The Inspector did, however, tell the Accused that if he had anything to say for the purposes of the investigation he should go to the Station Officer. The Appellant did, soon after the confiscation of the cigarettes, make an entry in the station diary to the effect that he had picked up the packages after they had been dropped by an unknown man whom he was pursuing.

There is no doubt that the explanation given, if believed by the learned trial judge, would have cleared the Appellant. The learned Judge, in his judgment, stated that the story was not reasonable and that he did not believe it, and his finding was that the Appellant had been in possession of the cigarettes without lawful authority and reasonable excuse, knowing them to have been imported for the use of the N.A.A.F.I.

We consider it fair to point out that there was no evidence to the effect that the Appellant knew that the packages contained packets of cigarettes marked "N.A.A.F.I. Stores" and we have, therefore, given attention to the question whether the learned trial Judge's finding that Appellant knew the goods to be N.A.A.F.I. property unduly influenced him and adversely affected the Appellant.

As already pointed out, the mere fact that the cigarettes were ultimately found to be N.A.A.F.I. property, rendered the Appellant liable to be punished unless he discharged the onus placed upon him to establish lawful authority or a reasonable excuse. The Appellant did give an explanation which the trial judge considered not reasonable and did not believe and it seems to us that, whether or not the Appellant knew that the cigarettes were N.A.A.F.I. property could not

and did not influence the finding. On behalf of the Appellant, our attention was called to Criminal Appeal No. 185/42, where this Court allowed the appeal because the Court below had not dealt with the defence of reasonable excuse. In that case, however, it seems that the defence of reasonable excuse was to some extent supported by evidence, whereas in the present case there is only the word of the Accused. It is true that in the aforementioned criminal appeal there occur the words: "The excuse on the face of it is a reasonable excuse. It may not be a correct excuse but it is a reasonable excuse". These words probably refer to the principle that, in a case like the present one, the onus of establishing the excuse is not so heavy as the onus which normally lies on the prosecution to establish the guilt of the Accused. In other words, the excuse need not be established beyond any reasonable doubt and the onus may be discharged by the evidence of the probability of that which the Accused is called upon to establish. We hasten to say that we do not disagree with that principle, but we cannot find in the present case that the trial judge had no justification for rejecting an excuse which had lost all its value by not being spontaneous.

The appeal is therefore dismissed.

Delivered this 10th day of July, 1946.

Chief Justice.

HIGH COURT No. 27/46.

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

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

IN THE PETITION OF:—

Afif Shehadeh Abdul Karim & 7 ors. — PETITIONERS.

v.

The Assistant District Commissioner, Tulkarm. — RESPONDENT.

Bonds with sureties for good behaviour — Sureties ordered to pay sum specified in bonds — Scope of sec. 6(1), Crime (Prevention) Ord.

Return to an order *nisi* dated the 27th day of February, 1946, calling upon the Respondent to show cause why his order of the 9th February, 1946, in Case No. 2/46, wherein he ordered amongst other things, each of the Petitioners to pay a sum of LP. 50.— the amount for which he stood as a surety under the Crime (Prevention) Ordinance, should not be set aside; order *nisi* made absolute:—

District Commissioner or President District Court cannot order forfeiture

of bonds executed under Crime (Prevention) Ordinance without affording parties concerned, whether as principal or sureties, opportunity to make representation or object to order of forfeiture or payment.

(*M. L.*)

ANNOTATIONS: On duty of officer given judicial powers affecting rights of person or property to hear person concerned before exercising his powers see C. A. 63/45 (12, P. L. R. 518; 1945, A. L. R. 755), see also Maxwell On the Interpretation of Statutes, Eighth Edition, p. 316.

(*A. G.*)

FOR PETITIONER: Moghannam.

FOR RESPONDENT: Acting Crown Counsel — (Salant).

ORDER.

This is a return to an order *nisi* directed to the Assistant District Commissioner of Tulkarm and calling upon him to show cause why an order made by him on the 9th February, 1946, should not be cancelled.

The order by the Assistant District Commissioner was to the effect that each of the present Petitioners was to pay a sum of LP. 50 for which he had signed a bond as surety under the Crime (Prevention) Ordinance, Cap. 30.

The bonds were furnished in the following circumstances: four s were each ordered under the Crime (Prevention) Ordinance to a bond in the sum of LP. 50 for being of good behaviour for a of one year and two sureties subscribed each of the bonds. We mention that, according to the translation placed before us, the king in the bond signed by Respondents 7 and 8 for example, the principal should "improve his behaviour": this is not one ie undertakings specified in either section 2 or section 3 of the dinance. This point is, however, not of major importance in this case and we need only call attention to sections 2 and 3 of the Ordinance which provide that the bond shall be in the form set out in the schedule to the Ordinance and should specify undertakings mentioned in the Ordinance and none other.

The form of bond clearly indicates that the sum mentioned therein may become payable by each of the persons who have signed it whether as principal or as sureties if the principal makes default, *i. e.* if he fails in his undertaking to be of good behaviour, or to keep the peace, or to refrain from disturbing public tranquility, as the case may be.

In the present case, the Petitioners have complained that the first Respondent decided that the bond furnished by each of the principals was "waived and not declared forfeit. The two bonds given as surety in each of the above cases are hereby declared forfeit and shall be collected". We incline to think that the first Respondent's intention was to forfeit each bond but to call upon the sureties, and not upon

the principals, to pay. It must be conceded that the order is defective, but we are not prepared to say that for that reason alone we would have interfered in this matter.

We will now proceed to deal with the main ground of complaint put forward, namely, that the Petitioners were not made parties to the proceedings and were not summoned to defend the claim against them. Section 6(1) of the Ordinance vests in the District Commissioner or President of a District Court the power to forfeit bonds entered into under the provisions of the Ordinance and to adjudge the persons bound therein or any of them to pay the sums for which they are respectively bound. He may adjudge any such bond forfeited if it is proved to him that the principal has been convicted of an offence "which is in law a breach of the condition of such bond". It is obvious, therefore, that there must not only be a conviction, but that such conviction must be of such a nature as to amount to a breach of the undertaking given in the bond. What is not abundantly clear is whether under the said section 6(1) an order of forfeiture or of payment may be made by a District Commissioner or President of a District Court without giving an opportunity to the parties concerned, whether as principal or as sureties, to make representations or object to the order of forfeiture or payment.

We are of opinion that the wording of the section makes it necessary to afford an opportunity to the interested parties to be heard or to make representations. It seems to us impossible to arrive at any other conclusion, being given that the words "adjudge" and "judgment" are used in the subsection. It is our view that the legislator used these words advisedly because he had in mind that there might be good grounds of objection against forfeiture. For example, it might be urged that the conviction relied upon as a breach of the undertaking is under appeal, or that it is not such as to constitute a breach of the undertaking given, or that it does not refer to the principal subscriber of the bond.

It is not disputed that the bonds which Petitioners signed as sureties were forfeited without their being summoned or given the opportunity of defending themselves. In view of our interpretation of section 6(1) of Cap. 30, we can but hold that Respondent's order of the 9th February, 1946, is invalid and must be rescinded in so far as it affects the Petitioners. We order accordingly, and grant LP. 10 inclusive costs to the Petitioners jointly.

Delivered this 18th day of April, 1946, in the presence of. Mr. T. Mogannam for Petitioners and Mr. E. Salant for Respondent.

British Puisne Judge.

CRIMINAL APPEAL No. 72/46.

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

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

IN THE APPEAL OF:—

Ahmad Mahmoud el-Hassan & 3 ors. APPELLANTS.

v.

Attorney General. RESPONDENT.

Receiving stolen property — C. C. O. 309 — Suspicion of knowledge — Breaking and entering C. C. O. 297.

Appeal from the judgment of the District Court, Haifa, dated 6th June, 1946, in Criminal Case No. 96/46, whereby Appellants 1 and 2 were convicted of an offence *contra* section 297 of the Criminal Code Ordinance, 1936, and Appellants 3 and 4 *contra* section 309 of the said Code, and sentenced to three years, one year, one year and 18 months' imprisonment, each respectively; appeal allowed as regards Appellants Nos. 3 and 4:—

In prosecutions under sec. 309 C. C. O., although guilty knowledge may be inferred, mere suspicion of guilty knowledge is insufficient to support a conviction.

(*A. M. A.*)

ANNOTATIONS: For authorities on secs. 309—311 of the C. C. O. see note 2 in A. L. R. to CR. A. 176/45 (12, P. L. R. 497; *ante*, p. 56); *cf.* also CR. A. 69/46 (*ante*, p. 366) and note.

(*H. K.*)

FOR APPELLANTS: Nos. 1, 3 and 4 — Elia.
No. 2 — Kurdi.

FOR RESPONDENT: Crown Counsel — (Southworth).

JUDGMENT.

In this case the Appellants Nos. 1 and 2 were charged under section 297 of the Criminal Code Ordinance. Mr. Elia on their behalf confined his argument on appeal to the submission that there was no evidence of breaking into and that the charge ought to be altered to section 263 or to section 270 of the Criminal Code Ordinance.

Now, there was evidence that this was the store of one Anastasy Jriandafiddis, that it was usually kept locked and that after the disappearance of the peas the lock was found forced. The learned Judge of the Court below was satisfied that the Accused Nos. 1 and 3 were the persons who entered that store and took from it the sacks of peas.

This was a finding of fact which was justified by the evidence, and indeed it has not been contested by the Appellants.

Having arrived at that finding we consider that the learned Judge was entitled to draw the inference, which he did draw that those people entered the store by removing this lock which constitutes a breaking into sufficient to satisfy the requirements of section 297. We consider that there is no substance in this ground of appeal.

There remains for consideration the question of Appellants Nos. 3 and 4 who were indicted for receiving stolen property under section 309, Criminal Code Ordinance. Now, it is a condition precedent to a conviction under that section that an accused person must have known the property in respect of which he was charged, to have been stolen. It is a fact that in the majority of cases the question of this knowledge must be a matter of inference to be gleaned from the surrounding circumstances. The trial Judge, in the course of his judgment, has said in a summing up which we cannot criticise, that he refused to believe the evidence of some witnesses, but that in regard to the possession of stolen property he relied mainly on the evidence of the witness Ragheb Ahmad el Yousef. With great respect to the learned Judge, it appears to us that the evidence of this witness could not be said to establish with any degree of certainty that the Accused must have known that the property was stolen. At most it would amount to a suspicion which, in our opinion, falls far short of what is necessary to satisfy the requirements of section 309 of the Criminal Code Ordinance. The fact that the peas were sold at night by the Accused might also give rise to suspicion but here we would remark that there is nothing really unusual in such a sale in this country. Moreover, there has been no suggestion that the sale was a sale for under-value. There was at least some evidence that the Accused had bought some of those peas in market overt.

For these reasons we are forced to the conclusion that there was not sufficient evidence to justify the finding that the accused persons knew the goods to be stolen. It follows that the conviction against Appellants Nos. 3 and 4 (Accused Nos. 4 and 5) must be quashed, and the conviction against Appellants Nos. 1 and 2, (Accused Nos. 1 and 3) must be confirmed.

Delivered this 3rd day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 320/45.

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

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

IN THE APPLICATION OF :—

Mohammad Adeeb el-Amiri. APPLICANT.

v.

Salim Katul. RESPONDENT.

Copyright — Particulars of infringements may be ordered — Sweet v. Maugham, Oliver v. Dickin.

Application for leave to appeal from the Order of the District Court, Jerusalem, dated 30th June, 1945, in Motion No. 222/45 (in Civil Case No. 42/45), refused:—

In copyright cases, although particulars of infringements need not be given in the statement of claim, they may be ordered by the Court to be given if applied for by the defence.

(*A. M. A.*)

REFERRED TO: Sweet *v.* Maugham, 1840, 11 Sim. 51, 9 L. J. (Ch.) 323; Oliver *v.* Dickin, 1936, 2 Ali E. R. 1004.

ANNOTATIONS: See the paragraph in Halsbury referred to in the judgment. (*H. K.*)

FOR APPLICANT: Elia.

FOR RESPONDENT: Merguerian.

ORDER.

This is an application for leave to appeal against an order of the District Court of Jerusalem ordering Plaintiff to give particulars. The Plaintiff was refused leave to appeal by the District Court Judge.

The statement of claim is one alleging an infringement of copyright, claiming damages and an injunction.

The Defendant asked for particulars of the alleged infringement referred to in paragraph 3 of the statement of claim.

Plaintiff-Applicant's contention is that, in copyright cases, particulars of the infringement complained of need not be given, and Mr. Elia has cited certain authorities (Hailsham Volume 7 page 586 section 909) Sweet *v.* Maugham (1840) 11 Sim. 51 *etc.*

After hearing Mr. Merguerian and reading the case Oliver *v.* Dickin (1936) 2 All England Reports, p. 1004 we have reached the conclusion that although particulars need not be stated in a statement of claim, yet when particulars are asked for there is no reason why, in proper

cases, they should not be given. We see no reason for granting leave to appeal. Leave to appeal is refused. Respondent is granted LP. 5 inclusive costs.

Given this 12th day of April, 1946.

British Puisne Judge.

CIVIL APPEAL No. 79/45.

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

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

IN THE APPLICATION OF :—

Qassam Fawzi Ghussein & an. APPLICANTS.

v.

Antone F. Albina & an. RESPONDENTS.

Land settlement appeals — L. S. A. Rules, R. 9(3) — Application for joinder and for consolidation — Application of C. P. R. to L. S. appeals.

Application that the Applicants may be admitted as third party under Rule 9(3) of the Land (Settlement of Title) Rules in this appeal; in the alternative that Applicants be cited as 2nd Respondents to the appeal under Rule 313 of the Civil Procedure Rules, 1938; and that the said appeal No. 79/45 be heard and/or consolidated with C. A. No. 135/45 brought by the Applicants against 2nd Respondent; alternative application granted and consolidation ordered:—

Although R. 9(3) of the Land (Settlement of Title) (Procedure) Rules has not been repealed, it was rendered obsolete and replaced by the Civil Procedure Rules when the Land Court was substituted by the Supreme Court in Land Settlement appeals.

(*A. M. A.*)

ANNOTATIONS :

1. Note, however, that in Land Settlement proceedings the procedure laid down in the Land (S. of T.) Procedure Rules should be followed: C. A. 185/43 (1943, A. L. R. 538); *cf.* also C. A. 229/45 (*ante*, p. 359).

2. The C. P. R. apply to appeals from decisions of Land Settlement Officers: C. A. 95/43 (1943, A. L. R. 262) and C. A. 8/44 (11, P. L. R. 487; 1944, A. L. R. 568).

3. On repeal by implication see the cases cited in note 2 to H. C. 38/43 (1943, A. L .R. 199); *cf.* also C. A. 349/43 (11, P. L. R. 333; 1944, A. L. R. 364).

(*H. K.*)

FOR APPLICANTS: A. Atalla, F. Nazzal and A. Michaeli.

FOR RESPONDENTS: No. 1 — Olshan.

No. 2 — Elia.

ORDER.

This is an application by way of motion made by Fawzi Bey Ghussein on behalf of his two minor children Bassam and Bassima in connection with Civil Appeal No. 79/45 which is now pending before this Court. The Appellant in C. A. 79/45 is Mr. Albina and the Respondent is his wife née Takountieff.

The application is for leave to enter as 3rd party in the aforementioned appeal as provided by Rule 9(3) of the Land (Settlement of Title) Rules, or alternatively to be cited as Respondents to the aforementioned appeal under Rule 313 of the Civil Procedure Rules, 1938. The Applicant also asks for the consolidation of C. A. 79/45 and C. A. 133/45 in which he is the Appellant and Mrs. Albina is Respondent.

The two appeals are from two separate decisions of a Settlement Officer but the link between the two cases is that they refer to the same piece of land. Put shortly, the facts are that Fawzi Bey Ghussein transferred in 1940 the said land to Mrs. Albina after Mr. Albina had failed to appear. Mrs. Albina subsequently claimed the land at Settlement proceedings and succeeded in defeating the rival claims of Government and of certain other parties. When the Schedule of Rights was posted up, Fawzi Bey sought to have his children substituted for Mrs. Albina's as owners of the land on the ground that the transfer made by him was null and void. This application was refused by the Settlement Officer and an appeal was lodged citing Mrs. Albina as Respondent.

Mr. Albina, on the other hand, also sought to have his wife's name replaced by his own in the same Schedule of Rights on the ground that his wife had acted as his agent when the transfer took place. This application was refused because the Settlement Officer held it had not been made at the proper time.

The application for joinder and consolidation is strenuously resisted by Mr. and Mrs. Albina. One point raised by the Respondents is that Rule 9(3) of the Land (Settlement of Title) Rules is obsolete because it was not amended when the Land Court ceased to be the appellate Court for Land Settlement cases. This point is well founded. It seems that the object of No. 48 of 1939 was to institute the Supreme Court as the appellate Court (in lieu of the Land Court) and to apply the Civil Procedure Rules, 1938, to Land Settlement appeals.

We must, therefore, turn to Civil Procedure Rule 313, which empowers this Court to have additional Respondents cited. Although the conduct of the Applicant has not been such as would incline us to ease his path in this litigation, it is impossible in this case to ignore

the fact that the crux of the two appeals is whether Mrs. Albina was acting as her husband's agent when the land was transferred. It would be difficult, not to say impossible, for this Court to receive full enlightenment unless all parties are heard at the same time. We therefore consider it necessary to order that the Applicant be cited as Respondent in Civil Appeal 79/45 and Mr. Albina cited as Respondent in Civil Appeal 133/45, and that Civil Appeals 79/45 and 133/45 be consolidated.

The question of costs is reserved until final decision in the two appeals.

Given this 11th day of July, 1946, in the presence of Mr. Pascal Carmi for Applicants and Mr. S. Georges Elia for Respondent.

Chief Justice.

CIVIL APPEAL No. 56/46.

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

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

IN THE APPEAL OF :—

Ibrahim Khalil Sharbiny & an. — APPELLANTS.

v.

Abdul 'Al Salim Qazaq. — RESPONDENT.

Contracts — Failure by one person of constituent parties to sign — Estoppel — C. A. 127/43 part performance.

Appeal from the judgment of the District Court, Haifa, dated the 29th January, 1946, in Civil Case No. 74/44, allowed:—

If there has been part performance of a contract, the point that the contract was not properly signed cannot be raised.

(*A. M. A.*)

FOLLOWED: C. A. 127/43 (1943, A. L. R. 379).

ANNOTATIONS: *Cf.* C. A. 254/45 (*ante*, p. 155) and cases cited in note 3 thereto; *vide* also C. A. D. C. Ha. 116/45 (1946, S. C. D. C. 246) and note 1.

FOR APPELLANT: A. Lipshitz.

FOR RESPONDENT: A. Khamra.

JUDGMENT.

This is an appeal from the judgment of the Acting Relieving President of the District Court, Haifa. The facts as found by the learned Relieving President, can in the main be accepted. There was an agree-

ment between the Appellants and the Respondent, under which the Respondent undertook to sell to the Appellants a plot of land at Balad El Sheikh. The consideration for the sale, which was LP. 50, duly passed, but for some reason the contract, which was signed by the first Appellant was not signed by second Appellant, who was the wife of the first Appellant, although she purported to be a party to it. The learned Relieving President was of opinion that this was a fatal defect and in the result he decided that there was in fact no contract. The Appellants contended that the omission of the signature was not a fatal defect, because the Respondent by his conduct was estopped from pleading this. Several cases were quoted in support of the contention. The learned Relieving President came to the conclusion that these cases were no authority for holding that the Defendant was estopped by his conduct, and taking the cases quoted alone, the learned Relieving President was justified in his conclusion. But C. A. 127/43 to which the learned Relieving President's attention was not invited is a clear authority for the proposition that where there has been part performance a defect in form in the contract does not necessarily constitute a ground for avoiding it.

The question now arises was there on the part of the Respondent such a part performance of this contract as would estop him from advancing the plea on which he succeeded before the District Court?— Apart from the contract for the sale of the land, there was another contract under which the Respondent who was a mason, undertook to build a house for the Appellants on this plot of land, and in fact he did erect the building for them. In this connection it is relevant to note that the Respondent in his evidence said he considered the two contracts to be part of the same transaction. We have now the position that there was only one person who could give the Appellants such possession of this land as would entitle them to build a house for themselves upon it. That one person was the Respondent, and from the facts that he built the house and allowed the Appellants uncontested occupation for many years we consider it reasonable to infer a delivery of possession to them in pursuance of the terms of the contract. There was therefore such a part performance of the contract as now estops him from advancing a technical plea that the contract was not signed by one of the Appellants.

It follows that the appeal must be allowed with costs on the lower scale to include an advocate's attendance fee of LP. 10.—. Costs awarded by the Courts below are reversed.

Delivered this 11th day of July, 1946.

Chief Justice.

CIVIL APPEAL No. 83/46.

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

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

IN THE APPLICATION OF:—

M. G. Levin & 4 ors. APPLICANTS.

v.

Elfriede Boehm. RESPONDENT.

Interlocutory injunction — Final remedy will not be granted, Dodd v. Marine Workers Union — Balance of convenience.

Application for leave to appeal from the Order of the District Court, Haifa, dated 18th March, 1946, in Motion No. 132/46; application granted and appeal allowed:—

Courts will not (except by consent) grant on an interlocutory application an injunction which has the effect of granting the sole relief claimed in the main action.

(*A. M. A.*)

FOLLOWED: Dodd *v.* Amalgamated Marine Workers Union, 1923, 93 L. J. (Ch.) 65, 39 T. L. R. 379 C. A.

ANNOTATIONS: For recent local authorities on interlocutory injunctions see Mo. D. C. T. A. 92/45 (1945, S. C. D. C. 103) and annotations, Mo. D. C. T. A. 432/45 (*ibid.*, p. 340), Mo. D. C .T. A. 421/45 (*ibid.*, p. 357), Mo. D. C. T. A. 603/45 (*ibid.*, p. 558), Mo. D. C. Jm. 443/45 (*ibid.*, p. 617) and Mo. L. C. Ha. 365/45 (*ibid.*, p. 685).

Cf. Halsbury, Vol. 18, pp. 27 *et seq.*, sec. 2.

(*H. K.*)

FOR APPLICANTS: Salomon.

FOR RESPONDENT: Klug.

JUDGMENT.

In an appeal from an interlocutory order, this Court would be most reluctant to interfere with the discretion of a judge of first instance particularly as it is impossible for the Court of Appeal to have that grasp of the essentials of the case which is available to the lower Court. Nevertheless, the Appellants were entitled to appeal and we must decide the case on the facts placed before us. It may well be that at the hearing of the main case many of these facts may not be established, but this in a way is incidental to all interlocutory motions. Our task is not made easier in that the learned President has not indicated the grounds upon which he made the order, for the very sound reason as

he has stated, that he did not wish to prejudice the main case. It is probable that many of the facts and arguments adduced before us were not presented to him. The facts as they are now available to us (and again we remark that they may not be the facts finally established) are set out below.

An institution known as the Army Garrison Club was established in 1940 at Haifa by the Haifa Hospitality Committee.

The Haifa Hospitality Committee is to all intents and purposes a committee of the Jewish Community Council of Haifa. It was nominated for the purpose of organizing a club for the welfare of members of His Majesty's and Allied Forces and, like other similar Hospitality Committees, it is supervised by a Central Hospitality Committee set up under the auspices of the Jewish Agency for Palestine which gives financial assistance and other support to the movement.

These various Committees are not incorporated and their composition and powers are therefore very loosely defined. One result of this state of things is that so-called "trustees" were given supervision of the affairs of the Club. The first trustee was one Mr. A. Yaeli, a member of the Haifa Hospitality Committee.

The position is to a certain extent simplified by the fact that both Plaintiff and Defendants in the Court below agree that the Army Garrison Club is an institution of the Jewish Agency for Palestine (see para. 3 of Mrs. Boehm's affidavit, and para. 8 of Mr. Levin's affidavit).

In 1941, the first "trustee" Mr. Yaeli entered into a written agreement with Mrs. Boehm concerning catering arrangements for the visitors of the Club. The document has been marked E. B. 1. It was at the outset for a period of six months and, for the present purposes, it may be assumed that it was extended from time to time for periods of six months. Certain changes in the original conditions were made, notably in 1943. Two main difficulties arising under or from this agreement must be mentioned. The first is that Mrs. Boehm's contention is that Mr. Yaeli, the first trustee, who signed E. B. 1, was replaced by Mr. Golan and then by Dr. Zeitlin and that the latter is the only person who would have the right of terminating her activities at the Club.

The second difficulty is that Mrs. Boehm contends that she was a "contractor" and not an employee, whereas the Defendants contend that she was a salaried employee of the Haifa Hospitality Committee. In support of the Defendant's contention, attention was drawn in paragraph 30 of Mr. Levin's affidavit to a letter dated 23.3.43 addressed

to Mrs. Boehm altering the conditions of the original agreement (this letter has been marked E. B. 2).

Mrs. Boehm's contention that she acknowledges only Dr. Zeitlin as the person with whom she is bound by her contract is of importance because Dr. Zeitlin did not terminate the agreement. On the 31.1.46 written notice of termination of the agreement was conveyed to Mrs. Boehm by Mr. Levin acting as chairman of the Haifa Local Hospitality Committee. Mr. Levin stated in his letter that the Central Hospitality Committee had transferred to the Haifa Local Hospitality Committee, with the approval of the Jewish Agency, the direct control of the economy and of the buffet of the Army Garrison Club at Haifa.

Mrs. Boehm thereupon began Civil Case No. 40/46 now pending before the Haifa District Court between Mrs. Boehm against Mr. Levin and four others (who are the present Applicants) as Defendants. The statement of claim in that case prays for a judgment declaring "that the Plaintiff's agreement with the nominee and trustee of the Jewish Agency for Palestine, *i. e.* to cater for the visitors of the Army Garrison Club, 5, Balfour Street, Haifa, is in force till 16.6.46 at least, the Plaintiff is entitled to enter the premises of the said Club and to cater for the visitors, that Defendants are not entitled to disturb Plaintiff in carrying on her said business; restraining Defendants and any of them, their servants and agents, from preventing Plaintiff to enter the premises of the said Club and to carry on there her business of catering for the visitors of the said Club; restraining Defendants and any of them, their agents and servants, from using Plaintiff's chattels, furniture and other goods which are at the premises of the said Club; granting Plaintiff such further and/or other relief as the honourable Court may deem just and equitable and ordering Defendants jointly and severally to pay Plaintiff's costs and advocate's fees".

On the 19th February, 1946, notice of motion was given by the Plaintiff to the Defendants that an application for an interlocutory injunction would be moved on the 15th of March.

The only difference between the prayer which concludes the Statement of Claim and the motion for an interlocutory injunction is that the former seeks a declaration that a certain agreement will be in force "until the 16.6.46 at least".

The first remark which we desire to make is that, in the circumstances of this case, it is obvious that the grant of the interlocutory injunction applied for would almost be tantamount to a judgment in Mrs. Boehm's favour in the main case. Another remark, closely allied to the preceding one, is that a decision on the motion for an interlocutory

injunction could hardly be arrived at without determining all the issues raised in the main case.

We have offered the above remarks because we have in mind the principle that it is not the practice of Courts (except by consent) to grant on an interlocutory application an injunction which has the effect of granting the sole relief claimed in the main action (Dodd *v.* Marine Workers Union 93 L. J. Ch. 65).

We are of opinion that leave to appeal should be granted, and counsel for the parties having agreed that in the event of leave being granted we should decide on the appeal at the same time, we will now proceed to examine whether we can support the grant of an interlocutory injunction.

One important fact is that Mrs. Boehm has not had access to the Club since the 1st February, 1946. The attitude taken by the Defendants in the Court below (now Appellants) is that the Club would be shut down if Mrs. Boehm had to be reinstated.

Is the position in this case such as to justify the grant of an interlocutory injunction? We have to choose between the risk of causing the closing down or disorganization of the Army Garrison Club, or the protection of Mrs. Boehm's interests. Are the latter's interests such that the refusal of an interlocutory injunction would hopelessly prejudice them? We do not think so, inasmuch as it seems clear that Mrs. Boehm was entitled to a monthly fixed sum (whether as salary or as limited profit does not matter). The position would possibly have been different if Mrs. Boehm had been entitled to carry out a catering business entirely for her own profit.

It cannot be too strongly emphasized that the equitable remedy sought by Mrs. Boehm cannot be granted as of course and that the principle is that such a remedy is granted to prevent what we would call irreparable harm.

We are of opinion that in the present case the balance of convenience is not on Mrs. Boehm's side. However right her contentions might be, she can receive adequate compensation, whereas it would be very prejudicial to members of the Forces to be deprived of the amenities of the Army Garrison Club.

We therefore allow the appeal and rescind the order made on the 18.3.46, with LP. 5.— inclusive costs to Applicants.

Delivered this 27th day of March, 1946.

Chief Justice.

CIVIL APPEAL No. 194/46.

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

BEFORE: De Comarmond and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Jamil Elias Salom & an. — APPLICANTS.

v.

Antranik Kopalian. — RESPONDENT.

Stay of execution — Attachments — Leave to appeal — C. P. R. 331—2, C. A. 66/40, R. S. C., Cropper v. Smith, Brown v. Brook, Smith Hogg & Co. Ltd. v. The Black Sea & Co. Ltd., Webber v. L. B. & S. C. Rly — Concurrent jurisdiction of two instances — Grant of leave to appeal does not operate as stay.

Application to stay the execution of the order of release of the provisional attachment placed in Civil Case No. 31/46, District Court Jaffa, granted:—

1. The Court from which an appeal is about to be made may grant stay of execution before the appeal is filed.

2. In exceptional circumstances the Court to which an application for leave to appeal has been made may grant stay of execution pending the determination of the application.

(*A. M. A.*)

REFERRED TO: C. A. 66/40 (7, P. L. R. 220; 1940, S. C. J. 136; 7, Ct. L. R. 165); Cropper *v.* Smith, 1882, 24 C. D. 305, 53 L. J. (Ch.) 170, 49 L. T. 548; Brown *v.* Brook, 86 L. T. 373, 18 T. L. R. 383; Smith Hogg & Co., Ltd. *v.* Black Sea & Baltic General Insurance Co., Ltd., 1939, 162 L. T. 11; Webber *v.* L. B. & S. C. Railway Co., 1881, 51 L. J. (Q. B.) 154 C. A.

ANNOTATIONS:

1. Note that (oral) applications for stay of execution made "immediately after judgment is delivered" are envisaged in the proviso to item 77 of the Court Fees Rules, 1935.

2. *Cf.* P. C. L. A. 13/38 (6, P. L. R. 69; 1939, S. C. J. 98; 5, Ct. L. R. 97), wherein the Supreme Court assumed "an inherent power to preserve the rights of parties intact pending an appeal to His Majesty in Council". But see also P. C. L. A. 3/44 (11, P. L. R. 394; 1944, A. L. R. 663).

3. *Vide* Halsbury, Vol. 14, pp. 31—33, paras. 61—62 and the Commentaries in the Annual Practice to O. 58, RR. 16 & 17; see also C. A. 201/46 (*post*, p. 387), and note 1.

(*H. K.*)

FOR APPLICANTS: No. 1 — Malak.
No. 2 — Elia.

FOR RESPONDENT: H. Farouki.

ORDER.

Application for stay of execution.

The Applicants are the Plaintiffs and the Respondent is the Defendant in Civil Case No. 31/46 now pending before the District Court of Jaffa.

The Plaintiffs, now Appellants, had obtained from the Registrar of the said Court a provisional attachment against some machinery belonging to the Defendant, but this attachment was subsequently released by a learned Judge of the same Court. The Plaintiffs decided to appeal and applied to the District Court for leave to appeal and for a stay of the order releasing the attachment. Leave to appeal was refused on the 28th May, 1946, but it is mentioned in the application now before us that a stay of execution was granted for one week to enable the Applicants to apply to the Supreme Court sitting as a Court of Appeal for leave to appeal and for stay of the order releasing the provisional attachment.

All necessary steps have been taken for the application for leave to appeal to be heard by this Court, but, in the meantime, the temporary stay of eight days granted by the Court below would have lapsed had not the Applicants moved this Court on the 8th June for a further stay until the application for leave to appeal can be heard.

The Respondent to this application has contended that this Court has no jurisdiction to entertain such an application because no appeal has been filed. Respondent's advocate relied on Rule 332 of the Civil Procedure Rules and has referred us to C. A. 66/40, 7 P. L. R. 220, which, however, is not a decision on the point now at issue and is of interest only because it lays down certain principles for the interpretation of the Civil Procedure Rules.

Rule 332 reads as follows:—

> "When an appeal has been filed the Court from which the appeal is made or the appellate Court may order a stay of execution pending the determination of the appeal, on such terms, including the filing of adequate security by the party applying for a stay, as the Court shall think fit".

It is important to note that Rule 332 does not purport to preclude the grant of stay of execution *unless* an appeal has been filed: what it does is to lay down that after an appeal has been filed, both the Court from which the appeal is made and the appellate Court have power to grant a stay. Prior to the filing of an appeal, it seems clear to me that the Court from which the appeal is made has power to stay

execution, and on this point, Rule 331 is of importance. Rule 331 reads as follows:—

> "No appeal shall operate as a stay of execution unless the Court appealed from or the appellate Court shall otherwise order. All applications for such stay shall in the first instance be made to the Court from which the appeal is made".

and its main object is to establish the principle that an appeal does not operate as a stay of execution but it leaves the door open to applications for staying execution.

I have no doubt that the Court from which an appeal is to be made has power to suspend execution in proper cases and under suitable terms even before an appeal is filed in the appellate Court; if it were otherwise, appeals would become useless in many instances. But the point at issue in the present case is that leave to appeal has been refused by the Court below and an application having been made to the appellate Court for such leave, whether the latter has power to entertain an application for stay pending the hearing of the application for leave to appeal.

Our Rules 331 and 332 are somewhat similar to Rules 16 and 17 of the English Rules (see Annual Practice 1945, pages 1336—1340) and I find it clearly established in England that in spite of Rule 17 (which corresponds to our Rule 332) there is concurrent jurisdiction in the Court below and the appellate Court for the grant of stay (see Cropper *v.* Smith 49 L. T. 542 and Brown *v.* Brook 86 L. T. 373). I have also looked up cases where leave has to be obtained to appeal to the House of Lords from the Court of Appeal in England but have only come across cases where leave to appeal had been obtained. Thus in Smith Hogg & Co. Ltd. *v.* The Black Sea and Baltic General Insurance Co. Ltd., 162 L. T. 11, leave to appeal to the House of Lords had been obtained, and the Court of Appeal refused a stay on the ground that it could only be granted under very exceptional circumstances such as for instance where execution would destroy the subject matter of the action or deprive the Appellant of the means of prosecuting the appeal.

I have, however, found one case which has some bearing on the question which falls to be decided in the present application. It is the case of Webber *v.* L. B. & S. C. Railway (1881) 51 L. J. Q. B. 154, C. A., which is mentioned in Vol. 21 of the Empire Digest at page 450, paragraph 333. The Applicants had applied for a stay of execution to the Court of Appeal while they were making up their minds whether to appeal to the House of Lords. The Court of Appeal refused the application and Jessel M. R. said:—

> "Defendants have neither presented nor decided to present an appeal to the House of Lords, and we are asked to grant a stay of execution in order to give them an opportunity to decide whether they will do so or not. I have never heard of such an application except where an appeal has been presented or where the House of Lords is not sitting, and then the Applicant always undertakes to present it".

It seems to follow from the passage quoted above that a stay may, in special circumstances, be granted by the Court from which an appeal is to be made even when an appeal has not actually been lodged.

Following the same line of reasoning it seems to me hardly conceivable that the Court to which appeal may lie would have no power to maintain the *status quo* for a few days until it has had the opportunity of deciding whether to grant leave or not. I have, after some hesitation, reached the conclusion that, in exceptional circumstances, an appellate Court to which an application for leave to appeal has been made may grant a stay of execution pending the hearing or determination of such application.

In the present instance, there is an additional factor which is that a stay was granted by the Court below to enable the Applicants to come before this Court. This fact indicates that the Court below did not consider that the Applicants were trying without reasonable cause to deprive the Respondent of the fruits of his victory.

Being satisfied in this case that the application for leave to appeal would become pointless if a stay is not granted; being satisfied that a bond has been given by the Applicants in connection with the provisional attachment; and being given that the Court below must have intended to stay the carrying out of its decision until this Court could hear the application for leave to appeal and the application to stay the release of the provisional attachment I consider that exceptional circumstances do exist. I therefore order that the decision sought to be appealed against shall not be carried out until this Court has decided whether to grant leave to appeal. I would add that, even if leave to appeal is granted, it would not mean that a stay would be granted as a matter of course.

Costs of this application to abide the decision in the application for leave to appeal. To avoid difficulties, I fix advocate's attendance fee at LP. 5 for each advocate, to depend on final result.

Given this 9th day of July, 1946, in the presence of Mr. G. Elia for Applicants and clerk of counsel for Respondent.

British Puisne Judge.

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 APPLICATION OF :—

Mediha bint el Haj Salim Abu El Einein. APPLICANT.

v

Ahmad Haj Ibrahim Mohd. Izz & 3 ors. RESPONDENTS.

Application for stay or attachment — Rs. 303, 331 — Discretion under R. 331 — Application must first be made to District Court under R. 303.

Application for an order that the transfer of the properties in Land Registry File No. 175/44 (Safad) the subject matter of the above appeal, *viz.* 3 out of 21 shares registered in the names of Respondents Nos. 2, 3 and 4 respectively in the property registered in Safad Land Registry Vol. 7 Folio 36 be stayed, and/or that a provisional attachment be placed on the said properties, and/or that an entry be made in the Land Registry to the effect that an appeal is pending as regards the aforesaid properties and that such order be in force pending the final determination of the appeal from the judgment of the 15th May, 1946, delivered in the above proceedings; application refused:—

The Court of Appeal will not entertain an application under R. 303 unless the application was first submitted to and adjudicated upon by the District Court.

(*A. M. A.*)

ANNOTATIONS :

1. On stay of execution pending appeal *cf.* C. A. 226/45 (12, P. L. R. 473; 1945, A. L. R. 703) and Mo. D. C. Ha. 308/46 (1946, S. C. D. C. 370) and note 2 thereto.

2. On the power of the Court of Appeal to order attachments *vide* CR. A. 96/37 (4, P. L. R. 261; 1937, S. C. J. (N. S.) 496) and note 1 thereto in S. C. J.

3. *Cf.* Annotated Laws of Palestine, Vol. 2, pp. 165—6, heading *District Court* for analogous decisions in connection with applications for leave to appeal.

(*H. K.*)

FOR APPLICANT: Wittkowski.

FOR RESPONDENTS: No. 1 — Absent — served.
Nos. 2—4 — Tscherniak.

ORDER.

This is an application for the stay of a judgment of a District Court. It falls to be considered under two heads; Under Rule 331 and 303 of the Civil Procedure Rules, 1938. It has been argued that Rule 331 does apply. We find it unnecessary to decide whether in law Rule

331 is applicable because in the particular circumstances of this case we would not be prepared to exercise the discretion vested in us under Rule 331 particularly in view of the fact that it has already been considered by the District Court. There remains for consideration Rule 303. We agree with Mr. Wittkowski that we have an inherent jurisdiction, even if he has not applied to the District Court. We do not agree that to send it back to the District Court would be a formalism because in the circumstances of this case we would not be prepared to exercise any jurisdiction under Rule 303 before the issue had been adjudicated upon by the District Court.

The application must therefore be refused without prejudice to the Applicant to apply to the District Court under Rule 303.

Given this 27th day of June, 1946.

Chief Justice.

CIVIL APPEAL No. 17/46.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Abraham Savransky. APPELLANT.

v.

Yona Baal Taxa. RESPONDENT.

Arbitration — Failure by arbitrator to hear evidence — Illegality.

Appeal from the order of the District Court Haifa dated the 4th December, 1945, in Civil Case No. 112/45, allowed:—

Although the parties may waive their right to have evidence heard in arbitration proceedings, in the absence of such waiver an arbitrator commits misconduct if he makes an award without hearing evidence.

(*A. M. A.*)

ANNOTATIONS: See Annotated Laws of Palestine, Vol. 2, pp. 125 *et seq.*, heading *"Hearing the Evidence"; cf.* also C. D. C. T. A. 368/44 (1946, S. C. D. C. 253, end of p. 255).

(*H. K.*)

FOR APPELLANT: Eliash and Heth.

FOR RESPONDENT: Geiger.

JUDGMENT.

Frumkin, J.: The parties to this appeal submitted to arbitration a dispute relating to an alleged partnership entered between them for

the purchase and sale of certain goods and the distribution between them of the profits thereof. The arbitrator heard the statements of the two parties and without hearing further evidence gave his award directing the Appellant to pay to the Respondent the sum of LP. 750.— plus LP. 50.— as fees of the arbitration. The Appellant thereupon appealed to the District Court of Haifa by notice of motion asking for an order to set aside the award on the grounds mainly of misconduct and that the submission arose out of an illegal claim or transaction. The learned President dismissed the application on all grounds.

The main ground of appeal is that there was misconduct on the part of the arbitrator by basing his award on no evidence whatsoever. As a rule, even an arbitrator has to base his award on proper evidence and the general rule that the Plaintiff has to prove his case would apply also in arbitration, but of course parties before arbitration may waive this right.

On this point the learned President came to the conclusion that both parties decided not to call any witnesses but were content to be heard in address by the arbitrator. But on examining the evidence it does not appear that in fact the parties did decide not to call any evidence. Leaving aside the evidence of the Appellant, whom the learned President did not consider to be a satisfactory witness and who said in Court in his evidence that he asked the arbitrator to summon witnesses, we find that the Respondent did not go so far as to say that the parties have decided not to call evidence. All he says is that on the part of the Appellant there was no insistence and that the arbitrator said that "we had both better agree to witnesses not being called as he understood everything and was prepared to give an award". He goes on to say that "We both agreed that witnesses should not be called and that award should be made". When we turn however to the evidence of the arbitrator himself who gave evidence before the Court below we find that he said: "I heard no witnesses ... May be one or other of the parties said he had witnesses but I did not avail myself of the opportunity to call witnesses. Applicant did not ask me to call witnesses. I was convinced that it was not necessary to hear witnesses".

I do not think that this evidence warrants the conclusion arrived at by the learned President that both parties decided not to call any witnesses. There was therefore misconduct on the part of the arbitrator in giving an award based on no proper evidence, and on this ground alone the Appellant must succeed, and it is not necessary to go into the other grounds of appeal including the one of illegality. Suffice it to say that on the face of it, and in accordance with Re-

spondent's own case, there is some presumption of illegality as the allegation was that he and the Appellant agreed that the latter should purchase scrap iron from the authorities for use in his factory, and instead of so using it sell it on the market and shared the profits between them. The learned President disposed of this point very shortly by saying:—

> "I have considered the other grounds put forward in support of the application but I am not satisfied either that the award should be set aside so far as they are concerned".

If not for the conclusion I have just arrived at, that there was misconduct, it would have been necessary to remit the case for further consideration on the point of illegality.

In the result the appeal is allowed and the judgment of the District Court is set aside and the application of the Appellant to set aside the award is granted.

Respondent will pay the costs here and below and including LP. 15 advocate's fees for the hearing of the appeal.

Delivered this 5th day of April, 1946.

Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 397/45.

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

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

IN THE APPEAL OF:—

Jacob Pereman. — APPELLANT. (APPLICANT).

v.

Archimandrit Abrami. — RESPONDENT. (RESPONDENT).

Summary Procedure, C. P. R. 241 — Application for leave to defend dismissed for non appearance — Application to set aside the dismissal, C. P. R. 213, 250 — Appeal from refusal, whether decree or order — Effect of failing to give notice under R. 333, C. A. 183/45 — Costs.

Appeal from the decree of the District Court of Tel-Aviv dated 2.12.45, in Civil Case No. 190/45 (Motion No. 306/45), dismissed:—

1. The refusal by a District Court to set aside the dismissal of an application for leave to defend, is a decree and may be appealed without leave.

2. The Court may, of its own motion, take the point that no appeal is properly before it and if there has been no compliance with R. 333, the successful party may be deprived of costs.

(*A. M. A.*)

FOLLOWED: C. A. 183/45 (13, P. L. R. 51; *ante*, p. 72).

ANNOTATIONS:

1. On "orders" and "decrees" see annotations to C. A. 243/45 (*ante*, p. 330).

2. On rr. 213 & 250 of the C. P. R. *cf.* C. A. 433/44 (12, P. L. R. 243; 1945, A. L. R. 412) and C. A. 401/44 (*ibid.*, pp. 289 and 415).

3. For other authorities on R. 333 of the C. P. R. as amended see C. A. D. C. Ja. 138/44 (1946, S. C. D. C. 144), C. A. D. C. T. A. 57/45 (*ibid.*, p. 352), C. A. 7/46 (*ante*, p. 290) and C. A. 162/46 (*post*, p. 418).

(*H. K.*)

FOR APPELLANT: Eisenberg & Perlmutter.

FOR RESPONDENT: Unger.

JUDGMENT.

The Respondent sued the Appellant before the Tel-Aviv District Court on a promissory note and the statement of claim bore the endorsement "Summary Procedure" as prescribed by Rule 241 of the Civil Procedure Rules, 1938.

The Appellant submitted an application for leave to appear and defend, and the date fixed for hearing the said application was the 24.7.45. On that date, the Appellant (the Defendant-Applicant in the lower Court) failed to appear and the matter was adjourned to the 16.9.45 on the ground of Applicant's illness. On the 16.9.45, the Appellant again failed to appear but his wife came to Court, produced a medical report, and applied for a further adjournment. This was opposed by the Plaintiff (now Respondent). The learned Judge decided that there was no reason for further adjournment inasmuch as the Applicant had already been given the opportunity of appointing an advocate and had failed to do so.

It has been urged before us that the learned Judge when granting the first adjournment had not stated that an advocate should be retained. We hasten to state that we attach no importance to this objection. Whether or not the learned Judge did mention on the 24.7.45 that the Applicant should retain an advocate does not affect the decision he arrived at on the 16.9.45 not to grant a further adjournment. It was quite reasonable for the learned Judge to take the view that a summary procedure matter could not be indefinitely kept in abeyance,

the more so as an advocate could easily have done justice to the application even in the Applicant's absence.

After refusing a further adjournment, the learned Judge in the Court below dismissed the application for leave to appear and defend, and then proceeded to give judgment against the Defendant, *i. e.* present Appellant. The latter then applied to the District Court to set aside the dismissal of his application for leave to appear and defend and the judgment. This new application purported to be made under Rules 213 and 250 of the Civil Procedure Rules.

The District Court, composed of Judges Mani and Cheshin, considered that they had jurisdiction under Rule 250 to entertain the application, and finally dismissed it. It is against this dismissal that the present appeal has been lodged.

At the hearing of this appeal, Respondent's advocate sought to raise the preliminary objection that there was no appeal before us because leave to appeal had not been obtained, his contention being that the decision of the District Court refusing an application to set aside made under Rule 250 was an "order" and not a "decree". Notice of the preliminary objection not having been given to the other side, the Court pointed out to the learned advocate that he had not complied with Rule 333 of the Civil Procedure Rules, as amended in 1945. Respondent's advocate then contended that no notice under Rule 333 was necessary because the defect complained of could not be remedied by the Appellant. A similar contention was put forward in Civil Appeal 183/45 and was rejected on the ground that to read the rule as suggested would be stretching words beyond their clear meaning. The Court in C. A. 183/45 expressed the following view: "The rule was promulgated for the purpose of disposing of preliminary objections before the hearing. The question as to whether the defect can be remedied is one for the side against whom it is made to decide. It follows that Dr. Eliash is precluded from making the objection now". We wish to add, however, that non-compliance by a respondent with Rule 333 does not mean that an appellate Court would entertain an appeal lodged without leave (where leave is necessary) or an appeal lodged in a matter where no right of appeal exists. It seems to us that when an appellate Court, of its own motion, dismisses an appeal, the Respondent who has failed to comply with Rule 333 would not be entitled to his costs. In the present case we called upon the advocates to address us on the point whether the decision sought to be appealed from was a "decree" or an "order". Our decision was that the dismissal of the application to set aside made under Rule 250 was,

in this case, a decree, because, so far as the District Court is concerned, it conclusively determined the rights of the parties with regard to any further proceedings before the District Court.

With regard to the merits of the appeal we have no hesitation, after considering the arguments submitted on behalf of the parties, to hold that the learned District Court Judges were fully justified in refusing to set aside the decision of the learned Judge who dismissed Appellant's application for leave to appear and defend, and who, subsequently, gave judgment for the Plaintiff, now Respondent. We have already stated that, in our view, the dismissal of the application to appear and defend was fully justified.

This appeal is dismissed. The Respondent is granted costs on the lower scale with LP. 10 (ten) advocate's attendance fee.

Delivered this 18th day of April, 1946, in the presence of Perlmutter for Appellant and no appearance for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 232/45.

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

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

IN THE APPEAL OF:—

Abdul Karim Abdul Karim Moussa Fayad & an. APPELLANTS.

v.

Yousef Ben Moussa Ahmad Abu Fayed & 7 ors. RESPONDENTS.

Specific performance — Agreements to sell and void dispositions — Whether damages provide adequate remedy — Liquidated damages agreed for repudiation.

Appeal from the judgment of the Land Court, Jaffa, dated 27th June, 1945, in Land Case No. 14/43, allowed:—

Specific performance of a contract to sell land may be ordered although the contract provides for liquidated damages in case of repudiation, if the position of the parties has changed as a result of the contract, such as by the purchaser entering into possession and cultivating the land.

(*A. M. A.*)

ANNOTATIONS: *Cf.* the following authorities and the notes thereto in A. L. R.:

C. A. 97/44 (1945, A. L. R. 14), C .A. 132/44 (*ibid.*, p. 122), C. A. 437/44 (*ibid.*, p. 126), C. A. 192/44 (*ibid.*, p. 160), C. A. 150/45 (12, P. L. R. 345; 1945, A. L. R. 455), C. A. 40/45 (1945, A. L. R. 667) and C. A. 254/45 (*ante*, p. 155).

(*H. K.*)

FOR APPELLANTS: Elia.

FOR RESPONDENTS: Cattan.

JUDGMENT.

FitzGerald, C. J.: In this case certain essential facts are not in dispute. The litigation arose out of an agreement (Exhibit M/1) made between the Appellants and the ancestor of the Respondents. By that agreement the Respondents' ancestor purported to sell 6667 shares out of 16661 of lands of Deir el Balah, to the Appellants, or rather to their father because they are now suing as his heirs. The deed acknowledges the receipt of LP. 150 as consideration for the sale. There is an important clause 6 which is to the following effect:—

> "The first party undertook that, in case of any repudiation of the sale or contradiction to any of the conditions of this contract taking place on his part, he is bound to pay LP. 50.— as damages to the second party and this amount was decided and agreed upon between both parties".

The agreement was not registered, and the first point to be decided, as Mr. Cattan for the Respondents has emphasised, is whether this was a final sale or an agreement to sell. If it was a final sale the effect of non-registration is to make it null and void. Now, it is a well-established principle that in determining whether the contract is a final contract or an agreement to sell the Courts may go behind the form of the contract to ascertain what was the true intention of the parties. Clause 9 of the contract states that:—

> "It was made temporarily for securing the transaction and pending effecting the said official transaction in the *Tapu* Department".

This appears to us to be a clear indication that it was an agreement to sell, because it provided that the final statutory requisites were to be carried out at a later date. Having come to this conclusion, it follows that the Appellants are not precluded from seeking the equitable remedy of specific performance. It is scarcely necessary to emphasise once more that this equitable remedy of specific performance will not be granted if the Court is of the opinion that damages would be sufficient to compensate the aggrieved party. Mr. Cattan has argued that it follows irresistibly that damages are sufficient remedy in this case, because the parties themselves have, in fact, said so in Clause 6 of

the contract. But here again the answer to this question can only be given after ascertaining the true intention of the parties as disclosed by an examination of the contract as a whole. Clause 6 deals with repudiation of the sale, and it estimates the sum of LP. 50 as fit compensation for the repudiation. But, I think, that this must be interpreted as meaning a repudiation before any specific act had been done in pursuance of the contract — a repudiation before the rights or obligations of the parties had in any way been altered. It seems to me that here there has been an alteration in the position of the parties because there is clear evidence that the Appellants have been in possession and cultivated this land for a considerable number of years, so that there can be little doubt that during those years the position of the parties was changed as a result of the agreement. During this time the land has increased three or four fold in value, and it is obvious that the sum of LP. 50 would now be a very poor substitute for what the Appellants would lose by a repudiation of this sale. The whole basis of the District Court's judgment was that the Appellants had a sufficient alternative remedy in that they could claim back the amount actually paid together with liquidated damages of LP. 50. We, however, with great respect, cannot agree with the learned Judges of the District Court, that the established rights of the Appellants could be satisfied by liquidated damages of LP. 50. We are of opinion that equity demands that this contract which was made for valuable consideration paid and accepted, should be enforced. There must therefore be a decree for specific performance.

The appeal is allowed and the judgment of the Land Court set aside with costs, on the lower scale to include an advocate's attendance fee of LP. 10.—.

Delivered this 18th day of April, 1946, in presence of Mr. S. Sobel by delegation from Mr. M. Elia for Appellants & Mr. O. Mergurian for Respondents.

Chief Justice.

Curry, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEALS Nos. 342 & 321/45.

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

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

IN THE APPEALS OF :—

C. A. 342/45:—

Government of Palestine. APPELLANT.

v.

Adla bint Habib Seikaly & 10 ors. RESPONDENTS.

C. A. No. 321/45:—

Mustafa Abdul Hafiz El Aswad & 6 ors. APPELLANTS.

v.

Adla bint Habib Sekli & 26 ors. RESPONDENTS.

Land Settlement — Art. 20 in claims against Government — "Acquisitive prescription" — L. S. Ord., secs. 51—5 — Land Code, Art. 78 — Cross-Appeals, Re Cavander.

Appeals from the decision of the Settlement Officer, Haifa Settlement Area, in Case No. 83/Haifa, dated 27.7.45, dismissed as regards C. A. 321/45 and allowed as regards C. A. 342/45:—

1. Art. 20 of the Land Code cannot be relied upon against the Government even in settlement proceedings.
2. Sufficiency of notice of cross-appeal discussed.

(*A. M. A.*)

FOLLOWED: Cavander's Trusts, *in re*, 1881, 16 Ch. D. 270, 50 L. J. (Ch.) 292.

ANNOTATIONS:

1. Parts of the judgment dealing with the facts only are omitted.
2. *Cf.* C. A. 449/44 (12, P. L. R. 279; 1945, A. L. R. 339) and, as regards the effect of prescription of time in Palestine, see C. A. 244/45 (13, P. L. R. 84; *ante*, p. 129) and note 2.
3. *Vide* sec. 45 of the Interpretation Ordinance, 1945.
4. On the second point see Halsbury, Vol. 26, p. 119, para. 236, footnote (*e*) and Annual Practice, Commentaries to O. 58, R. 6, heading *"Notice of Cross-Appeal"*.

(*H. K.*)

C. A. No. 342/45:—

FOR APPELLANTS: Hazou.

FOR RESPONDENTS: J. Salomon and S. Khadra.

C. A. No. 321/45:—

FOR APPELLANTS: Cattan and S. Khadra.

FOR RESPONDENTS: J. Salomon and Hazou.

JUDGMENT.

— — — — — — — — — —*

I must now refer briefly to an incident which occurred at the beginning of the hearing of C. A. 321/45. The Appellants, who are the Awads, had directed their appeal against that part of the Settlement Officer's decision which deals with parcels 158, 22 and 23. Their advocate, Mr. Cattan, at the beginning of his address referred to parcels 22A and 25. Mr. Salomon for Respondents Shahins objected, and the Court upheld the objection. Later on, when C. A. 342/45 was heard, Subhi Bey Khadra (who also appeared for the Aswads) informed the Court that he had served notice under Rule 339 of the Civil Procedure Rules asking that the decision be varied in favour of Respondent No. 5 in respect of parcels 22A and 25.

After hearing arguments and on the authority of *Re* Cavander 16 Ch. D. 270, the Court held that the Aswads could not bring into the case parcels 22A and 25 which were not the subject matter of the appeal and which had been included in a separate claim in the settlement proceedings.

— — — — — — — — — —*

The first point I propose to deal with is whether the Settlement Officer erred when he held that in Land Settlement proceedings a party may rely on Article 20 of the Land Code as against the Government.

It is generally accepted and I would go so far as to say, beyond dispute, that Article 20 of the Land Code does not provide for what is commonly described as "acquisitive prescription". A plaintiff cannot base a claim to land on Article 20. The rights of a former owner or possessor of land are not extinguished after 10 years by virtue of Article 20, but he cannot enforce his claim unless the new occupier admits that he never had a good title to the land. It is important, however, to bear in mind the provisions of sections 51 to 55 of the Land (Settlement of Title) Ordinance, which provide that a person who has been in possession long enough to bar an action for recovery of the land may obtain a registered title to the land.

In my opinion, however, sections 51 and 52 cannot be used against the Government. These two sections and section 53 refer to rival claims as between a registered owner and a possessor and there is no ground whatsoever for holding that the expression "registered owner" includes the Government. And when one considers section 54 which

---

* Omitted.

(*Ed.*)

refers to unregistered lands, the position is made abundantly clear by the proviso which excludes *mahlul* land and *mewat* land from the effect of the section and which further re-affirms the provisions of Article 78 of the Land Code. As against the State a person must base a prescriptive claim to land on Article 78 of the Land Code which entitles such person to a title deed if he has possessed and cultivated state land for ten years without dispute, *i. e.* without his occupation being questioned before Court.

I therefore hold that, as against Government, Article 20 cannot be relied upon by a claimant even in Land Settlement proceedings.

The Appellant (*i. e.* the Government) having succeeded on this particular ground of appeal, the question I have to consider is whether the appeal should be allowed and the Settlement Officer's decision reversed in favour of Government or whether the case should be remitted back. For the reasons I will now proceed to give I have reached the conclusion that the latter course should be followed.

The Settlement Officer was undoubtedly influenced by the fact that the parcels in dispute were registered in 1926 (Exhibit 14) by Government as *miri* land granted to the High Commissioner in trust for the Government of Palestine. He took the view that the Government having assumed the capacity of *miri* holder, had to be regarded as an ordinary person, holding a *kushan* for *miri* land. The Settlement Officer was placed in presence of the fact that Government had registered itself as grantee of the right of possession (*tessauruf*) of land of which Government holds by law the *raqabe* or bare ownership, and no one seems to have attempted in the course of the settlement proceedings to ascertain the meaning (if any) of that registration.

Furthermore, the Settlement Officer having decided that Article 20 of the Land Code was applicable, did not have to investigate whether the Shahins had made title under Article 78 of the same Code: there is therefore a question of fact which must now receive the attention of the tribunal of first instance. As the record now stands, I cannot be certain that the Settlement Officer has definitely found that the Shahins could not succeed under Article 78. In this connection, I would call attention to the importance of having a clear finding as to the dates at which an uninterrupted period of prescription begins and ends, and also as to the importance (if any) of the fact that a particular claimant is not in actual possession when land settlement proceedings are initiated.

Had the Settlement Officer taken the line that he could not rely

for his decision on Article 20 of the Land Code, I am inclined to think that he would have applied himself to examine more closely certain aspects of the evidence, both oral and documentary, adduced by the Shahins. I have in mind the report of the so-called *Mewat* Commission (Exh. 16) made in 1922, which gives a description of the land and the extent of its cultivation. I have also in mind the letters addressed by the Shahins to Government officials in 1921, 1922 and 1928 (Exhibits 17, 18 and 26) in which they set out the various grounds upon which they relied for claiming a title deed. With regard to Exhibit 26 I would draw attention to the allegation made therein that the land was *Mahlul* and had been registered in the *Mahlulat* registers. This allegation that the land was *Mahlul* seems to have escaped the notice of all concerned and it was only during the last hearing of the appeal that Mr. Salomon pointed out that in Exh. 17 dated 31.8.1921, Selim Shahin mentioned that the Shahins had applied within the time fixed by Ordinance No. 186 "for the benefits" of the said Ordinance. It seems beyond doubt that the Ordinance No. 186 is the *Mahlul* Land Ordinance, 1920, published in the Official *Gazette* of the 15th November, 1920. That Ordinance required persons who had taken possession of *Mahlul* land prior to the commencement of the Ordinance to report the fact to the Administration within three months of the date of publication of the Ordinance and further provided that persons complying with that requirement would not be proceeded against but would in proper cases be granted a lease of the land.

I am inclined to think that a re-hearing of the case would enable the Government and the Shahins to take a more well-defined stand. As I have already remarked, it is quite obvious that the proceedings before the Settlement Officer consisted mainly of a duel on the issue of possession between the Shahins and the Aswads in which the Government took little active part; even when the appeal was argued it was evident that no clear-cut issue had emerged. This was chiefly noticeable in respect of the Respondents whose case was put on several alternative grounds.

The appeal C. A. 342/45 will, therefore, be allowed. The decision of the Settlement Officer is set aside and the case remitted to him for re-hearing as between the Appellant and Respondents 1, 2 and 3. The remarks I have offered will, I hope, guide the Settlement Officer and the parties as to the matters which fall to be investigated.

Respondents 1, 2 and 3 will pay to the Appellant in C. A. 342/45 costs on the lower scale with LP. 15 (fifteen) advocate's attendance fees.

Delivered this 6th day of June, 1946, in the presence of Mr. Mulky for Cattan for Appellants and Mr. Hooton & Mr. Salomon for Respondents in C. A. 321/45, and Mr. Hooton for Appellant and Mr. Salomon for Respondents in C. A. 342/45.

British Puisne Judge.

CRIMINAL APPEAL No. 46/46.

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

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

IN THE APPEAL OF:—

Kamel Musallam. APPELLANT.

v.

The Attorney General. RESPONDENT.

Food Control (Restriction of Movement) (Amend.) Order (No. 2) 1944 — "Edible Oil" includes olive oil.

Appeal from the judgment of the District Court, Nablus, in its appellate capacity dated 23rd of February, 1946, in Criminal Appeal No. 6/46 from the judgment of the Magistrate's Court, Jenin, dated 23.12.45, in Criminal Case No. 1925/45, dismissed:—

Olive oil is "edible oil" for the purpose of the Food Control (Restriction of Movement) (Amend.) Order (No. 2), 1944.

(*A. M. A.*)

APPELLANT: In person.

FOR RESPONDENT: Crown Counsel — (Hooton).

JUDGMENT.

We do not consider it necessary to call on Crown Counsel to reply.

The only point for decision in this appeal is whether the expression "Edible Oil" in the second schedule to the Food Control (Restriction of Movement) (Amendment) Order (No. 2) 1944, which appears at page 971, Suppl. No. 2 of 1944, includes "Olive Oil".

There is no doubt that olive oil is an edible oil, and we know of no definition of edible oil which excludes olive oil. In the circumstances we find that the appeal fails and we dismiss it.

Delivered this 15th day of May, 1946.

British Puisne Judge.

CIVIL APPEAL No. 352/45.

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

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

IN THE APPEAL OF :—

Dr. Josef Rosner. — APPELLANT. (CROSS-RESPONDENT).

v.

Heinrich Resek. — RESPONDENT. (CROSS-APPELLANT).

Court fees — A matter for the Registry — Objection to insufficiency cannot be taken — C. A. 34/44.

Appeal and Cross-Appeal from the judgment of the District Court, Tel-Aviv, dated 7th of October, 1945, in Civil Case No. 195/43; preliminary objection over-ruled:—

After assessment of Court fees and their acceptance by the counter clerk at the Registry, the point may not be taken by the opposing party that insufficient fees have been paid.

(*A. M. A.*)

FOLLOWED: C. A. 34/44 (11, P. L. R. 133; 1944, A. L. R. 392).

ANNOTATIONS: See the case quoted and note 1 thereto in A. L. R.

(*H. K.*)

FOR APPELLANT (CROSS-RESPONDENT): Badt.

FOR RESPONDENT (CROSS-APPELLANT): Goitein and Klimovsky.

RULING.

A preliminary objection has been raised that the proper Court fees on filing the cross-appeal have not been paid. We need only say that in our opinion the point is fully covered by Civil Appeal No. 34/44, 11 P. L. R., p. 133, where this Court established the general principle that the Court of Appeal will not sustain an objection as to the inadequacy of the fees where they have been assessed and accepted by the counter clerk at the Registry.

In this case the Cross-Appellant has paid the amount demanded by the Court counter clerk. The preliminary objection must, therefore, be over-ruled.

Given this 13th day of May, 1946.

Chief Justice.

PRIVY COUNCIL APPEAL No. 52/44.

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

BEFORE: Lord Porter, Lord Du Parcq and Sir John Beaumont.

IN THE APPEAL OF:—

Dr. Mahmud T. Dajani & 2 ors. APPELLANTS.

v.

Mustapha Bey Khaldi, since deceased, & an. RESPONDENTS.

Waqf — Dedication not complying with law relating to dispositions of lands — Conflict between heirs and mutawallis — Jurisdiction of Courts — P. O. in C., sec. 52, question whether land is waqf — Sec. 11 L. T. O. form of petition and of consent — "First" (Sec. 4(2) L. T. O.), "disposition" (sec. 2) — Lababidi v. Mamur awqaf, Turk Case, Abdul Jaber v. Sharia Court Jenin.

Appeal from the judgment of the Supreme Court of Palestine, sitting as a Court of Civil Appeal, in C. A. 251/43, dated 22.12.1943, allowed:—

1. The *Sharia* Court is not competent in cases of conflict between heirs and *mutawallis* whether lands are *waqf* or not.

2. Circumstances in which the provisions of the Land Transfer Ordinance have been complied with analized.

3. If the dedicator takes all steps required to give effect to the disposition, the fact that the *waqf* is not registered at the time of the dedicator's death does not invalidate it.

(*A. M. A.*)

REFERRED TO: H. C. 99/42 (9, P. L. R. 608; 1942, S. C. J. 605); C. A. 290/42 (10, P. L. R. 159; 1943, A. L. R. 166); C. A. 255/43 (10, P. L. R. 552; 1943, A. L. R. 721).

ANNOTATIONS:

1. The judgment under appeal (C. A. 251/43) is reported in 10, P. L. R. 646 & 1944, A. L. R. 104; for former proceedings in this matter see H. C. 129/42 (9, P. L. R. 771; 1942, S. C. J. 799; 12, Ct. L. R. 234) and for a subsequent application to the High Court wherein the judgment under appeal was criticised see H. C. 30/44 (1944, A. L. R. 249).

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

(*H. K.*)

JUDGMENT.

Lord Porter: This is an appeal from a decree and order dated the 22nd December, 1943, of the Supreme Court of Palestine sitting as a Court of Appeal whereby a judgment dated the 8th July, 1943, of

the Land Court of Jerusalem was reversed, and whereby it was adjudged that those who then represented the Respondents to this appeal be registered in the Land Registry of Jerusalem as owners of the lands in question in the appeal, and that the costs of the appeal to the Supreme Court be paid out of the estate. The question at issue is whether these lands were validly dedicated by their owner as a *waqf* so that on her death they passed to the *mutawallis* appointed by her as representatives of the *waqf* or whether there was no valid dedication and the lands passed to the heirs of the owner.

The lands in question are situated in Palestine and the disposition of land in that country is governed by the Land Transfer Ordinance (Cap. 81) the long title of which is "An ordinance to provide for the registration of dispositions and transmissions of land".

Its material terms are as follows:—

> "Section 2: 'Director' means the Director of Lands. 'Disposition' means a sale, mortgage, gift, dedication of *waqf* of every description and any other disposition of immovable property, except a devise by will or a lease for a term not exceeding three years, and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years.
>
> Section 3: This Ordinance shall apply to all immovable property, the subject of the Ottoman Land Code dated 7 *Ramadan* 1274 as well as to *mulk* land, all forms of *waqf* land and every other form of immovable property.
>
> Section 4: (1) No disposition of immovable property shall be valid until the provisions of this Ordinance have been complied with.
>
> (2) Any person wishing to make a disposition of immovable property shall first obtain the written consent required by the next succeeding sub-section.
>
> (3) In order to obtain the consent referred to in sub-section (2), a petition shall be presented through the Land Registry Office in which the land is situated to the Director setting out the terms of the disposition intended to be made and applying for his consent to the disposition.
>
> (4) The petition shall be accompanied by proof of the title of the transferor and shall contain an application for registration of a deed to be executed for the purpose of carrying into effect the terms of the disposition.
>
> (5) The petition may also include a clause fixing the damages to be paid by either party who refuses to complete the disposition if it is approved.
>
> Section 7: After the title has been examined and the consent required by section 4 has been obtained, a deed shall be executed in the form prescribed and shall be registered in the Land Registry: Provided that where a registered mortgage contains a covenant

by the mortgagor not to lease the mortgaged property without the consent of the mortgagee, the Director shall refuse to register any lease by the mortgagor of the mortgaged property unless the written consent of the mortgagee is first lodged with the Director of Lands.

Section 11: (1) Every disposition to which the consent required by section 4 has not been obtained shall be null and void:
Provided that any person who has paid money in respect of a disposition which is null and void may recover such money by action in the Courts.

Section 13: (1) When any immovable property passes by operation of a will or by inheritance, the legatees or heirs, as the case may be, shall be jointly and severally responsible for the registration of the immovable property in the name of the legatees or heirs within a year of the death.

(2) The registration shall be made upon the certificate of a competent Court stating that the person or persons requiring registration are entitled as legatees or heirs or upon a certificate signed by the *Mukhtar* or *imam* and two notables".

It was said by the Respondents that the requirements of these sections had not been complied with "that the dedication of this land as *waqf* was not valid, but was null and void or, at any rate, as the transfer had not been effected at the date of the death of the transferor, the suggested transmission to the *mutawallis* was ineffective to pass the property.

The property in dispute belonged before her death to *Sitt* Amineh Khaldi. The ownership of ten or eleven pieces of land is in issue and of these she was registered as part owner of three whereas of the others she had inherited a share from her relatives *Sheikh* Khaldi and Nafiseh and was entitled to obtain registration.

The lady died on the 9th November, 1942. She was anxious before her death to make a settlement of her lands as a *waqf* and accordingly, having, it seems, approached the *Kadi* of the *Sharia* or Religious Court in Jerusalem she made in his presence on the 4th April of the same year a dedication of the lands in question as *waqf*. The Respondents however maintain that such a dedication, though binding on the lady, does not constitute or take effect as a "disposition" of lands unless the provisions of the Land Transfer Ordinance are complied with and they contend that those provisions have not been fulfilled.

The facts relevant for a consideration of the point at issue are as follows:—

(1) On the 1st of April, 1942, *Sitt* Amineh sent an extract from the Register containing a list of the properties she wished to dedicate

to the *Kadi* of Jerusalem accompanied by a letter of which the material terms were:—

> "To His Honour, the *Qadi, Sharia* Court, Jerusalem.
>
> "Applicant: Amineh, daughter of the late Bader *Effendi* el Khaldi, of Jerusalem.
>
> Application: I own personally and by way of inheritance from my late brother *Sheikh* Khalil *Effendi* el Khaldi and my late sister Nafiseh el Khaldi the properties situated in Jerusalem as specified in a list registered in the *Tabu* Department of Jerusalem. I desire to dedicate as *waqf* what I am entitled to in the said properties under conditions which I shall prescribe before Your Honour. Will you please do me the favour to come to my house situated near the *Sharia* Court for registration of this *waqf* as I am a veiled Moslem Woman".

This letter was forwarded by the *Kadi* on the same day to the Registrar of Lands: he says:—

> "I beg to forward to you a schedule which was submitted to me by Amineh *Bint* Bader *Eff.* el Khaldi requesting registration as *waqf* of the property registered in her name and her share in the properties inherited by her from her brother *Esh Sheikh* Khalil *Eff.* and her sister *Sitt* Nafiseh, by virtue of two certificates of succession issued by this Court. Please say whether there is any objection for registration of the *waqf* or not".

Again on the same day the Registrar of Lands replied to the *Kadi* saying:—

> "On searching the Registers it appears that the *Raqaba* (ownership) of the properties shown in the *Tabu* extract attached to your letter is *mulk* property" (*i. e.* freehold) "and there is no objection to its being made a *waqf*, accordingly".

On receiving this reply the *Kadi* proceeded on the 4th April to the house of *Sitt* Amineh and there held a *Shariah* meeting at which the lady dedicated the properties in question to the *waqf* in the terms which are to be found in a *wakfieh* or deed of dedication of that date.

From that document it appears that not only had an extract from the Land Register been sent to the Registrar on the 1st of April but that a copy of the title deeds had also been furnished at the same time. Under the terms of the *wakfieh* the present Appellants were appointed *mutawallis* and the proceedings of the *Sharia* meeting terminated with the usual fictitious lawsuit by which dedication is effected and the transfer made irrevocable so far as the *Sharia* Court is concerned.

On the 15th of April the *Kadi* wrote again to the Registrar of Lands stating that a judgment had been given in the *Shariah* Court for the validity of the *waqf*, enclosing the *wakfieh*, and stating that the lady

was taking all the necessary legal and official measures for the registration of the *waqf* in the Land Registry.

The necessary petition fees were paid by the Appellant Mamduh *Eff.* Khadli, one of the *mutawallis,* on the 16th April and on the 22nd April he wrote to the Registrar of Lands pointing out that the *wakfieh* which had been sent by the *Kadi* had been registered in the *Shariah* Court, was accompanied by a schedule of properties and by two certificates of succession (*viz.*: those proving *Sitt* Amineh's succession from her brother and sister) and requesting that the properties might be registered as *waqf.*

Two days later the *Mutawalli* having discovered that two of the properteis dedicated had been mortgaged sent a further letter setting out this fact but asking that as the rights of the mortgagees had been reserved by the *wakfieh,* the mortgaged properties might be registered as *waqf* in the Land Registry. On the 27th April the Registrar of Lands sent on the file to the Director of Land Registration and enquired whether the transaction of the constitution of the *waqf* might be proceeded with in accordance with the *wakfieh* as requested by the applicant *Sitt* Amineh.

The Director replied to the Registrar on the 4th June authorizing the constitution of the *waqf* in respect of the properties not mortgaged, but requiring with regard to the mortgaged properties that no action be taken until the existing mortgage should be discharged.

Apparently some time after this note was despatched the Applicant or someone on her behalf either saw or wrote to the Director with the result that he wrote to the Registrar on the 16th September stating that the Applicant was insisting on the registration of the *wakfieh* on the properties which were mortgaged. The letter proceeds — "She desires therefore to register the *Wakfieh,* subject to the aforesaid mortgage. I have reconsidered the case and will have no objection to the registration of the *waqf* on the mortgaged properties provided a note is inserted against those entries that this *waqf* will take effect only subsequent to the mortgage being released as stated in the *Waqfieh*".

The steps necessary for registration had proceeded no further when the lady died but before that time the land had been officially valued in order that the fees payable might be ascertained. The *mutawallis* had always been prepared to make the requisite payment but since no information as to the amount of the valuation had been given to them until December, 1942, they were unable to tender the fees before that date. The Registrar kept those fees in deposit when they were tendered but did not accept them as payment of the sum due.

Immediately after the lady's death those then representing the Respondents claimed the property as her heirs, applied to be registered in the Land Registry as owners, brought this action in the Land Court claiming that the land should be registered in their names and applied for an injunction to restrain the Respondents from taking any step to register the lands in the name of a *waqf*. Meanwhile the Appellants had entered into possession of the property, had received the rents and profits, paid the interest on the mortgages and, it seems, sold some of the lands.

In these circumstances an *interim* injunction was granted until the trial of the action but on the hearing the action was dismissed and the injunction discharged.

An appeal however to the Supreme Court was allowed, the judgment of the Land Court reversed and the properties in dispute ordered to be registered in equal shares in the names of the Respondents. It is from that judgment that this appeal to His Majesty in Council is preferred.

The first argument put forward before their Lordships on behalf of the Appellants was that the matter was solely one for decision in the *Shariah* Court, had there been finally decided and was not within the jurisdiction of the Land Court.

The contention was put in this way: The Palestine Mandate, it was said, provided that "Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular the control and administration of *waqf* shall be exercised in accordance with religious law and the dispositions of the founders".

The Palestine Order-in-Council of 1922 was promulgated to carry out the mandate and provided:—

> "17. (1)(c) No Ordinance shall be promulgated which shall be in any way repugnant to or inconsistent with the provisions of the Mandate, and no Ordinance which concerns matters dealt with specifically by the provisions of the Mandate shall be promulgated until a draft thereof has been communicated to a Secretary of State and approved by him, with or without amendment.
>
> 42. The High Commissioner may by order establish Land Courts as may be required from time to time for the hearing of such questions concerning the title to immovable property as may be prescribed.
>
> 46. 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, 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 qualification as local circumstances render necessary.

— — — — — — — — — — —

51. Subject to the provisions of Articles 64 to 67 inclusive, jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the Courts of the religious communities established and exercising jurisdiction at the date of this Order. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

52. Moslem Religious Courts shall have exclusive jurisdiction in matters of personal status of Moslems in accordance with the provisions of the Law of Procedure of the Moslem Religious Courts of the 25th October, 1333, *A. H.* as amended by any Ordinance or Rules. They shall also have, subject to the provisions of any Ordinance or of the Order of the 20th December, 1921, establishing a Supreme Council for Moslem Religious Affairs, or of any Orders amending the same, exclusive jurisdiction in cases of the constitution or internal administration of a *waqf* constituted for the benefit of Moslems before a Moslem Religious Court.
There shall be an appeal from the Court of the *Qadi* to the Moslem Religious Court of Appeal whose decision shall be final".

Relying upon these provisions the Appellants say that the rights of the parties to the ownership of the disputed properties is a matter of succession, succession is personal status and Moslem Religious Courts are given exclusive jurisdiction in such matters.

They support their argument by referring to sections 2, 3(1), 6(1) and 25(1) of the Succession Ordinance which are in the following terms:—

"2. In this Ordinance unless the context otherwise requires — 'civil court' means a court established by, and sitting under the

authority of, the Government of Palestine, but does not include a Religious Court;

3. (1) The Civil Courts shall have exclusive jurisdiction in all matters relating to the succession to, and the confirmation of wills of, every Palestinian citizen and any other person, not being a foreigner:—

Provided that such citizen or other person was not at the date of his death either a Moslem or a member of one of the religious communities.

6. (1) The Moslem Religious Courts shall have exclusive jurisdiction as to all matters relating to succession upon death to the estate of a Moslem, whether under a will or otherwise.

25. (1) Any person claiming to be entitled to any share in immovable property forming part of a succession may apply to the Director of Lands to enter his name upon the register in respect of his interest, and such entry shall be made accordingly upon payment of the prescribed fees and upon production to the Director:—

(i) where the deceased was a Moslem, of an *ilam sharia* from the competent Religious Court;

(ii) in any other case:—

(a) of an order of the President of the competent District Court in any case in which there has been registered at the land registry a memorandum of an order under section 9(2), or the probate of a will;

(b) of an order of the President of the competent District Court in any case in which the deceased was a foreigner as to whose succession no order to refer has been made in pursuance of section 5, and in any case in which the deceased was not, at the time of his death, a member of one of the religious communities;

c) of an order of the competent Court of the community of which the deceased was a member at the date of his death in any case not falling within paragraphs (a) or (b)".

Though this question was fully argued before the Board, it is doubtful if it was persisted in before the Supreme Court.

But however this may be, in their Lordships' view it must fail. In their opinion no question arises here of succession. Admittedly the Respondents are *Sitt* Amineh's successors. Indeed they have been so declared by a certificate of the *Shariah* Court dated the 23rd November 1942. It is true that that certificate limits the succession to those lands which were not dedicated as *waqf*, but the ownership of the dedicated lands is not a question of succession. It depends upon a transfer by way of *waqf* purported to be made by the lady in her lifetime and is no more a succession than would be a dispute between the *mutawallis* of a *waqf* who claim that their title prevails over that of a purchaser from a former owner. The lady's death is but an in-

cident, not the foundation of the *mutawallis'* title. Their title is the dedication, not the death.

But even if the matter were not otherwise plain it is to be observed that section 52 of the Order-in-Council makes the jurisdiction of the Moslem Religious Courts subject to the provisions of any Ordinance and section 5 of the Civil and Religious Courts (Jurisdiction) Ordinance (Cap. 18) declares that "Every action or other proceeding concerning the ownership or possession of immovable property, shall be decided by a Civil Court, notwithstanding any claim by any party or person that the land is *waqf*". Their Lordships entertain no doubt that the Civil Courts had jurisdiction to hear and determine the matter.

Secondly, however, it was said that the land had been solemnly dedicated, that the lady had taken, or had had taken on her behalf, all steps that were possible to perfect the transfer and that the delay in registration, which was not her fault, was not a bar to the Appellant's claim. In answer, the Respondents relied upon the Land Transfer Ordinance, alleged that its terms had not been complied with and said that the gift of the land had never been perfected.

It is not disputed that the Ordinance applies to any case where the Land Court has jurisdiction nor that the dedication of a *waqf* is a disposition.

Accordingly it is argued that the provisions of the Ordinance have not been complied with in that (1) the written consent of the Director of Lands was never obtained and in any case was not obtained first, *i. e.* before the disposition was made.

(2) That no petition was presented and in particular no petition setting out the terms of the disposition;

(3) that no proof of title was sent;

(4) that the disposition was therefore invalid under section 4(1), and null and void under section 11.

Their Lordships are not prepared to accede to these arguments. They do not consider that the letter of the 1st April amounts to a petition within the terms of the Ordinance or that the answer of the Registrar of Lands amounts to a consent. They are, however, of opinion that the three letters of the 1st, 15th and 22nd April are a sufficient compliance. Having regard to the tenor of the correspondence they can have no doubt that the application was made on behalf of the lady. No particular form of petition is required, the *Waqfieh* deed was sent and contained all the terms of the disposition, the land had been identified and apparently two certificates of succession were sent dealing with the property which had passed to *Sitt* Amineh from her brother

and sister. It is true that one of the certificates printed in the record is of later date than this letter, but no denial of the receipt of both appears in the correspondence and no point of their absence is to be found in the arguments or judgments in the Courts below. It is also true that the Land Registrar who alone gave evidence at the trial in the Land Court stated that proofs of title included a *Mukhtar's* certificate as well as a Certificate of Succession, but no complaint of the absence of these documents is to be found in the letters emanating from or passing within the precincts of the Land Registry and no point as to their absence appears to have been taken in the Courts in Palestine.

It is said, however, that the absence of consent by the Director of Lands is a fatal flaw, that even if he indicated his consent with regard to the unmortgaged properties on the 4th June and of the mortgaged properties also by the letter of the 16th September, that consent was not given before the disposition and in any case was not given to the Applicant but was merely a departmental communication.

These letters are indeed dated after the dedication and *Wakfieh*. In their Lordships' view however the word "first" in section 4(2) is not to be taken as meaning "before the dedication", but as conveying that the consent must be given before the disposition becomes effective. This view is borne out by the terms of section 4(1) where it is said that the disposition shall not be valid until the provisions have been complied not as is the case with a failure to obtain the Director's consent at all, that the disposition is null and void under section 11(1).

Moreover, in their Lordships' opinion, the necessity of obtaining the written consent of the Director does not require that the consent should be communicated to the Petitioner.

In fact from the terms of the Director's letter of the 16th September, their Lordships would draw the inference that at any rate the Director's consent to registration of the unmortgaged property had been communicated to the Applicant, but provided the Director had assented in writing they do not think that his consent must reach the Applicant. It is required by the Registrar of Lands as his authority for the transfer, not by the transferee as part of his title.

Their Lordships are therefore of opinion that the provisions of the Land Transfer Ordinance have been sufficiently complied with.

There remains, however, the question whether a disposition of immovable property by way of gift can take effect before registration. The Chief Justice of Palestine thought not and Edwards, J., though with some reluctance, concurred. This view is expressed in the words

"A dedication of land as *waqf* does not become a disposition until such dedication has been registered under and in accordance with the provisions of the Land Transfer Ordinance".

In truth, however, under the definition contained in section 2 of the Land Transfer Ordinance "disposition" means (*inter alia*) "dedication of a *waqf* of every description" and is no less a disposition though it has not yet been registered.

The question now under consideration, as their Lordships see it, is not whether there has been a disposition but whether the voluntary transfer had been completed or sufficiently completed before the lady's death or whether it must be regarded as an incomplete transfer, which the law would not perfect after the decease of the dedicator.

In this connection their Lordships were referred to a number of cases tried in the Courts of Palestine in which conflicting decisions have been given.

In the first of these, Lababidi *v. Ma'mour Awqaf* (1942 9 P. L. R. 608) there does not appear to have been either petition, consent or registration.

The dedicator was *mutawalli*, remained in possession, and sold part of his property. He had done nothing towards perfecting his gift and his transfer might well be held to be ineffective.

The Turk case (1943, 10 P. L. R. 159) was decided in favour of the validity of the disposition.

In that case consent was held to have been obtained and it does not seem to have been suggested that any of the other formal steps had been omitted, save only that the transfer had not been registered. In these circumstances the Supreme Court, sitting as a Court of Appeal, held that the dedication was not null and void under section 11 and ordered that the transfer in the Registry into the names of the heirs of the dedicators should be annulled.

In a third case also on appeal, Abdul Jaber *v. Qadi* of the *Shariah* Court, Jenin (1943, 10 P. L. R. 552) the facts appear to have been somewhat similar to those in Lababidi's case and the same result followed. The Court seems to have laid some stress on the fact that a consent which had perhaps been obtained seven years after the execution of the *wakfieh* was obtained too late and it may well be that after that lapse of time a consent would be ineffective.

Of these three cases the first and last would appear to depend on facts differing from those in the present case, which indeed presents features more favourable to the efficacy of the dedication than even

the second since in that case no attempt at registration seems to have been made, whereas here the lady or her advisers seem to have taken every requisite step but only to have failed to obtain the necessary registration owing to the delay (no doubt unavoidable) in the Registry itself. In these circumstances their Lordships do not think that the dedication fails because the transfer had not been registered before the lady's death.

She had done all the acts required to be done by her, even to putting the *mutawallis* into possession. Nothing remained to be done which she could do or which would require an order of the Court to compel her to do in order to complete the disposition. Indeed so far as she was concerned, the dedication having been completed in the *Shariah* Court was irrevocable.

No doubt, as was held in the Turk case, purchasers for value or mortgagees would take precedence over volunteers whose title though earlier in date was unregistered, at any rate if they were without notice of that disposition, but heirs do not give consideration for the land they inherit: they are successors not purchasers and are in no better position than volunteers and as their Lordships have already pointed out the disposition is not null and void except where the necessary consent has not been given. In other cases it is merely invalid and even then only until the prescribed provisions have been complied with.

In the present case no further order of the Court is required on behalf of the Appellants to enable the Appellants' title to be completed. The Registrar unless prevented by injunction was and no doubt is prepared to register the Appellants as owners of the property.

In these circumstances in their Lordships' opinion the fact that *Sitt* Amineh died before registration could take place did not prevent the disposition being a valid one, capable of being registered after her death.

They will therefore humbly advise His Majesty that the appeal should be allowed, the order of the Supreme Court discharged, and the order of the judge of the Land Court restored.

The Respondents must pay the costs of the hearing before their Lordships' Board: the costs in the Courts in Palestine to be payable out of the estate.

Delivered this 14th day of May, 1946.

CIVIL APPEAL No. 151/44.

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

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

IN THE APPEAL OF:—

Emile Ibrahim Khalil Jad'un & 36 ors. APPELLANTS.

v.

Na'im Hanna Ayoub el-Tawasha & 159 ors. RESPONDENTS.

Registered title — When may be upset by unregistered document — Land Settlement.

Appeal from the decision of the Land Settlement Officer, Tiberias Settlement Area, dated 4.3.1944, in Case No. 1/Tabgha, allowed and case remitted:—

Registration may be upset by adverse possession or by a subsequent document. But if by document, the latter should be of a solemn nature.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 416—419 & 421/44 (*ante*, p. 313) and note 3 thereto; see also C. A. 355/44 (11, P. L. R. 642; 1944, A. L. R. 760) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANTS: Goitein and F. Atalla.

FOR RESPONDENTS: Cattan.

JUDGMENT.

This is an appeal from the decision of the Settlement Officer, of the Tiberias Settlement Area. It concerns land forming part of Tabgha village on Lake Tiberias. The area involved is 30 *feddans*. The first point to be emphasized and to be borne in mind throughout, is that the land was registered in the *Tabu* in the name of the Appellants. This Court has over and over again emphasized the sanctity of registration in considering the question of ownership of lands. Now it is true that in certain circumstances registration can be defeated by the establishment of adverse possession. In this case it appears that the Settlement Officer held that the original registration could be set aside by a copy of an unregistered document which was produced. It may well be that a prior registration could be set aside by a later executed document, but that document must at the least be of the same solemnity as the document of registration. Exhibit C in this case did not purport to be anything more than an extract from a book kept at the Orthodox Bishopric, at Acre. Many of the Appellants do not even agree to its authenticity, they say it was a bluff and a forgery. Apart from this latter averment, we find it difficult to appreciate how

this document, which was concerned mainly with the patching up of a religious dispute, although it is true it did deal with the lands in question, could in its present form be held to supersede the registration in the official land register. We feel that there is no course open to us, but to remit the case to the Settlement Officer to enquire more deeply into the origin of this document. We direct him to call for the production of the original and to have it proved by an official of the Bishopric, whose duty it is to keep the original of a document of this nature. Having done so he must then decide whether the document purported to alter the rights set out in the registration and whether in law it was capable of so doing.

We can deal shortly with the other points raised by Mr. Cattan, namely, that if Exhibit "C" was rejected, he would succeed on adverse possession. That may well be so, but there was no finding by the Settlement Officer of adverse possession sufficient to defeat the original registration. He stated very clearly that the basis of his judgment not only in regard to the legal rights which the document purported to confer but also on the issue of continuous possession, was Exhibit "C". In his revised judgment, the Settlement Officer will also doubtless deal with the question of adverse possession apart altogether from Exhibit "C".

Costs to be in the cause, but for the purpose of adjustment we fix the costs of this appeal at LP. 10.—.

Delivered this 15th day of July, 1946, in the presence of Mr. Moyal for Appellants and Mr. Cattan for Respondents.

Chief Justice.

CRIMINAL APPEAL No. 44/46.

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

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

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Mordechai Cohen. RESPONDENT.

Appeals in criminal cases — Different judgments on several counts — "Ruling" and judgment — Castro v. R. — Appeal by A. G. under sec. 67(1)(b) T. U. I. Ord., CR. A. 111/41 "facts", CR. A. 27/46.

Appeal from the judgment of the District Court, Jerusalem, dated 4th February, 1946, in Criminal Case No. 240/45, whereby Respondent was discharged from 37 counts preferred against him for non-compliance with an order of the Controller of Light Industries given under the Defence Regulations, 1939, *contra* Regulations 46 and 76 of the Defence Regulations, 1939, and paras. 1 and 4 of the said Order; preliminary objections overruled:—

1. An order discharging the Accused on one or more counts is a judgment.
2. A separate judgment may be given for each count.
3. The Attorney General may appeal from a judgment discharging the Accused for lack of jurisdiction.

(*A. M. A.*)

FOLLOWED: Castro *v.* R., 1881, 6 App. Cas. 229, 50 L. J. (Q. B.) 497, 44 L. T. 350; O'Connell *v.* R., 1844, 3 L. T. (O. S.) 429; CR. A. 111/41 (8, P. L. R. 403; 1941, S. C J. 378; 10, Ct. L. R. 125); CR. A. 27/46 (*ante*, p. 259).

ANNOTATIONS:

1. On the second point see Halsbury, Vol. 9, p. 138, second paragraph and *ibid.*, p. 174, para. 253, end of second paragraph.

Cf. CR. A. 122/42 (9, P. L. R. 592; 1942, S. C. J. 631) and note 1 in S. C. J.

2. On the last point see note 2 to CR. A. 27/46 (*supra*).

(*H. K.*)

FOR APPELLANT: Asst. Government Advocate — (Schajewitz).
FOR RESPONDENT: Goitein.

INTERLOCUTORY JUDGMENT.

Curry, J.: The Respondent was charged before the District Court on some 85 counts. In respect of counts 49—85 which were for "Non-compliance with an Order of the Controller of Light Industries contrary to paragraph 1—4 of such Order, and Regulations 46—76 of the Defence Regulations, 1939", the Respondent submitted that there was no case to answer as the Court had no jurisdiction to try those counts. The learned trial Judge came to the conclusion that he had not jurisdiction to try those counts summarily and discharged the Accused in respect of those counts. The trial in respect of the other counts proceeded and judgment was given in respect of them at a later date. The Attorney General has appealed against the discharge of the Accused in respect of the counts 49—85.

At the hearing of this appeal, Mr. Goitein, on behalf of the Respondent, raised two preliminary points.

His first objection is that there is no appeal before the Court because the decision to discharge the Accused in respect of these counts which was made on the 4th of February 1946 is headed "a Ruling". There can be no doubt that a decision discharging an accused is in

fact a judgment. I am unable to agree with the submission that there cannot be a separate judgment in respect of each count. In my opinion it is quite in order if an accused pleads guilty to certain counts for the Judge to convict and sentence the accused in respect of those counts and then proceed with the trial of the remaining counts and give judgment in respect thereof. The conviction in respect of the former counts would be a valid judgment. I am supported in this opinion by Archbold, 31st edition, p. 206:—

> "It is now the practice to enter up judgment and sentence separately on each count on which the prisoner has been convicted and not generally on the whole indictment, so that if on appeal the conviction on one or more counts is quashed, the judgment on good convictions on other counts may stand".

In Castro *v.* R., 6 Appeal Cases, 229, an indictment for perjury contained two counts, charging perjury to have been committed by the Defendant on two different occasions. It was there argued by the Accused that however many counts there might be, whether charging distinct offences or not, only one judgment could properly pass upon indictment for misdemeanour. The Lord Chancellor in his judgment says:—

> "Not only was no authority cited for that proposition, but the authority, which was for a different purpose relied upon, (O'Connell *v.* the Queen) clearly establishes the contrary".

In the latter case (O'Connel *v.* the Queen) it was held that where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. I think it is clear from the foregoing authorities that a separate judgment may be given upon each count in the one indictment. It follows that this objection must be overruled.

The next objection is that the Attorney General has no right of appeal in that he purports to appeal by virtue of section 67(1)(b) of the Criminal Procedure (Trial Upon Information) Ordinance *viz.* "that the law was wrongly applied to the facts". Mr. Goitein argues that no facts were adduced to which the law was applied. I fail to distinguish this case from Criminal Appeal No. 111 of 1941, 8 P. L. R. 403. In that case the objection was that the Court had no jurisdiction as the information had been filed in the wrong District Court. It was there held that the Attorney General had a right to appeal under this sub-section as the word "facts" had a wider meaning than "facts found by the Court of Trial founded on the evidence", and that judgment was again followed in Criminal Appeal 27/46. In Criminal Appeal 111 of 1941 two of the learned Judges expressed their doubt as to the

right of the Attorney General to appeal in such circumstances but they felt bound to follow the previous decisions of this Court. Sharing as I do those grave doubts as to the correctness of these decisions, I would have been inclined to hold that the time had now come to review those decisions, but I understand that the law is shortly being clarified in this matter and in those circumstances I think it would perhaps be inadvisable at this late and final stage to reverse our established case law. For this reason this objection must also be overruled.

Given this 21st day of May, 1946, in the presence of Schajowitz for Appellant, and Moyal for Respondent.

A/British Puisne Judge.

De Comarmond, J.: I concur.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 162/46.

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

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

IN THE APPEAL OF:—

Mussa Shamikh el Wuheidi. APPELLANT.

v.

Turki Mohammad Jaiyab el Wuheidi & an. RESPONDENTS.

Appeal listed for dismissal — Non payment of deposit — Rule 333 need not be complied with — Extension of time — "Good cause" — Forwarding a letter which is not received.

Appeal from the Decision of the Assistant Settlement Officer, Ramleh Settlement Area, dated the 11th of March, 1946, in Case No. 8/Mukheizin, dismissed:—

1. When an appeal is listed for dismissal for non payment of fees, the Respondent need not give notice under R. 333.
2. That counsel wrote to his client a letter which the client did not receive is not "good cause" for an extension of time.

(*A. M. A.*)

ANNOTATIONS:

1. On Rule 333 of the C. P. R., see C. A. 7/46 (*ante*, p. 290) and notes 1 & 2.
2. *Cf.* C. A. D. C. Jm. 6/46 (1946, S. C. D. C. 373).

3. On the requirements of "good cause" in such cases see C. A. 451/44 (1945, A. L. R. 194) and note 2; *cf.* C. A. 462/44 (12, P. L. R. 38; 1945, A. L. R. 437) and note 3 in A. L. R.

(*H. K.*)

FOR APPELLANT: F. Ghussein.
FOR RESPONDENTS: Nakhleh.

JUDGMENT.

This appeal has been listed for dismissal by the Registry of this Court for non-payment of deposit within the time limit fixed by the Assistant Registrar. Two points arise: The first is whether a notice under Rule 333 of the Civil Procedure Rules, 1938, is necessary where the appeal has been listed for dismissal by the Registry of the Court. In our opinion it is not. Turning now to the merits: This Court will always grant an extension where a reasonable cause has been shown. The cause alleged in this case is the failure of Counsel for Appellant to get in touch with his client in time. It is the duty of Counsel to take all reasonable steps to ensure that his client receives the letters he sent to him. In this case Fawzi Bey says he dispatched a letter which was not received. This is not a sufficient cause for granting an extension.

The appeal is therefore dismissed with LP. 5 inclusive costs to the Respondent.

Delivered this 24th day of June, 1946.

Chief Justice.

INCOME TAX APPEAL No. 6/45.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Keren Hashomer Hatzair Co. Ltd. APPELLANT.

v.

1. The Commissioner of Income Tax, Jerusalem,
2. The Assessing Officer, Galilee District, Nazareth. RESPONDENTS.

Income Tax — Fund to give credits to Hashomer Hatzair settlements — Donations — Sec. 5(1)(*a*), *"Gain or Profit" — Lincolnshire Sugar*

Co. v. Smart, Higgs v. Wrightson, Ostime v. Pontypridd and Rhondda Joint Water Board, Crook v. Seaham Harbour Dock Co.

Appeal from the assessment made by the Respondents dated the 25th of May, 1945, in Assessment No. 146/42 for the year of assessment 1943/44, allowed:—

A donation is not subject to income tax under sec. 5(1)(*a*).

(*A. M. A.*)

REFERRED TO: Crook *v.* Seaham Harbour Dock Co., 1931, 96 J. P. 13, 15 Tax C. 333, 48 T. L. R. 19; Lincolnshire Sugar Co., Ltd. *v.* Smart, 1937, A. C. 697, 106 L. J. (K. B.) 185, 156 L. T. 215, 53 T. L. R. 306, 20 Tax C. 643, (1937) 1 All E. R. 413; Clyde Higgs *v.* Wrightson, 1944, 1 All E. R. 488; Ostime *v.* Pontypridd and Rhondda Joint Water Board, 1944, 2 All E. R. 237.

ANNOTATIONS:

1. *Cf.* Halsbury, Vol. 17, pp. 147—9, sub-sec. 7 — *Trade Receipts.*

2. See, on sec. 5(1)(a) of the Income Tax Ordinance, I. T. A. 3/44 (11, P. L. R. 462; 1944, A. L. R. 490) and note in A. L. R.

(*H. K.*)

FOR APPELLANT: Persitz.

FOR RESPONDENTS: Wittkowski.

JUDGMENT.

The question to be decided in this appeal is whether the sum of LP. 576 received by the Appellant company as a contribution is subject to income tax.

Mr. Persitz, advocate, who appeared for the Appellant company called Mr. Eliezer Shapiro, who is a director of the company, as a witness.

It appears from the evidence of this witness that the company was established for the purpose of giving credits to settlements of the *Hashomer Hatzair*. The establishment of this company was promoted by the executive committee of *Hashomer Hatzair*, and the control of the company is vested in that committee which is entitled to appoint the directors of the company with the exception of one director who is appointed by the General Workers Association. The General Workers Association has not always exercised its right to appoint a director and in such case the executive committee of *Hashomer Hatzair* made that appointment too.

The Appellant company obtains some of its funds from the executive committee of *Hashomer Hatzair*, and other funds are obtained by direct sale of shares of the company to settlements. Ordinarily if the executive committee of the *Hashomer Hatzair* provide funds for the company they receive shares of equivalent value. The company also receives sums of money by way of donations from people and institutions abroad.

In the year 1942 the company received the sum of LP. 576 from the

executive committee of *Hashomer Hatzair,* and those responsible for the management of the company suggested to the executive committee that they should waive their rights in respect of the shares which would normally have been issued. The reason for this request was that the company would otherwise have closed the year with a deficit. The executive committee acceded to this request and gave the LP. 576 as a free gift. It appears from the statement of the witness that such free gifts had been given previously, and have also been given subsequently. The witness has stated that in consideration of the LP. 576 the company did not agree to render any special services to the executive committee of the *Hashomer Hatzair.*

The question to be decided is whether this sum of LP. 576 is income falling within section 5(1)(a) of the Income Tax Ordinance, 1944. That is to say, is it a gain or profit from any trade, business, profession or vocation?

Mr. Wittkowski for the Respondents has referred to the case of Lincolnshire Sugar Company *v.* Smart (1937) A. E. L. R. Vol. 1, p. 413, the case of Higgs *v.* Wrightson (1944) Vol. 1, A. E. L. R., p. 488, and the case of Ostime (H. M. Inspector of Taxes) *v.* Pontypridd and Rhondda Joint Water Board (1944) 2 A. E. L. R. 237.

In the present instance, it is not disputed that the contribution was free and voluntary. The company had no power to call for it. That cannot be said of the three cases to which Mr. Wittkowski has referred.

In the case of Crook *v.* The Seaham Harbour Dock Co. 16 T. C. 333 (referred to in 17 Hailsham, page 148, para. 307) it was held that a grant by Government of an amount equal to half the interest on money borrowed for the purpose of extending certain docks, such grant being made in order to assist unemployment, was not a trade receipt. The position here is somewhat similar. The contribution was made in order to enable the company to give loans to certain settlements.

In the present case I find myself quite unable to see how this sum of LP. 576 could possibly be described as being a gain or profit from any trade, business, profession or vocation. A free gift which is made to a private person is not subject to the payment of income tax, and I am unable to find any reason why a free gift, such as this, should be subject to income tax merely because it is made to a company.

In the result, I find that this appeal must be allowed, and that the income tax payable by Appellant in respect of the year of assessment 1943/44 must be assessed at LP. 38.137.

Delivered this 24th day of May, 1946 in the presence of Mr. Rosenberger for Appellant and Mr. Wittkowsky for Respondents.

British Puisne Judge.

HIGH COURT No. 11/46.

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

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

IN THE APPLICATION OF :—

Haj Ismail Ij'ara El Dweik. PETITIONER.

v.

The Local Building and Town Planning Commission, Hebron & an. RESPONDENTS.

Application by Respondent in High Court Case for extension of time to file an additional affidavit in reply.

Application for extension of period stipulated in the Order *Nisi* dated 25.2.46, for further 10 days, refused:—

High Court will not grant Respondent extension of time to file additional affidavit without his showing sufficient cause for such relief.

(*M. L.*)

REFERRED TO: H. C. 25/45 (12, P. L. R. 257, 1945, A. L. R. 543) and H. C. 15/46 (*post*, p. 442).

ANNOTATIONS: For authorities on Affidavits under the High Court Rules, see cases referred to (*supra*) and annotations in A. L. R.

(*A. G.*)

FOR APPLICANTS: Sha'ar.
(RESPONDENTS)

FOR RESPONDENTS: Nazzal and Hammoudeh — (by delegation).
(PETITIONER)

ORDER.

An order *nisi* was issued on the 25th February, 1946, on the application of Haj Ismail el Dweik and was directed to the Local Building and Town Planning Commission of Hebron and to the Chairman of the Municipal Council, Hebron.

The time fixed for filing replies expired on the 19th March and an affidavit sworn to by the second Respondent and dated the 16th March was filed in due time. It is important to note that in that affidavit the deponent stated that he had been authorised by the Municipal Council and by the Local Building and Town Planning Commission of Hebron to "reply and declare" on their behalf.

An application was made before us yesterday asking for an extension of time to file replies. The object of this application is to file an

affidavit sworn to by the engineer of the Hebron Local Building and Town Planning Commission who has, it is alleged, important technical evidence to give. It is alleged in the application that there was difficulty in securing the engineer's affidavit in time.

Fayez Eff. Nazzal, for Respondent, has raised several objections to this application. One of his objections is that a respondent is not entitled to file more than one affidavit in reply. In support of this objection, he quoted H. C. Case No. 25/1945.

We wish to call attention to the remarks made in High Court Case No. 15/46 with regard to the abovementioned decision. One of the relevant remarks was as follows: "We do not think that the learned Judge who decided H. C. 25/45 intended to lay it down as an absolute rule that the Court cannot admit more than one affidavit from one respondent. We think that he was only expressing the view that unnecessary affidavits ought not to be allowed, and with that view we agree". Another relevant remark made in the same case was that "it is obviously possible that the Respondent may not be in a position to give, himself, evidence as to facts which it is necessary for the Court to know in order to enable it to come to a finding".

In the present instance, we do not have to decide the point because we are of opinion that no sufficient cause has been shown for granting an extension of time. We do not even have before us an affidavit in support of the averment made that it was difficult to obtain the engineer's affidavit. Furthermore, as already pointed out, the Mayor's affidavit purports to be on behalf of both Respondents and gives no inkling that further evidence is essential.

For these reasons we refuse the application.

Respondent's advocate is allowed LP. 5 (five) attendance fee for yesterday's hearing.

Given this 2nd day of April, 1946.

British Puisne Judge.

CIVIL APPEAL No. 65/46.

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

BEFORE: De Comarmond and Frumkin, JJ.

IN THE APPEAL OF:—

"Arad" Ltd. Association Dalia Mechanical Workshops. APPELLANTS.

v.

Migdal Insurance Company Ltd. RESPONDENTS.

Insurance — Employers' indemnity policy — Effect of subsequent statutory alteration of compensation scale — Construction, Mayor of Berwick v. Oswald, Bailey v. de Crespigny, Aktieselskabet Ocean v. B. Harding & Sons Ltd., Reigate v. Union Manufacturing Co. — Construction contra proferentem — Increase of compensation after occurrence of accident — W. C. (A) *Ord.* 1943.

Appeal from the judgment of the District Court of Jerusalem dated the 13th day of February, 1946, in Motion No. 444/45, allowed:—

1. On the construction of the policy in this case the indemnity contemplated was against payments due under the Workmen's Compensation Ordinance as from time to time amended.
2. *Quaere* whether the increased rate is payable in respect of accidents predating the amending Ordinance.

(*A. M. A.*)

REFERRED TO: Berwick-upon-Tweed Corporation *v.* Oswald, 1854, 23 L. J. (Q. B.) 321, 23 L. T. (O. S.) 272; Baily *v.* de Crespigny, 1869, L. R. 4 Q. B. 180, 38 L. J. (Q. B.) 98, 19 L. T. 681; Aktieselskabet Ocean *v.* Harding (B.) & Sons, Ltd., 1928, 2 K. B. 371, 97 L. J. (K. B.) 684, 139 L. T. 217; Reigate *v.* Union Manufacturing Co. (Ramsbottom), 1918, 1 K. B. 592, 87 L. J. (K. B.) 724, 118 L. T. 479 C. A.

ANNOTATIONS:

1. The judgment of the District Court is reported in 1946, S. C. D. C. 242.
2. See Halsbury, Vol. 7, p. 218, para. 297 with footnote (*h*) and Vol. 10, p. 259, para. 325 with footnote (*e*).

(*H. K.*)

FOR APPELLANTS: Elhanany.

FOR RESPONDENTS: Wittkowski and Bar Neev.

JUDGMENT.

In 1941 Respondent Company issued to the Appellant an Employers' Indemnity Policy for a period of one year expiring on the 1st October, 1942, and renewable for further periods. The object of the policy was to indemnify the Appellant against the payment of compensation to workmen employed by them and injured in the course of their employment. The relevant part of the policy reads as follows:—

> "If the Insured is liable to pay compensation for such injury under the Workmen's Compensation Ordinance, 1927, then the Company shall indemnify the Insured against all sums for which the Insured shall be so liable and will in addition be responsible for all costs and expenses incurred with its consent in defending any claim for such compensation".

This policy was renewed in 1942 to expire on the 1st October, 1943. On the 4th November, 1942, one of Appellant's workmen was injured and compensation became payable for incapacity. At the time of the accident and up to the 17th August, 1943, the amount of compensation payable for total or partial incapacity was a weekly payment not exceeding LP. 1. The maximum weekly payment was raised to LP. 1.500 by an amendment of the Workmen's Compensation Ordinance, Cap. 154, which was published and came into force on the 17th August, 1943 (Ordinance No. 17 of 1943).

The difficulty which has arisen between the two parties to this appeal is that the Respondent company contends that it contracted to indemnify the Appellant in accordance with a scale of compensation in force when the policy was issued and is not bound to pay an increased indemnity on a new scale introduced by legislation passed during the currency of the policy, but after its issue. This contention was upheld by the District Court and the learned Relieving President explained in his decision that he was following the principle that where performance of a contract has been rendered impossible by a subsequent statute, the contract ceases to be binding. In support of his view the learned Judge relied on the following words of Maule, J., in the case of Mayor of Berwick *v.* Oswald, quoted in the case of Baily *v.* de Crespigny, 4 Q. B. (1869) p. 186, which are as follows:—

> "There is nothing to prevent parties if they choose by apt words to express their intention so to do, from binding themselves by a contract as to any future state of law, but people in general must always be considered as contracting with reference to the law as existing at the time of the contract ... and the words showing a contrary intention ought to be pretty clear to rebut that presumption".

It was pointed out by the learned advocate for the Appellant that Maule, J., gave a dissenting judgment in the Mayor of Berwick case. This, however, does not detract from the value of the principle enunciated by the learned Judge, but the question is whether that principle is applicable to the present case. It must be noted that Maule, J., was careful to use the words "people in general must always be considered" and due regard must be paid to the words "in general" when dealing with a case like the present one where the contention of the Insured is that the whole object of the contract was that the Insurer would defray whatever compensation and other expenses became payable by reason of the Workmen's Compensation legislation.

Counsel for the Respondents has drawn attention to the line of cases where a contract instead of setting out at full length some provisions

or conditions merely refers to a provision or condition contained in another contract or in legislation, and he submitted that in such cases the reference becomes part of the contract at the time it is signed and is not varied by changes in the model borrowed from. This is a correct exposition of the jurisprudence and is aptly expressed by Russel, J., in the case of Aktieselskabet Ocean *v.* B. Harding and Sons Limited reported in (1928) 2 K. B. p. 371. At p. 394 the following passage occurs:—

> "The document which contains the reference is to be read as if the wording of the document referred to were repeated therein, so as to create rights and liabilities as between the parties thereto. The document referred to need not even be a document which purported to create rights or liabilities; it may be merely a printed form".

I do not consider, however, that the principle just mentioned is applicable in the present case in view of the nature and contract of the policy issued by the Respondent.

If we go back to the actual wording of the policy which is set out at the beginning of this judgment we find that reference is made to the Workmen's Compensation Ordinance of 1927. Obviously, the form of policy was an old one and had not been revised after the publication of the revised laws which had consolidated the Ordinance of 1927, as subsequently amended and the Respondent made it clear that he was arguing the case on the basis that the policy referred to and was affected only by the law in force at the time of its issue, and he conceded that the reference to the Ordinance of 1927 could not be interpreted as meaning that the policy referred only to the Workmen's Compensation legislation in force in 1927.

I would point out that this concession is not without importance and, in my view, the policy must be read as if it refers to the Workmen's Compensation Ordinance purely and simply. Being given the object of the policy, I am of opinion that the wording thereof cannot mean anything else but that both parties intended and did provide that the Insurer, (*i. e.* the Respondent) would keep the Insured free from any payments or expenses in respect of accidents to the workmen covered by the policy. Consequently if, during the currency of the policy, the Workmen's Compensation legislation is amended, I am of opinion that the insurer cannot refuse to face increased payments brought about by the amending legislation. If the Insurer had meant to limit his liability to the scale of compensation in force at the inception of the policy he should have done so in clear words, and I am sure that if the question had been raised when the contract was made,

both parties would have agreed that their idea was that the policy would indemnify the insured completely whether or not there were changes in the law (see Reigate *v.* Union Manufacturing Company (1918) 1 K. B. 592, 605). In this connection I would point out that the Respondent could not but be aware that the law was liable to be altered from time to time and I would add that I am of opinion that the terms of the policy should be interpreted in favour of the Insured (*i. e.* the Appellant).

I therefore hold that the policy which is the subject matter of this appeal does not mean that the Insurer would pay compensation only on the scale in force at the time of the issuing of the policy.

This disposes of the main point in this appeal, but there is another point which I cannot overlook although it did not receive much attention in the course of the arguments. The point I have in mind is that the accident which gave rise to payment of compensation in this case took place during the currency of the policy, but prior to the passing of Ordinance No. 17/43. It might be questioned whether an increase in the scale of compensation after the occurrence of the accident binds the insurance company to pay increased compensation. I have no doubt in the present case that the insurance company (*i. e.* the Respondent) is so bound because section 5 of the amending Ordinance lays down that where compensation is payable to a workman under the provisions of the principal Ordinance in respect of any injury occurring before the commencement of the amending Ordinance but where the amount thereof has not been determined in accordance with the provisions of the principal Ordinance before that date, the amount of such compensation shall be determined as if the amending Ordinance had been in force at the date of the accident.

The appeal is therefore allowed. The decision of the Court below is set aside and it is hereby declared that the Respondent is liable to pay to the Appellant all those amounts that the Appellant is liable to pay to the workman, Benyamin Rosenberg, by virtue of an award dated 10.1.45 made by the British Magistrate of Tel-Aviv, sitting as an Arbitrator under the Workmen's Compensation Ordinance.

The Appellant is awarded costs of the Court below, including advocate's attendance fee as awarded to the Respondent, and costs of this appeal on the lower scale together with an advocate's attendance fee of LP. 10.

Delivered this 12th day of July, 1946.

British Puisne Judge.

CIVIL APPEAL No. 365/45.

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

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

IN THE APPEAL OF:—

Sheikh Abdul Qader el-Muzaffer. APPELLANT.

v.

Hilmi Atalla & 3 ors. RESPONDENTS.

Members of partnership taking premises on rent in their individual capacity — Partner selling his interest in the firm including his interest in the lease — Parting with possession — Breach of covenant against sub-letting.

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity, dated 25.9.45 in Civil Appeal No 37/45, from the judgment of the A/Chief Magistrate, Jaffa, dated 18.6.45, in Civil Case No. 1725/43, allowed:—

1. Members of a partnership who rented a shop must be regarded as having done so as individuals, if there is no indication in contract and no presumption raised by conduct that they were dealing in their partnership capacity.

2. If a lessee gives a stranger a licence to occupy the premises but does not part with possession he commits no breach of a covenant against sub-letting.

(*M. L.*)

REFERRED TO AND DISTINGUISHED: Chaplain *v.* Smith L. R. K. B. D. 1926 and Jackson *v.* Simmins, L. R. 1 Ch. D. 1923.

ANNOTATIONS: For District Court decisions on joint tenancy see C. A. D. C. Ha. 212/43 (1944, S. C. D. C. 29), C. A. D. C. Ha. 66/44 (1944, S. C. D. C. 218), C. A. D. C. Ha. 120/44 (1945, S. C. D. C. 128).

(*A. G.*)

FOR APPELLANT: A. Levin.

FOR RESPONDENTS: Elia.

JUDGMENT.

Were it not for the divergence of opinion between the learned Magistrate and the District Court I should have said that this case did not present any great difficulty. The decision depends entirely on a question of fact. Atalla and Georgiadiss entered into a contract with Sheikh Abdel Qader el Muzaffer, the Appellant in the present case, under which the Appellant let them a shop in King George's Avenue, Jaffa. In this shop they carried on a grocery business. One of the

conditions of the lease was that it should not, except with the consent of the lessor, be occupied by any other person or persons. The written agreement of lease gave no indication that it was other than a contract between the lessor and lessees in their individual capacity. It so happens that the two lessees did form a partnership some time before the making of the lease. Another point to be noted is that they traded as individuals under the name of "family grocer" before they registered their partnership under that name. The lessor maintains that he leased the premises to them as individuals, that, in fact, he did not know they were partners until much later on, and he alleges, as part of his argument, that the purpose of the clause to which we have referred, was to confine the lease to those individuals and to those individuals only. The learned Magistrate found as a fact that the lease was to those persons in their individual capacities. His judgment goes on to say:—

> "It was established before me that the tenants did not mention in writing at the time of concluding the two deeds" (one of which is the lease which is now the subject-matter of the appeal) "that they were forming a partnership ..... and that they signed the two deeds in their personal capacities".

and later on:—

> "It is clear that the partnership did not contract with the Plaintiff" (Appellant in the present case) "and that the latter did not contract with anybody by the name of the 'Family Grocer' partnership".

This was a very clear finding of fact and apparently it was also accepted by the District Court on Appeal. Now, there is nothing in the law to prevent members of a partnership contracting in their individual capacity. It is, of course, true, as Mr. Elia submits, that if the conduct of the parties was such as to raise the presumption that they were dealing in their partnership capacity, the landlord would be estopped from pleading that they contracted as individuals. But in this case we are satisfied, as both the learned Magistrate and the District Court were, that the conduct of the lessees, *vis-à-vis* the Appellant, raised no presumption that the contract was made in their partnership capacity. The contract, interpreted as it was, reduced to writing was quite clearly one with the lessees as individuals and not as a partnership body.

As a second line of argument Mr. Elia relied on the principles established in Chaplain *v.* Smith L. R. K. B. D. 1926, and Jackson *v.* Simmins, L. R. 1 Ch. D. 1923. It seems to me that the principle established by those cases was that if a lessee gives a stranger a licence to occupy the premises but does not part with possession he commits no breach of a covenant against sub-letting. It is necessary, therefore, to enquire

whether the lessee, Atallah, did in fact part with the possession of his share in this lease. There cannot, to my mind, be any doubt that he did. He retired from the partnership. He sold his interest in the partnership which included his interest in the lease. All the rights which he had are now exercised by the new partners to his entire exclusion. It, therefore, cannot be said that he still retains possession of the premises and that the principles established in the cases quoted by Mr. Elia apply.

It follows that the learned Magistrate was correct when he found that there had been a breach of Clause 3 of the agreement which entitled the lessor to an order of eviction.

For these reasons the appeal must be allowed, the judgment of the District Court set aside and the decision of the Magistrate restored, with costs on the lower scale to include advocate's attendance fee of LP. 10.

Delivered this 12th day of March, 1946.

Chief Justice.

I concur.

Puisne Judge.

CIVIL APPEAL No. 178/45.

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

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

IN THE APPEAL OF:—

Mahmoud Issa Moussa el Zaghmouri & an. APPELLANTS.

v.

Dr. Ya'coub Said Abu Ghosh & 5 ors. RESPONDENTS.

Land settlement — Agreement made after initiation of L. S. — Failure to transfer due to compromise by vendor — Purchasers' rights — L. S. Ord. sec. 26 & rules.

Appeal from the decision of the Assistant Settlement Officer, Ramleh Settlement Area, dated 3.2.45 in Case No. 17/al-Khalayil, dismissed:—

A compromise made in Land Settlement proceedings will not be set aside by the L. S. Officer, at the instance of a party who complains that the compromise prejudices her rights against one of the parties thereto, under a contract made subsequently to the initiation of Land Settlement proceedings.

(*A. M. A.*)

FOR APPELLANTS: Nakhleh.

FOR RESPONDENTS: Hassan Ahmad Inbawi (by Power of Attorney). Elia and in person.

JUDGMENT.

The relevant facts for the purposes of this appeal from the decision of the Assistant Settlement Officer of the Ramleh Settlement area are the following:—

By an Agreement signed in 1940, Respondents 1, 2 and 3 contracted to transfer to the two Appellants 80 *dunums* of land in a land settlement area and which consisted of parcels 1, 3, 4 and 5 of Block 4837, Al Khalayil lands. Settlement proceedings had begun in 1937 and the 80 *dunums* in question were the subject matter of rival claims which were still pending in 1940. This explains why Clause 2 of the Agreement provided that the Respondents undertook to transfer the land to the Appellants when the settlement proceedings were completed. Clause 3 of the Agreement was to the effect that the Appellants were allowed to enter into possession of the 80 *dunums*. Clause 7 was to the effect that failure to transfer would entitle the Appellants to a refund of the amounts paid by them and to a penalty of LP. 480 for expenses and damages.

The rival claims affecting the 80 *dunums* were dealt with in cases 8 and 16/Al Khalayil. In case No. 8 the dispute was between the Respondents Abu Ghosh and their cousins; in Case No. 16 certain neighbours claimed against the Respondents Abu Ghosh.

On 24.8.43 Case No. 16 was decided in favour of the Abu Ghosh Respondents subject to the decision in Case No. 8 which was the case between Respondents Abu Ghosh and their cousins. Case No. 8 ended on the 30.11.43 in favour of the Respondents Abu Ghosh; an appeal was lodged and the decision was upheld by the Court of Appeal in 1945.

There was also Case No. 7/Al Khalayil between Respondents No. 5 and Respondents Abu Ghosh regarding some land not comprising the 80 *dunums* with which we are concerned. A compromise was arrived at in that case and was approved by the Settlement Officer on the 26.10.43. The compromise was to the effect that Respondent No. 5 would give up his claim in consideration of the transfer to him of 70 out of 80 *dunums* in parcels 1 and 3 of Block 4837.

It is not disputed that the 70 *dunums* thus ceded by the Abu Ghosh Respondents form part of the 80 *dunums* they had agreed to transfer to the Appellants after completion of the Settlement proceedings.

The Settlement Officer approved the compromise on the 26.10.43 subject to the result of cases 8 and 16, *i. e.* subject to the Abu Ghosh Respondents being confirmed on appeal in the ownership of the land. Ultimately in 1945, the Court of Appeal upheld the decision in Case No. 8 and the compromise thus took full effect.

An important feature is that the present Appellants did not even attempt to intervene in the Settlement proceedings until the 19.11.43, *i. e.* some three weeks after the aforementioned compromise had been approved. On that date they wrote to the Settlement Officer and subsequently entered a claim on the 11.1.1944, against the Abu Ghosh Respondents and Respondents No. 5 and 6 (the latter was cited because Respondent 5 had renounced his rights in the 70 *dunums* in his favour). This claim which was investigated by the Settlement Officer as Case No. 17/Al Khalayil, was that the compromise in Case No. 7 should be rescinded and the Appellants (then Claimants) should be registered as owners of the 80 *dunums* mentioned in the 1940 Agreement. The Settlement Officer rejected the claim on the grounds, *inter alia,* that the Claimants had submitted their claim after the conclusion of all the cases affecting the land in question. The Settlement Officer also mentioned in his decision that the Claimants (now Appellants) knew fully well when they entered into the agreement that the land was under Settlement; that the land was *musha'a*; that the 4th Respondent did not sign the Agreement. Mr. Elia who appeared for one of the Respondents called attention to section 26 of the Land (Settlement of Title) Ordinance and to Rule 9(2) of the Settlement of Title (Procedure) Rules. He submitted that the Appellants' claim was made too late and should not have been added to the Schedule of Claim. We would point out that whereas section 26 refers to "claims of right in the block", the rule refers to parcels. It may be that Mr. Elia's submission is correct but we would not like to make a pronouncement without hearing fuller argument. For the purposes of this decision, however, the point need not be decided.

The more important point, in our opinion, is that the Agreement was signed after Settlement proceedings had begun and conferred on the Appellants no rights to any land until completion of the Settlement proceedings and unless the first three Respondents won their claim. The Appellants were apparently content to run the risk of the land they had in view being allotted to persons other than Respondents 1, 2 and 3 and they cannot expect to be allowed to upset the decisions arrived at by the Settlement Officer on the ground that Respondents 1, 2 and 3 (not to mention Respondent 4 who was not a party to the

Agreement) should not have entered into a compromise involving transfer of the portion of land which was the subject matter of the Agreement. If such a course were permissible, there would be no end to Settlement proceedings. In the present instance, for example, the Settlement Officer would have had to re-open Case No. 7 and upset a compromise which affected Respondents 5 and 6 who were not parties to the Agreement.

We therefore hold that the Settlement Officer's decision is correct and the appeal stands dismissed with costs on the lower scale and LP. 10 advocate's attendance fee for advocate Elia who appeared for one of the Respondents.

Mr. Nakhleh for the Appellants requested us, if the decision went against him, to make it clear that his clients would have the right to take further steps when the Schedule of Rights is published. We regret being unable to satisfy this request because by so doing we might prejudge issues which have not yet arisen and which have not been debated before us.

Delivered this 11th day of July, 1946, in presence of Najih Eff. Germanus for Appellants and Mr. E. George Elia for Respondent No. 6.

Chief Justice.

HIGH COURT No. 44/46.

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

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

IN THE APPLICATION OF:—

George Kavouksorian. PETITIONER.

v.

1. The Commissioner of Prisons, Jerusalem,
2. The Superintendent, Central Prison, Jerusalem. RESPONDENTS.

Accused tried on several separate counts under Food Control Ord. as amended — Conviction and sentence of fine or imprisonment in default of payment on each of several counts — Question as to whether imprisonment sentences should run concurrently or consecutively.

Return to a summons in the nature of *Habeas Corpus* issued on the 8th of April, 1946, directed to the Respondents calling upon them to produce the Pe-

titioner before this Court on Thursday, the 18th of April, 1946, at 9 o'clock in the forenoon for the purpose of hearing and determining this petition, and to await the further orders of this Court, dismissed:—

1. (*Obiter*): In case of any divergence between District Court (Summary Trials) Rules and Criminal Code Ordinance latter must prevail.

2. A sentence of imprisonment in default of payment of fine is remission — earning for purposes of sec. 69, Prisons Ordinance, 1946.

3. Where Court sentenced accused at one trial to fine or imprisonment in default of payment in respect of each of several offences committed at various intervals and not closely linked together, sentences will run consecutively, if no indication in judgment that they should run concurrently.

(*M. L.*)

REFERRED TO: CR. A. 122/42 (9, P. L. R. 592; 1942, S. C. J. 631); CR. A. 51/45 (12, P. L. R. 232; 1945, A. L. R. 570).

ANNOTATIONS: On consecutive sentences see the case referred to (*supra*), see also CR. A. 132/42 (9, P. L. R. 613; 1942, S. C. J. 982) and annotations in S. C. J.

(*A. G.*)

FOR PETITIONER: H. Atalla.

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

ORDER.

This is a return to a writ of *Habeas Corpus*.

The Petitioner was tried before the District Court, Jerusalem, on twelve counts, and he pleaded guilty to six of them. He was convicted on each of those counts and was, on 7.2.46, sentenced, under the provisions of section 10 of the Food Control Ordinance, 1942, as amended by the Defence (Amendment of Food Control Ordinance, 1942) Regulations, 1944, (see page 17 of Supplement No. 2 of 1944) to a fine of LP. 1000 on each of the six counts, and in default of the payment of the fine in respect of each count he was sentenced to go to prison for three months.

Under section 10 of the Food Control Ordinance, as amended, an offender can be sentenced to a fine not exceeding LP. 2500, or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment.

The learned Relieving President when passing the sentence in default properly took into consideration the provisions of section 42(2)(b) of the Criminal Code Ordinance which fixes a maximum penalty of three months imprisonment in default of payment of a fine.

It is perhaps convenient at this point to refer to the proviso to section 42(2)(b) of the Criminal Code Ordinance, which reads as follows:—

"Provided that instead of ordering imprisonment the Court may direct that such fine shall be recovered in accordance with the provisions of section 41(c) of this Code".

It is clear that the proviso has no application in the present instance as the learned Relieving President did not give such a direction. Furthermore, this is not a case in which section 3 of the Debt (Imprisonment) Ordinance (Cap. 48) can apply as the Petitioner was immediately imprisoned on the order of the trial Court on his failure to pay the fines.

We find that we must regard the sentences in default of payment of the fines as being alternative sentences. That is to say if there had been only one fine of LP. 1,000 with a sentence of three months imprisonment in default, the serving of that sentence would have liquidated the fine.

The first point which we have to decide is whether a default sentence of three months imprisonment is remission-earning for the purposes of section 69 of the Prisons Ordinance (No. 3/1946 — see Supplement No. 1, Palestine *Gazette*, 1946, page 28). If the default sentence is not remission-earning then, of course, the detention of the Petitioner is lawful because three months have not expired since the sentence was passed.

Mr. Baker, who appeared on behalf of the Respondents, expressed the view that the default sentence was a sentence of imprisonment for the purposes of section 69 of the Prisons Ordinance, and we entirely concur. Needless to say this is a decision which has the support of the Petitioner's advocate.

We now come to the principal point in this case, and that is whether the sentences in default of payment of the fines are to run consecutively or concurrently.

The offences of which the Petitioner was convicted were not all committed at the same time. The first took place on 26.6.45 and the last on 30.10.45. So it is clear that the Petitioner could have been separately tried for each of the six offences in respect of which he was convicted.

We are not sitting as a Court of Appeal and we are only concerned to determine what is the legal effect of the sentences passed in the form in which they were passed by the learned Relieving President.

Section 23 of the District Courts (Summary Trials) Rules, 1938, (Supplement No. 2, Palestine *Gazette*, 1938, page 259) provides that — "Unless the Court otherwise orders a sentence of imprisonment shall run from the date of conviction".

Section 48 of the Criminal Code Ordinance (No. 74/1936) provides that:—

> "Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under subsequent conviction, shall be executed after the expiration of the former sentence, unless the Court directs that it shall be executed in lieu of the former sentence or of any part thereof".

We do not think that Rule 23 of the District Courts (Summary Trials) Rules was intended to amend or affect the provisions of section 48 of the Criminal Code Ordinance, and if there were any divergence between the two we would feel bound to follow the Criminal Code Ordinance. The Summary Trials Rules were made under section 20 (1)(b) of the Courts Ordinance (Cap. 28), since replaced by the Courts Ordinance No. 31/1940, and section 20 (Cap. 28), or section 22 of Ordinance 31/1940, do not empower the Chief Justice to amend the Criminal Code Ordinance.

If the Petitioner had been convicted before one Court and sentenced to three months imprisonment, and had then been convicted, on the same day, before another Court and sentenced to three months imprisonment, the second sentence would have been executable after the expiration of the first sentence. That is to say the Petitioner would have had to undergo six months imprisonment in the aggregate.

The question then is this — does the fact that he was convicted of several offences by the same Court, and does the fact that he was given the option of paying fines instead of going to prison make any difference?

We think not. The trial Court convicted the Petitioner on six separate counts. It imposed a fine of LP. 1000 on each count with a default sentence of three months in respect of the non-payment of each fine. It further issued six separate commitment warrants setting out the fine of LP. 1000, and the "period of imprisonment in lieu of payment of fine" as three months in each of them.

In the circumstances we find that the six convictions took place one after the other.

It is true that the fines were all immediately payable, but if the Petitioner could not, or if he elected not to pay them, then the sentences in default must take effect one after the other in the same order as the convictions.

In Criminal Appeal 122/42 (9, P. L. R. 592) the Supreme Court in dealing with a case in which there were a number of counts involving three accused persons stated:—

> "Of course such sentences may, and should, in normal circumstances

> be stated to run concurrently with the first sentence on the first count".

In the present case the learned Relieving President did not state that the sentence in lieu of payment of the fines were to run concurrently, and we cannot find that he intended that they should so run.

If the learned Relieving President did intend the sentences in default to run consecutively that would not be illegal. In Criminal Appeal 51/45 (12, P. L. R. 232) the Court stated:—

> "We agree with Abcarius Bey that it is not in accordance with modern procedure to pass consecutive sentences for offences which were so closely linked together and we think the procedure is undesirable; but it is not illegal".

In the present instance the offences were not all committed on the same occasion, and they cannot be described as closely linked together. Offences do not become less serious the more often they are repeated.

The result is that unless he pays the fines or part of them the Petitioner will have to serve eighteen months imprisonment, less any remission that he may earn.

The petition is dismissed.

Delivered in open Court this 20th day of April, 1946, in the presence of Mr. Atallah for Petitioner, and Issa Eff. Akel for Respondents.

British Puisne Judge.

HIGH COURT No. 107/45.

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

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPLICATION OF:—

Haj Hassan 'Id el Walidi & 9 ors. — PETITIONERS.

v.

The Director of Land Registration, Jerusalem & 2 ors. — RESPONDENTS.

Irrevocable power of attorney executed before Notary Public and containing admission of receipt of full amount agreed upon — Notarial notice retracting admission and purporting to revoke the p/a — Director of Land Registration refusing to act on the p/a — Proper practice to be followed.

Return to an order *nisi* issued on the 2nd of January, 1946, directed to the first Respondent calling upon him to show cause, if any, why he should not proceed with the transaction of transfer into the names of the Petitioners of the lands, the subject matter of the power of attorney, Exhibit A; order *nisi* made absolute:—

1. High Court in exercise of its exclusive jurisdiction in the matter will set aside a Public Officer's order, even though made in conformity with his usual practice for some years, if it is satisfied that in exercising his discretion he applied a wrong principle.

2. Irrevocable power of attorney — not deprived of its character of irrevocability by provision of refund of money received and payment of liquidated damages in case of repudiation or revocation.

3. (a) Where Director of Land Registration is asked to act on an irrevocable power of attorney and giver of it alleges revocation or fraud, proper course for Director is not to refuse his consent to the disposition thus forcing the third party to take the initiative and go to Court but to allow the principal a reasonable time to obtain from a competent Court an *interim* stay order pending determination of the case for declaration of nullity.

(b) (*Obiter*): Director of Land Registration should, as a rule of good practice, require in such a case the principal to file an affidavit stating the reasons why the power is null and void.

REFERRED TO: H. C. 18/45 (12, P. L. R. 248; 1945, A. L. R. 563); C. A. 303/44 (12, P. L. R. 64; 1945, A. L. R. 142).

ANNOTATIONS:

1. On points 1 and 2 see cases referred to (*supra*) and annotations in A. L. R.

2. On binding force of practice see CR. A. 119 and 121/43 (1943, A. L. R. 732) and H. C. 42/43 (10, P. L. R. 239; 1943, A. L. R. 257).

(*A. G.*)

FOR PETITIONERS: Nazzal.

FOR RESPONDENTS: No. 1 — Spry.
Nos. 2 & 3 — Elia.

ORDER.

Shaw, J.: This is a return to an order *nisi* dated 2.1.46 calling upon the first Respondent to show cause why he should not proceed with the transaction of transfer into the names of the Petitioners of the lands which are the subject-matter of the power of attorney (Exhibit A).

This case raises a very important question — the question whether a party who has executed an irrevocable power of attorney can stop it from being acted upon by alleging that he has revoked it.

The affidavit of the first Petitioner shows that on 2.2.44 the second and third Respondents, as heirs of Zayed Salem al Abid, together with six others who are heirs of the other registered owner Ishtewi 'Id El

Hamidi, executed an irrevocable power of attorney in favour of the Petitioners in respect of certain lands, admitting receipt in full of the purchase price of LP. 8,000, and appointing Haj Salameh bin Sa'id and Haj Husein el Bitar, jointly or severally, to carry out the transfer at the Land Registry at Gaza, to the names of the Petitioners. According to the same affidavit, Haj Salameh bin Sa'id applied to the Land Registry of Gaza to effect transfer to the Petitioners, and both agents were willing to effect transfer. On or about 14.10.45 the advocate for the second and third Respondents served the Petitioners, Haj Salameh bin Sa'id, and the Land Registrar of Gaza, with a notarial notice (Exhibit B) purporting to revoke the power of attorney. This notarial notice stated, *inter alia,* that the purchasers had not paid the full price of LP. 8,000 but had paid only LP. 4,000, and that the power of attorney had become null and void. It should be mentioned that the other agent Haj Hussein el Bitar is now dead.

It should be observed that the only ground for revocation mentioned in Exhibit B is the non-payment of the full purchase price.

The Gaza Land Registry file was thereafter submitted to the first Respondent, and the Petitioners, through their advocate, made representations to the first Respondent submitting that the power of attorney, being an irrevocable one, could not be treated as having been invalidated by a purported revocation. The first Respondent's final decision was conveyed to the Petitioner in a letter dated 4.12.45 which reads as follows:—

> "In view of the fact that El Haj Salameh Musallam ibn es Sa'id is seeking to act by virtue of a Power of Attorney given to him by Ibrahim and Hassan aulad Zaid Salim el Abeed (*inter alia*) which they have now purported to revoke, I am not prepared to give my consent under section 4 of the Land Transfer Ordinance to any disposition of their shares in the land in question.
>
> 2. Whether or not the purported revocation is effective is a matter which, failing agreement, must be decided by the Court: I do not consider it within my powers to do so".

The first Respondent in his affidavit in reply to the Order *Nisi* states:—

> "3. The facts recited in the said petition are substantially correct, except for the statement in clause 6 regarding the practice in my Department, which should be qualified. My usual practice in recent years has been to refuse my consent to any disposition sought to be effected by virtue of a power of attorney which the principal claimed to have revoked.
>
> 5. It is my humble submission that the withholding of my consent to the proposed disposition was a proper exercise of the discretion vested in me by the Land Transfer Ordinance and I therefore make

> this affidavit in support of my application that the Order *Nisi* be discharged".

The second Respondent in his affidavit in reply has put forward, in addition to the allegation of non-payment of the full purchase price, two other reasons for contesting the validity of the power of attorney. He alleges fraud, and states that the power of attorney does not express the true intention of the second and third Respondents.

Section 4 of the Land Transfer Ordinance (Cap. 81) provides that any person who wishes to make a disposition of immovable property must first obtain the written consent of the Director of Lands, and it is obvious that the Director has a discretion to refuse his consent for good and proper cause. There is no suggestion that the Director has in this instance acted in bad faith or with any improper motive, and the only point which I have to decide is whether or not he has based the exercise of his discretion upon a wrong principle.

By virtue of section 7(b) of the Courts Ordinance, No. 31/1940, the High Court of Justice has exclusive jurisdiction to issue orders 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. There is no doubt that if the Director has applied a wrong principle in exercising his discretion it is for this Court to direct him to correct his order by applying the right principle — see H. C. No. 18/45, P. L. R. Vol. 12, p. 248.

So I have to decide whether the Director has applied any wrong principle in this instance. Article 1521 of the *Mejelle* (I quote from Hooper's translation) provides that:—

> The principal may dismiss his agent from his agency. He may not do so, however, if the rights of third parties are affected.

In the present case the power of attorney was irrevocable in form. It was executed in the presence of a Notary Public, and I must regard it as the solemn and considered act of the persons who executed it.

It may be remarked that the power of attorney did provide for what was to happen if the principals went back on it or if they discharged their two attorneys. In such case the principals were to return the LP. 8,000 in full and were to pay a further sum of LP. 3,000 to the purchasers as liquidated damages. This condition does not, in my judgment, deprive the power of attorney of its character of irrevocability. It merely means that it is irrevocable unless and until the LP. 11,000 have been paid to the purchasers.

So the position is this — that the giver of this irrevocable power of attorney has succeeded in holding up the proceedings for the transfer of the land by merely alleging that the LP. 8,000, which in the said

power they admit having "received in and from the said purchasers in cash a payment in advance", had not been paid in full. If a person who has made an irrevocable power of attorney is allowed so easily to repudiate it then to a large extent it is stripped of its usefulness.

In refusing his consent in this instance the Director acted in accordance with a practice which has, it seems, grown up in his department "in recent years". I have no hesitation in holding that such a practice is based on a wrong principle so far as irrevocable powers of attorney are concerned. The Director is not, of course, called upon to decide whether the power of attorney has or has not been properly revoked.

It is for that reason that he must exercise care so as to ensure that one party is not placed in the position to which he would be entitled only if a decision had been given in his favour.

Each case should, of course, be considered on its own merits (see Civil Appeal No. 303/1944 reported in 12 P. L. R. page 64).

In the present case it seems to me that the important feature is that the giver of the power of attorney has received money from the "Third Party" on the strength of an irrevocable power of attorney which lays down that refund must be made and liquidated damages paid if it is revoked. Given that the purported revocation in this case has not been preceded or accompanied by the agreed payment to the "Third Party", it would place the latter in an unfavourable and unfair position if he were forced to take the initiative and go to Court.

The proper course would have been for the Director to allow a reasonable time to the giver of the power of attorney to obtain from a competent Court a declaration that it is null and void. The giver of the power of attorney would then apply, if so advised, to such Court for an *interim* stay Order to be served upon the Director.

I therefore, make this Order *Nisi* absolute and I direct the first Respondent to proceed with the transaction after a period of fourteen days from the date of this Order (if delivered in presence of the second and third Respondents or their advocate) or from the date of service (if delivered in absence), unless a stay order from a competent Court is served upon him.

Although I do not wish to lay it down as an absolute rule, I consider that it would be a good practice if, in a case like this, the Director were to require the giver of an irrevocable power of attorney who seeks to stay proceedings on it, to file an affidavit stating what his reasons are for alleging that the power is null and void.

The Petitioners will have fixed costs in the sum of LP. 15.— to be paid by the second and third Respondents jointly and severally.

Delivered in open Court this 6th day of March, 1946, in the presence of Mr. A. Michaeli for the Petitioners and Mr. Spry for Respondent No. 1, and Mr. Cohen for Respondents Nos. 2 & 3.

British Puisne Judge.

I concur.

British Puisne Judge.

HIGH COURT No. 15/46.

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

BEFORE: Shaw and De Comarmond, JJ.

IN THE APPLICATION OF:—

Fatmeh bint Mahmoud As'ad Ammar. PETITIONER.

v.

The Assistant Inspector General C. I. D. of Jerusalem. RESPONDENT.

Respondent in High Court filing additional affidavit — Failure to disclose all relevant facts — Egyptian law as to acquisition of Egyptian nationality by marriage — Question of res judicata and estoppel.

Return to an order *nisi* issued on the 8th day of February, 1946, directed to the Respondent calling upon him to show cause why he should not refrain from deporting the Petitioner from Palestine, discharged:—

1. (a) Respondent in High Court may file in addition to his own affidavit one of another person testifying facts necessary for Court to know before coming to a finding and to which the Respondent may not be in a position to give evidence.

(b) While unnecessary affidavits ought not to be allowed, there is no absolute rule that High Court cannot admit more than one affidavit from one Respondent.

2. Although all relevant facts must be disclosed by Petitioner High Court may overlook failure to mention a certain fact if they think that Petitioner may have laboured under impression that it had no bearing on the only issue or issues.

3. Magistrate's decision when acquitting Accused from charge of illegally entering Palestine that Accused was a Palestinian does not estop Prosecution in subsequent proceedings from averring that Accused was a foreign national.

(*M. L.*)

REFERRED TO: H. C. 25/45 (12, P. L. R. 257; 1945, A. L. R. 593); R. *v.* Hutchins, 44 L. T. p. 364; H. C. 19/44 (11, P. L. R. 115; 1944, A. L. R. 347).

ANNOTATIONS:

1. For authorities on affidavits under the High Court Rules see H. C. 25/45 (*supra*) and annotations in A. L. R. The decision in this case was followed in H. C. 11/46 (*ante*, p. 422).

2. On point 2 see H. C. 64/45 (1945, A. L. R. 640) and annotations; see also H. C. 54/45 (12, P. L. R. 479; 1945, A. L. R. 818) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONER: Sanders.

FOR RESPONDENT: Acting Crown Counsel — (Salant).

DECISION ON PRELIMINARY OBJECTION.

The Respondent, who is the Assistant Inspector General, C. I. D., Jerusalem, has filed, in addition to his own affidavit, a further affidavit with a view to proving the Egyptian law.

Mr. Weston-Sanders for the Petitioner has referred us to H. C. 25/45 (12, P. L. R. 257) where the Court held that a respondent in High Court proceedings is not entitled to file more than one affidavit. The learned Judge who decided that case observed that he was fortified in coming to this conclusion by the appearance of the word "the" in line 1 of Rule 7. It is obviously possible that the Respondent may not be in a position to give himself evidence as to facts which it is necessary for the Court to know in order to enable it to come to a finding. That is probably the case here, — the Respondent is probably not an expert in Egyptian law and in order to prove that law we do not think that he can be prevented from putting in an affidavit by an expert.

We do not think that the learned Judge who decided H. C. 25/45 intended to lay it down as an absolute rule that the Court cannot admit more than one affidavit from one Respondent. We think that he was only expressing the view that unnecessary affidavits ought not to be allowed and with that view we entirely agree. We also observe that in Rule 8 the words "affidavits in reply" appear, and we do not think that the draughtsman was necessarily referring to a case in which there might be more than one respondent.

In the circumstances we find that this objection fails and we dismiss it.

British Puisne Judges.

ORDER.

De Comarmond, J.: At the instance of Petitioner an order *nisi* was issued directed to the Respondent and calling upon him to show cause why he should not refrain from deporting Petitioner from Palestine.

Two affidavits and copies of certain documents have been filed by the Respondent: one affidavit is sworn by Mr. James Munro, Super-

intendent of Police, and the other by Mr. Yedid Levi, Magistrate. Both deponents were, on the application made on behalf of Petitioner, cross-examined before this Court upon their affidavits, and we have had the benefit of arguments addressed to us by Mr. Salant, for Respondent, and Mr. Sanders, for Petitioner.

The event which led to the present proceedings was the making of a deportation order against Petitioner on the 21st December, 1945, under section 10(1)(c) of the Immigration Ordinance, 1941. The order was signed by Mr. Giles, Assistant Inspector General of Police, duly authorised by the High Commissioner.

Section 10(1)(c) of the said Ordinance provides for the making of a deportation order in respect of any person, not being a Palestinian citizen, who is found in Palestine after entering the country without obtaining permission in accordance with the provisions of the Ordinance.

The ground relied upon by Petitioner is that she is a Palestinian citizen and cannot, therefore, be deported.

In her petition to this Court, Petitioner alleges that although she was originally a Lebanese citizen, she acquired Palestinian citizenship in 1933 by virtue of her marriage to one Sharif Bin Mohammad el As'ad, a Palestinian. The petition also set out that after being divorced from the said Sharif, Petitioner married in 1937 one Ahmad Bin Hassan Bin Ahmad el-Mani, also a Palestinian.

Petitioner further alleges that in 1943 she was tried at Haifa on the charge of re-entering Palestine after having been deported therefrom and that she was acquitted by the Magistrate on the ground that she was a Palestinian citizen.

There is no doubt that if Petitioner married a Palestinian citizen prior to 1939 she did acquire Palestinian citizenship by virtue of such marriage. It was only in 1939 that Article 12 of the Palestinian Citizenship Order, 1925, was amended. The position since 1939 is that a woman does not acquire Palestinian citizenship, as of course, by marrying a Palestinian.

I will now refer to Mr. Munro's affidavit which reveals the following facts:—

(a) that the Petitioner was deported to the Lebanon in February, 1938, after being sentenced to one and a half months imprisonment and recommended for deportation by the Magistrate's Court of Haifa;

(b) that she was divorced at Haifa from Ahmad bin Husein bin Ahmad el-Mani in May 1938, and later married in November

1939, one Sha'ban Sameh Ali el Kurdi, an Egyptian subject;

(c) that she was again charged for being found to be illegally in Palestine and was sentenced to imprisonment in January, 1941, and was deported a second time to the Lebanon on the 31st January, 1941;

(d) that she was again arrested on the 30th June, 1943, and charged for re-entering Palestine illegally and was fined and subsequently deported to the Lebanon on the 29th July, 1943.

It is important to note that, in her petition to this Court, Petitioner failed to mention her marriage to El Kurdi. Although it has been repeatedly laid down by this Court that relevant facts must be disclosed, we are prepared in this case to overlook the matter because Petitioner may have laboured under the impression that the only issue was whether by marrying Palestinians (as alleged by her) she had acquired Palestinian citizenship.

Be that as it may, it is a most important fact that the Petitioner married in November, 1939, one El Kurdi, who, so far as the evidence goes, was an Egyptian subject.

Article 12 of the Palestine Citizenship Order, 1925, as amended by Article 6 of the Palestine Citizenship (Amendment) Order, 1939, lays down that a Palestinian female citizen who marries an alien does not cease to be a Palestinian citizen unless and until she possesses the nationality of her husband. We have had the benefit of Mr. Yedid Levi's expert evidence on the Egyptian law, and the least we can say, as at present enlightened, is that there is reason to think that Petitioner's marriage to an Egyptian did confer upon her Egyptian nationality.

It remains to deal with Petitioner's contention that in Criminal Case No. 14973/43, before the Magistrate's Court of Haifa, the learned Magistrate expressed himself as satisfied that she was a Palestinian citizen by virtue of her marriage to Palestinian subjects. It must be pointed out, however, that no mention was made before the Magistrate of Petitioner's marriage to El Kurdi. Evidence was given by the prosecution to the effect that Petitioner had entered Palestine without a passport and Petitioner in her evidence stated that her last marriage was with Ahmad El-Mani, a Palestinian. It is highly probable that the learned Magistrate's decision would have been different had he known that Petitioner's matrimonial venture was with an Egyptian subject.

Mr. Sanders, for Petitioner, has laid stress on the importance of Petitioner's acquittal by the Haifa Magistrate's Court which he relies

upon as constituting *res judicata*. With this contention we do not agree. First of all, we would point out that in the present instance it would be more correct to say that Petitioner relies on the doctrine of estoppel. We do not, however, consider that Respondent is estopped from averring that Petitioner is an Egyptian national because in the Haifa criminal case the learned Magistrate expressed himself as satisfied that she was a Palestinian citizen. The Magistrate's decision does not purport to settle an issue of personal status. The Magistrate's pronouncement to the effect that Petitioner was a Palestinian was only incidental to the dismissal of the charge which was then tried (see R. *v.* Hutchins, 44 L. T. p. 364). Furthermore, we do not consider that Petitioner could, in any event, rely on the Haifa trial in the course of which she gave incomplete and misleading evidence regarding her latest marriage.

The evidence we have before us is that Petitioner's last marriage was to an Egyptian subject and, after reading Mr. Levi's affidavit and hearing his evidence we cannot reject the possibility that Petitioner did acquire Egyptian nationality when she married el Kurdi. It was for Petitioner to establish, beyond doubt, that she is a Palestinian citizen. She has failed to do so and, as at present enlightened, we feel bound to presume that the order of deportation has been properly made (see High Court No. 19/44, 11 P. L. R. p. 115).

The rule is, therefore, discharged.

Given this 11th day of April, 1946.

British Puisne Judge.

CIVIL APPEAL No. 326/45.

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

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

IN THE APPEAL OF:—

Fouad Sikhtian. APPELLANT.

v.

Father Youhanna Tomb. RESPONDENT.

Question of waiver of condition in contract of lease — Stipulation re time and method of payment of rent — Equitable relief in cases under Rent Restrictions Ordinance.

Appeal from the judgment of the District Court, Haifa, in its appellate capa-

city, dated 29th July, 1945, in Civil Appeal No. 49/45, from the judgment of the Magistrate, Haifa dated 22.3.45 in Civil Case No. 1517/44, dismissed:—

1. a) A long course of payments at precise intervals of time differing from those stipulated in contract may establish waiver of the particular condition governing the time of payment.

b) Acceptance of rent at one time a month late, at another 2 months late and again on another occasion 6 months late does not set up a new condition as to time, nor does it turn the contract into a plain contract with provision for an annual rent to which Art. 476 of *Mejelle* applies.

2. While in cases under Rent Restrictions Ord. regarding dwelling houses Courts will grant equitable relief where there have been minor lapses in payment of rent, they will not do so without substantial reasons given for delay where business premises are concerned.

(*M. L.*)

ANNOTATIONS:

1. As to waiver of breach of contract of lease see C. A. 260/42 (1943, A. L. R. 78, 10 P. L. R. 38) and annotations thereto in A. L. R., see also C. A. 83/44 (1944, A. L. R. 803, 11 P. L. R. 411) and annotations.

2. As to equitable relief see C. A. 260/42 (*supra*) and annotations; C .A. 139/43 (1943, A. L. R. 386); C. A. 303/43 (1944, A. L. R. 488) and C. A. 44/45 (1946, A. L. R. 98; 12, P. L. R. 511) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Wittkowski and Katafago.

JUDGMENT.

In this case the relations between the parties were determined by a contract which was reduced to writing and signed. That contract leaves no doubt as to what the intention of the parties was, namely the lease of a store at the annual rent of LP. 87 which was to be payable monthly by bills. Now the Appellant agrees that these were the original contractual relations between them, but he says that they have been altered by waiver. It is true that the terms of a contract of this nature can be modified and indeed altered by acquiescence in a waiver, but the first point to be emphasised is that the onus of proving the waiver is on him who claims the benefit. It is conceded by the Respondent that that part of the written contract which provided for payment by bills instead of by cash or currency has been waived. From this Mr. Eliash proceeds to argue that the whole of this clause has been waived, and having gone thus far he then indicates what takes the place of the clause. His argument is that then it becomes a plain contract with provisions for an annual rent, which by reference to Article 476 of the *Mejelle*, is payable annually. The argument at first sight is an attractive one, but we must examine the contract as a

whole to arrive at the real intention of the parties. This involves an analysis of the nature of the waiver. Now it is our opinion that that part of the contract which states "payable monthly by bills" deals with two matters: firstly, it regulates the time of payment, and secondly, the method of payment. The time of payment was to be monthly regardless of the method, and the method was by bills. It is conceded that there has been a waiver in regard to the second part, so it is unnecessary for us to pursue that further. We have only to consider whether there was a waiver of that part which provides for a monthly payment. We agree with Mr. Eliash that if there has been evidence of a long course of payments at precise intervals of time differing from the period stipulated in the contract, it might establish that there has been a waiver of that particular condition governing the time of payment. But here, as the learned President points out, there was no evidence of a system of payments at regular intervals. The payment at one time has been made a month late, at another time two months late, and even on one occasion six months late. The acceptance of those payments by the lessor did not, in our view, set up a new condition as to the time. They amounted to no more than an acquiescence in each breach as it arose, and they cannot be said to have established a new system which was to govern the future. For those reasons we are of opinion that this ground of appeal must fail.

We come now to deal with the alternative ground of appeal which was a plea for equitable relief. It is true that in cases under the Rent Restrictions Ordinance the Courts will grant equitable relief where there have been minor lapses in regard to the payment of rent. This is particularly so in regard to dwelling houses where the main object of the Ordinance is to protect the person in the dwelling. But to establish a ground for equitable relief in the case of business premises, which should be conducted on business lines it appears to us that a more substantial reason than that advanced in this case, *i. e.* that the Appellant was in Syria and he had omitted to take due precaution to ensure that his agent paid the rent, would need to be put forward. For these reasons we are of opinion that there are no grounds for equitable relief and the appeal must be dismissed with costs on the lower scale to include LP. 10 advocate's fees.

Delivered this 1st day of April, 1946.

Chief Justice.

BZU/LIB Institute of Law
23364