ANNOTATED

SUPREME COURT JUDGMENTS

1942

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CIVIL APPEAL No. 245/41.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Abdul Jabir Abdul Aziz. — APPELLANT.

v.

1. Abdul Aziz Abdul Hamid Daoud Khalid,
2. Abdul Rahman Abdul Hamid Daoud Khalid. — RESPONDENTS.

Jurisdiction of Magistrate's Court sitting as Land Court — Rectification of register under Land Settlement Ordinance, Sec. 66 not included in Sec. 3(b) of Magistrates' Courts' Jurisdiction Ordinance, Land Courts Ord., Sec. 2 and 3.

In dismissing an appeal from the judgment of the Magistrate's Court of Jaffa, sitting as a Land Court, dated the 27th day of November, 1941, in Civil Case No. 694/41 :—

HELD : The jurisdiction of the Magistrate sitting as a Land Court extended only to actions enumerated in Section 3 of the Land Courts Ordinance and did not comprise rectification of the land register in accordance with Section 66 of the Land (Settlement of Title) Ordinance.

ANNOTATIONS : *Cf.* note 5 to CR. A. 119/41 (1941, S. C. J. 559).

FOR APPELLANT : Shihadeh.

FOR RESPONDENTS : Azar.

JUDGMENT.

In this appeal a very short point arises. The Appellant brought an action in the Magistrate's Court of Jaffa for the rectification of a land register under Section 66 of the Land (Settlement of Title) Ordinance. The Magistrate (His Worship Mr. S. Daoud) held that he had no jurisdiction because, under Section 3(b) of the Magistrates' Courts Jurisdiction Ordinance, 1939, he had jurisdiction to deal with actions concerning immovable property in accordance only with the provisions

of the Land Courts Ordinance. When one turns to Section 3 of the Land Courts Ordinance, one finds that the powers given to Land Courts are restricted to six specified matters. Now, had the Legislature intended to give to Magistrates' Courts the powers given to Land Courts under Section 66 of the Land (Settlement of Title) Ordinance, read together with the definition of "Land Court" in Section 2 of that Ordinance, the Legislature could well have done so ; and, in enacting Section 3(b) of the Magistrates' Courts Jurisdiction Ordinance, 1939, would certainly not have limited the powers of Magistrates to dealing only with the matters specified in Secion 3 of the Land Courts Ordinance. For example, they could have said, when enacting Section 3(b) "in accordance with the provisions of the Land Courts Ordinance and the Land (Settlement of Title) Ordinance". They omitted, however, to mention the Land (Settlement of Title) Ordinance and we consider that this omission must have been intentional.

For these reasons we consider that the Magistrate came to a right conclusion in holding that he had no jurisdiction. We accordingly dismiss the appeal with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 10.

Delivered this 15th day of January, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 148/41.

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

BEFORE : Copland, A/C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Eliahu Kshak. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal against sentence — Bank robbery — No special treatment in cases of violence.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 15th of December, 1941, in Felony No. 338/41, whereby the Appellant was convicted of breaking into a building with intent to commit theft therein, contrary to Section 298 of the Criminal Code Ordinance, 1936, and of personating Public Officers, contrary to Section 115(b) of the Criminal Code Ordinance, and

of being in possession of a firearm and ammunition without licence and authority, contrary to Section 36(2)(a) and (f) of the Firearms Ordinance, and sentenced to five years' imprisonment :—

HELD : 1. Breaking into a Bank whilst being armed was one of the most serious offences against public security and the sentence of five years' imprisonment was not excessive.

2. Special treatment should not be given in cases of crimes of violence.

ANNOTATIONS :

1. *Cf.*, on sentence generally, CR. A. 133/41 (1941, S. C. J. 501) and note 3.

2. On special treatment see, *e. g.*, CR. A. 27/41 (1941, S. C. J. 146, last line of the judgment) and CR. A. 64/41 (*ibid.*, p. 198).

FOR APPELLANT : Goitein.

FOR RESPONDENT : Omar Eff. Wa'ary.

JUDGMENT.

The Appellant pleaded guilty for charges of breaking into the Arab Bank with intent to commit theft, personating a Public Officer, being in possession of firearms without a licence, and being in possession of ammunition without authority. At the time that he committed these offences he was a member of a band of several persons, all engaged on the same enterprise. He was sentenced to five years' imprisonment. In the circumstances we cannot possibly say that such a sentence is excessive. Breaking into a Bank whilst being armed is, I should imagine, probably one of the most serious offences against public security that can well be imagined. The appeal must, therefore, be dismissed.

Delivered this 8th day of January, 1942.

Acting Chief Justice.

With regard to the application for special treatment, this is not one of those cases in which, in our opinion, it should be granted. The Appellant pleaded guilty to a charge of bank robbery whilst armed, and generally speaking, special treatment should not be given, in our opinion, in crimes of violence. The fact that he was a supernumerary Police Corporal is not an extenuating circumstance but makes the offence worse. The application is, therefore, refused.

Acting Chief Justice.

CIVIL APPEAL No. 260/41.

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

BEFORE : Rose, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Abdel Halim Abdallah Nasser. APPELLANT.

v.

Ahmad Shukri Taji el Faruki. RESPONDENT.

Bankruptcy — Receiving order made in absence of debtor — Ground for non-appearance — Discretion to rescind receiving order — Creditor's address not given in body of bankruptcy notice — Particulars as to amount of debt, Bankruptcy Ord., Sec. 3(3).

In dismissing an appeal from the order of the District Court of Nablus, dated the 11th day of December, 1941, in M. R. No. 48/41 (Bankruptcy No. 2/41) :—

HELD : 1. Inadvertance or misunderstanding were not good cause for non-appearance.

2. There was a discretionary power to rescind a Receiving Order having regard to the merits of the case.

3. There was nothing in the point that the creditor's address was not given in the body of the Bankruptcy Notice but only at the conclusion thereof.

4. The amount due was stated with sufficient accuracy in the Bankruptcy Notice as the wording used therein was identical with the wording of the judgment.

ANNOTATIONS :

1. See, on the first point, C. A. 234/41 (1941, S. C. J. 545) and note 3.

2. On the third point compare C. D. C. T. A. 41/39 (Tel-Aviv Judgments, 1939, p. 16).

FOR APPELLANT : Dunkelblum.

FOR RESPONDENT : Elia.

JUDGMENT.

This is an appeal from an Order of the District Court of Nablus declining to rescind a Receiving Order which had been previously made by it. The original Receiving Order was made on the 15th September, 1941, and the Appellant, who was duly served, failed to appear. In

due course the Appellant moved the Court to rescind this order and in his order the learned Judge says :—

> "I think it is obvious that the reason given for non-appearance of judgment-debtor is no reason at all. Inadvertance or misunderstanding could not excuse him."

This seems to us to be a sensible view of this matter.

However, in spite of the failure of a debtor to appear there is, of course, a discretion in the Court to rescind a Receiving Order, if it thinks that there is good reason so to do. It is clear that this power of rescission is discretionary and no doubt in considering whether or not to rescind such an order the Court will have regard to the merits.

In this case the grounds which are urged for the rescission of the order are two, both of them being purely technical and quite devoid of any merits.

The first point is that the Bankruptcy Notice should have contained the address of the creditor in the body of the notice. In fact, the notice mentions the name of the creditor but only gives the address at the conclusion of the document which says that the creditor's address for service is –- "Bustros Street, Sursok Building, Jaffa". The learned Judge came to the view on that that there is no merit in that point and we agree.

The second point is that the amount is not sufficiently accurately stated. Section 3(3) of the Bankruptcy Ordinance says :—

> "A bankruptcy notice under this Ordinance shall be in the prescribed form, and shall require the debtor to pay the judgment debt or the sum ordered to be paid in accordance with the terms of the judgment or order".

It is admitted by counsel for the Appellant that the wording used in the notice is identical with the wording of the judgment. The principal amount LP. 3,375.— is mentioned. The learned Judge of the District Court came to the view that there was no merit in that point either and he saw no reason for rescinding the decree on that ground. We agree.

For these reasons the appeal must be dismissed with costs on the lower scale to include the sum of LP. 15.— for advocate's attendance fee.

Delivered this 22nd day of January, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 1/42.

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

BEFORE : Gordon Smith, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

Spiros Yanoulatos. APPELLANT.

v.

The Attorney General. RESPONDENT.

Forfeiture of ship for immigration offence — Jurisdiction of District Court, CR. A. 119/41 — Res judicata — Finding as to prohibited immigrants, Defence (Immigration) Regulations, Reg. 2 — Meaning of "found", Reg. 3 — Failure to rebut presumption raised by Reg. 7 — Appellant's standing in the proceedings.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 23rd day of December, 1941, in Criminal Case No. 112/41, whereby the Court ordered the forfeiture of the S/S Atlantic :—

HELD : 1. (Following CR. A. 119/41) : The District Court on its criminal side had jurisdiction to order the forfeiture of the vessel.

2. As the Court of Criminal Appeal had held that there was no proper application for forfeiture before the District Court at the first trial the matter was not *res judicata*. Nor was the acquittal of the master relevant to the forfeiture.

3. The District Court had made a definite finding of fact that there were prohibited immigrants on board the ship.

4. The District Court was bound by the interpretation given to the word "found" by the Court of Criminal Appeal.

5. The acquittal of the master on the criminal charge was not sufficient evidence to rebut the presumption raised by Regulation 7 of the Defence (Immigration) Regulations.

6. As the Appellant had been held not to be the master of the vessel he could only appear as the owner or agent and it was open to him to rebut the presumption as to the knowledge of the master, agent or owner and to show cause why the ship should not be forfeited. This he had not done.

FOLLOWED : CR. A. 119/41 (1941, S. C. J. 559).

ANNOTATIONS :

1. See the previous proceedings in this case : CR. A. 86/41 (1941, S. C. J. 338) and CR. A. 119/41 (*supra*) and notes.

2. Note that the Court of Criminal Appeal in CR. A. 119/41 (*supra*) simply dismissed the appeal and did not remit it to the District Court for retrial as stated in the judgment.

3. On the second point see, *per contra*, C. A. 234/40 (1940, S. C. J. 439).

FOR APPELLANT : Weinshall & Toister.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

This is an appeal against the decision of the District Court which was delivered on the 23rd of December, 1941. The order was, that the S/S Atlantic now lying at Haifa Port Area be forfeited to the Government of Palestine. Against that order this appeal has been entered, I assume, by Spiros Yanoulatos for S/S Atlantic, as described on the application and notice of appeal. This matter has been several times before the District Court and before this Court and in Criminal Appeal No. 119/41 this Court then sent matters back to the District Court for retrial, and various findings and decisions were come to in the judgment in sending back to the District Court matters for retrial.

In the first place the Court of Appeal held that the District Court had been wrong in holding that the word "found" in Regulation 3 of the Defence (Immigration) Regulations meant "first found", and in fact the Court of Appeal held that those words menat 'in whatever circumstances the ship arrived here" or to put it more shortly "however it got here". Then the Court found that the presumption as in Regulation 7 was a rebuttable presumption and could be rebutted by the owner, agent or master. That Regulation 7 reads :—

> "If in any proceedings under these regulations it is shown that there were prohibited immigrants on board any vessel the owner, agent or master of such vessel shall be presumed to have knowledge of that fact."

and the Court held that that was a rebuttable presumption.

Then the Court found that there were in fact 1700 prohibited immigrants on board. It also found that the application for forfeiture was not made by the Attorney General himself and, therefore, there was no proper application before the District Court which could be considered. The Court also found that an application of this nature should be made to the District Court on its criminal side but the appeal was dismissed on the ground that the application for forfeiture was not made by the Attorney General himself. Subsequently there were proceedings again by the Attorney General himself in the District Court for forfeiture of the ship. I may mention that there was an appeal against the acquittal of the master in earlier proceedings. Now, against the judgment in which the District Court made the order for forfeiture, and which I have already referred to, the Applicants have appealed.

I am taking the grounds of appeal as set out in the Notice of Appeal. The first ground was that the District Court had no jurisdiction. That has already been dealt with, as I have just referred to and in the judgment of the Court of Criminal Appeal in case 119/41. The learned Judge said in the judgment — "I think, therefore, though with some

doubt, that applications for forfeiture under Regulation 3 should be made to the District Court on its Criminal Side."

Then the second ground is that the District Court is wrong in holding that the matter was not *res judicata*. This relates of course to the application for forfeiture and the acquittal of the master and it has been argued before us that because the master was acquitted on a criminal charge, therefore the matter of forfeiture is *res judicata*. I do not see how that can be substantiated in view of the finding of the Court of Appeal that there was no application before the District Court at all because it had not been signed or put forward by the Attorney General himself. It seems to me that the forfeiture of the ship and the acquittal of the master are two entirely different things and it has, as I just have said, been held that there was no application in the first instance for forfeiture, and, therefore, I do not see how the acquittal of the master is relevant to the forfeiture.

The third ground of appeal is that there was no evidence as to prohibited immigrants being on board and no finding of fact to this effect by the Court below. The Court below definitely held to the contrary. All the 1700 passengers, therefore, come within Regulation 7(2) (*sic*) and were prohibited immigrants.

The next ground is that the District Court was wrong in refusing to hear arguments on Regulation 3. That regulation was the subject of the interpretation of the Court of Criminal Appeal and I have already referred to that passage where the Court distinctly interpreted the word "found". Then it is put forward in the next ground of appeal, that the evidence adduced was sufficient to rebut the statutory presumption in Regulation 7. Well, Regulation 7 refers not only to the master but to the owner and the agent, and the mere fact that the master has been acquitted on a criminal charge does not seem to me to substantiate or be sufficient evidence to rebut that presumption. The District Court had considerable difficulty in deciding who was the owner. In fact, I do not think the Court came to any conclusion on that, it states :—

> "As regards the owner there appears to be some conflict of evidence as to who is the owner. If Aghanimos is to be considered the owner we are satisfied that he knew perfectly well for what purpose the Atlantic was to be used, *i. e.* the carrying of prohibited immigrants. On the other hand if the owner is Yax as suggested by Mr. Koussa and as testified to by Yanoulatos the Captain ; then this Court does not consider that the evidence adduced rebuts the presumption of knowledge under paragraphs 3 and 7 of the Defence (Immigration) Regulations, 1940."

I do not think we can, by any means, say that the District Court erred in that respect.

It was also submitted that the facts found were contrary to the evidence adduced. Now, it seems that the Court in the earlier appeal also held that this application for forfeiture could be made *ex parte*, and then, naturally, if properly authorised people came forward to show cause against such forfeiture that would be in order. That has not been done. There is the master, there is the owner, there is the agent, any of those could come forward to rebut the statutory presumption and so avoid the forfeiture. I asked Dr. Weinshall how it was he was here and for whom he was appearing, and apparently he was instructed by Yanoulatos. If this man, Yanoulatos, was not the master, (and he was acquitted on the grounds that he was not the master) how does he appear in these proceedings ? He must be the owner or he must be the agent. If he is not the owner, I suppose, he must be acting on behalf of the owner and as his agent, and as such he can come forward and show cause why the ship should not be forfeited. Such, in my opinion, has not been done and no grounds have been shown why the ship should not be forfeited and we agree that there is no substance in this appeal. This appeal must, therefore, be dismissed with costs.

Delivered this 26th day of January, 1942.

Chief Justice.

CIVIL APPEAL No. 220/41.

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

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

IN THE APPEAL OF :—

1. Hasan 'Abd er Raziq Ahmad Kullab,
2. Muhammad 'Abd er Raziq Ahmad Kullab,
3. Khadija 'Abd er Raziq Ahmad Kullab,
4. 'Ayisha Muhammad el Khatib. APPELLANTS.

v.

1. Jabr Hasan Ahmad Kullab,
2. Shakir Hasan Ahmad Kullab,
3. Isma'il Hasan Ahmad Kullab,
4. 'Abd el Fattah Hasan Ahmad Kullab. RESPONDENTS.

Prescriptive title, Land Law (Am.) Ord., Sec. 2(2) — Presumption as to possession by co-heirs rebutted by 22 years' acquiescence.

In dismissing an appeal from the decision of the Settlement Officer, Gaza Settlement Area, dated the 22nd day of September, 1941, in Case No. 40/32/Bash-shit :—

HELD : The presumption that, amongst co-heirs, possession by one was possession by all was only a presumption and as the persons who claimed as co-heirs had for 22 years asserted no right and no claim to the property in question the presumption was definitely rebutted.

ANNOTATIONS : See C. A. 197/41 (1941, S. C. J. 458) and notes 5 and 6.

FOR APPELLANTS : D. Moyal.

FOR RESPONDENTS : Abcarius.

JUDGMENT.

This is an appeal from a decision of the learned Settlement Officer, Gaza Settlement Area, in which he rejected the claim of the present Appellants before him with regard to two *Qirats* out of a large number of *Qirats* in the *Masha'* lands of Bash-shit Village. The Settlement Officer found that a *hijjeh,* Exhibit 'E', was a genuine document and that, by that document, the present Respondents' father had bougt all lands accruing to their uncle, Abd er Razzak, by inheritance, whether registered in the *Tabu* or obtained by his father by possession and recorded in the village records. He further held that the matter rested purely on acquisition in good faith and undisputed possession from the year 1909 until settlement in 1932 and he held that those two matters had been proved. Thereupon he ordered the land to be recorded in the names of the Defendants, the present Respondents.

Three grounds are raised by the Appellants. The first one is that the Settlement Officer wrongly reopened the case after judgment had been reserved. Now this depends very largely upon what actually took place at the hearing before the Settlement Officer. In his Interlocutory Order of the 14th June, 1940, the Settlement Officer states :—

> "The Defendants allege acquisition of the shares by purchase but refrain from proving the purchase at this stage and base their defence on Section 2(2) of the Land Law Amendment Ordinance, 1933."

The Settlement Officer went on to hold that the provisions of that Ordinance could not be applied to the present case and ordered then that the evidence of the Defendants should be led as to the alleged purchase by them of the shares in dispute.

Now, in the first place we think that the Settlement Officer came to a wrong decision on the question of adverse possession. It is clear

from the evidence before him and on the admissions made by the Appellants, that for 22 years none of the Appellants had taken any share in the produce of these particular lands. The presumption, that amongst the co-heirs possession by one is possession by all, is only a presumption which may be rebutted as other presumptions may be, and when we find that for 22 years, far beyond the period laid down in the law for prescriptive possession, the persons who claim, as co-heirs, had asserted no right and no claim to the property in question, in our opinion the presumption is definitely rebutted.

For this reason alone the appeal must fail, as in such a case it is immaterial whether the *hijjeh* is or is not a valid document or whether the *hijjeh* only deals with the registered lands and not with unregistered lands.

For these reasons, therefore, we think that the Settlement Officer came to a correct decision though his reasons which animated his judgment were not right. The appeal must, therefore, be dismissed with costs on the lower scale and we certify the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 12th day of January, 1942.

Acting Chief Justice.

CRIMINAL APPEAL No. 151/41.

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

BEFORE : Copland, A/C. J., Edwards and Khayat, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Naftali Herman Brender. RESPONDENT.

Interpretation of statutes — Failing to furnish information, Trading with the Enemy Ord., Sec. 9 — Custodian not empowered to require information by general notice in the Gazette, Custodian Order, paragraphs 3(1) and 11 — Power to impose time limit.

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 16th day of November, 1941, in Criminal Case No. 127/41, whereby the Respondent was acquitted of failing to furnish the Custodian with information

required under section 9 of the Trading with the Enemy Ordinance, 1939, and under Section 9(6) of the Trading with the Enemy Ordinance, 1939, and knowingly or recklessly making a statement which is false contrary to section 10(1) of the Trading with the Enemy Ordinance, 1939, and in amending the judgment of the Court below :—

HELD : 1. The words "shall be empowered to require *any person* to furnish, *etc.*," in paragraph 9 of the Trading with the Enemy (Custodian) Order meant a personal notice addressed to a particular person and the Custodian was not entitled to require information by a general notice in the *Gazette*.

2. The Custodian could require any particular person to furnish him with information or returns within a time fixed by him.

ANNOTATIONS :

1. Other proceedings in this matter : C. A. 143/41 (1941, S. C. J. 456).

2. *Cf.* CR. A. 1/41 (1941, S. C. J. 238) and note 1.

3. See, on the first point, H. C. 80/40 (1940, S. C. J. 350, on top of page 353) and H. C. 82/41 (1941, S. C. J. 547, on pp. 551—2 and 552—3). The position has now been remedied by the express provisions of Section 9C of the Trading with the Enemy Ordinance as enacted in the Defence (Trading with the Enemy) Regulations, 1942, P. G. No. 1165, Suppl. 2, p. 249.

FOR APPELLANT : Blum.

FOR RESPONDENT : B. Joseph and Caspi.

JUDGMENT.

This is an appeal by the Attorney General against an acquittal of one, Mr. Brender, on a charge under Section 9(6) of the Trading with the Enemy Ordinance, 1939, of failing, without reasonable cause, to produce, in accordance with the requirements of an order made by the Custodian under Section 9 of the Ordinance, information required to be produced or furnished under the Order. There was a second count in the information on which the District Court acquitted on hearing the evidence on that count, and no appeal has been taken against that acquittal. The Attorney General, however, appeals on the acquittal on the first count because the District Court there held that the notice required under paragraph 11 of he Trading with the Enemy (Custodian) Order, 1939, must be a personal notice and not a general notice published in the *Gazette*. The District Court further went on to hold that the Custodian did not only publish a notice requiring information but in that notice had set a time limit of 14 days which he could not do.

The Court is of opinion that, on the true construction of paragraph 11 of the Trading with the Enemy (Custodian) Order, the Custodian is not entitled by means of a general notice published in the *Gazette*

to require persons to furnish information or returns as set out in paragraph 11. To our minds, it is quite clear that the words "shall be entitled to require *any person* to furnish" must mean a personal notice addressed to that particular person. Paragraph 3(1) of the Custodian Order imposes a liability on any person owing money to an enemy to pay it to the Custodian. The persons owing the money therefore are under an obligation to pay it and under paragraph 11 the Custodian, if not satisfied with the information, has power to require that person to give fuller details, but there is nothing in paragraph 11 which authorises a general notice to be made in the *Gazette*.

With regard to the time limit of 14 days, the Court wishes to make it quite clear that, whilst the Custodian cannot impose a liability by general notice in the *Gazette* and, therefore, cannot fix by general notice a time limit, yet he is certainly entitled under the last part of paragraph 11 to require any particular person to furnish him with information or returns within the time to be fixed by the Custodian. Subject to this amendment the appeal is dismissed.

Delivered this 13th day of January, 1942.

Acting Chief Justice.

CIVIL APPEAL No. 235/41.

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

BEFORE : Copland, A/C. J. and Rose, J.

IN THE APPEAL OF :—

Hussein Saleh Hajjat. APPELLANT.

v.

1. Ahmad Khamis el Ghazawi,
2. Aldallah Abdul Hafiz Razzaq,
3. Farid Abdul Chani Razzaq for himself and on behalf of the heirs of his father. RESPONDENTS.

Civil Procedure — Trial protracted — Plaintiff failing to appear — Magistrate striking out the case temporarily with liberty to renew without fees — No power for such an order — Proper procedure under M. C. P. R., Rule 137(c) — Plaintiff proceeding without motion to set aside ex parte order, M. C. P. R., Rule 163 — Proceedings vitiated — Failure to deal with issues.

In allowing an appeal from the judgment of the Magistrate's Court, Haifa, sitting as a Land Court, dated the 5th day of November, 1941, in Case No. 4607/40 :—

HELD : 1. Cases had to be tried with celerity when once they were started.

2. The Magistrate had no power to order the temporary striking out of the case with liberty to renew without fees. On the Plaintiffs' failure to appear the Magistrate should have proceeded under Rule 137(c) of the Magistrates' Courts Procedure Rules and either adjourned the case or dismissed it, on the Defendants' application.

3. The Plaintiffs should have applied by motion for the setting aside of the *ex parte* judgment and their failure to do so vitiated the reinstatement and the subsequent course of the case.

4. Where issues are framed the Court should notice what the issues are and deal with them.

ANNOTATIONS :

1. *Cf.*, on the first point, C. A. 112/39 (1939, S. C. J. 517).

2. On reinstatement of a struck out action see C. A. 226/38 (1939, S. C. J. 337).

FOR APPELLANT : Asfour.

FOR RESPONDENTS : 'Asal.

JUDGMENT.

This is an appeal from a judgment from one of the learned Magistrates in Haifa sitting as a Land Court. The first comment we would make on this case is the length of time over which the proceedings were dragged before the Magistrate. The first part of the record, which has been translated, is dated the 20th January, 1941. It was not until the 5th of November of that year that the Magistrate finally persuaded himself that he could give judgment.

Now, it is quite impossible for any case to be tried by anyone satisfactorily under those conditions. To begin with, when September comes the Magistrate or the Judge who has been trying the case has quite forgotten what has happened in January and February. Cases must be tried through when once they are started, not with much greater celerity than here because there was no celerity at all in this case, but with celerity. As I said this case is a striking example of how a case should not be tried.

What happened in this unfortunate litigation was that when the case came for trial on the 20th January, 1941, the attorney for the Defendant was duly present in Court but nobody appeared for the Plaintiffs. Later on one of the Plaintiffs appeared and asked for adjournment because his advocate was sick. There was then a certain

amount of discussion. The Defendant asked the Court to dismiss the case because it had been already adjourned several times and the Plaintiff was showing reluctance in bringing his witnesses or to appear, but finally the Magistrate ordered the temporary striking out of the case with liberty to renew without fees within two months. Now, that, of course, was entirely wrong and that order the learned Magistrate had no power whatever to make. In circumstances such as these, when the Plaintiff had not appeared, the Magistrate should have proceeded under Rule 137(c). He should have adjourned the case if he liked but since the Defendant asked for dismissal the Magistrate should have dismissed the case there and then. We have no sympathy with the Plaintiffs who could not even appear in time in Court and inform the Court and the other parties that their advocate was sick. The case, therefore, having been struck out the only way in which the Plaintiffs could have proceeded after that was to apply under Rule 163 by motion to set aside the *ex parte* judgment. This they did not do and the reinstatement, therefore, was entirely wrong and their failure to apply under Rule 163 vitiated the whole subsequent course of the case.

One further observation perhaps we would make, and that is if issues are framed the Court should make some little attempt, at any rate, to notice what these issues are and to deal with them.

The appeal will be allowed for the reasons which we have given and the judgment of the learned Magistrate set aside. The Plaintiffs' case will be dismissed. The Appellant is entitled to costs here and below, the costs of this appeal to be on the lower scale, and the sum of LP. 15 advocate's attendance fee on the hearing of this appeal.

Delivered this 7th day of January, 1942.

Acting Chief Justice.

CRIMINAL APPEAL No. 147/41.

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

BEFORE : Copland, A/C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Zakariya Abdul Rahman Dahdah. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal against sentence — Shop breaking, C. S. O., Sec. 297(a) —

Contemporary offences of the same nature to be tried together — Sentences to run concurrently unless exceptional circumstances.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 15th of December, 1941, in Criminal Case No. 208/41, whereby the Appellant was convicted of breaking into a building and committing theft therein, contrary to Section 297(a) of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment to run after the expiry of the sentence he is serving, and in ordering the sentences to run concurrently :—

HELD : 1. Offences committed round about the same time, within a few days of each other, by the same person, in similar circumstances, should, if possible, be tried together.

2. Save in the most exceptional circumstances consecutive sentences should not be imposed.

ANNOTATIONS : On the second point see, *per contra*, CR. A. 13/41 (1941, S. C. J. 63).

APPELLANT : In person.

FOR RESPONDENT : Omar Eff. Wa'ary.

JUDGMENT.

The Appellant was convicted of breaking and entering into a coffee house in Jaffa and stealing 70 mils, contrary to Section 297(a) of the Criminal Code Ordinance, and was sentenced to three years' imprisonment. He had previously been sentenced twice to five years' imprisonment, reduced on appeal in each case to two years, and the sentence of three years, against which he is now appealing, was ordered to run after the termination of the sentences of five years. Now at the time of the previous offences this present charge was still standing against him. The Court is of opinion that offences committed round about the same time, within a few days of each other, by the same person, in similar circumstances, should, if possible, be taken together. It is no good trying a man separately on different days, as the Court then does not get the correct picture of what the situation is, and in addition the Court is of opinion that, save in the most exceptional circumstances, consecutive sentences should not be imposed. One of these exceptional circumstances, of course, would be where an offence is committed in prison whilst the man is already serving a sentence, but consecutive sentences are very apt to cause extreme hardships in circumstances when it is not desirable.

The appeal against the sentence of three years is dismissed, but we order that it run concurrently with the sentences of two years and any others which this man may be at this moment serving.

Delivered this 8th day of January, 1942.

Acting Chief Justice.

CRIMINAL APPEAL No. 4/42.

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

BEFORE : Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Ahmad Diab Ahmad el Abed. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder — Statement of Appellant to Police — Inferences not based upon evidence — Premeditation — Provocation.

In dismissing an appeal from the judgment of the Criminal Assize Court sitting at Jaffa, dated the 5th day of January, 1942, in Criminal Assize Case No. 66/41, whereby the Appellant was convicted of murder, contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. As the Appellant knew that his wife was a prostitute the fact that he found her in a brothel could not be considered as provocation and — on the evidence as a whole — there was sufficient material to infer premeditation.

2. The inference which the Trial Court drew that failing his wife's return, the Accused intended to kill her, was not based on any evidence.

ANNOTATIONS :

1. On premeditation see CR. A. 57/40 (1940, S. C. J. 442) and note 3. See also CR. A. 87/41 (1941, S. C. J. 295).

2. On provocation *cf.* CR. A. 151/37 (1938, 1 S. C. J. 21).

FOR APPELLANT : Salih and Zein Eddin.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

This is an appeal from the judgment of the Court of Criminal Assize sitting at Jaffa, convicting the Accused of murder.

Counsel for the Appellant contends that there was no sufficient evidence of premeditation to justify a conviction of murder ; alternatively that, the evidence apart, the findings of fact in the very short judgment of the Trial Court are inadequate to support such a conviction.

The matter is not free from difficulty, partly owing to the fact that the Court seems to have attached importance to a statement of the Accused to the Police in which he said, *inter alia* :—

> "I took her (deceased) to the school not to see her son but in order to kill her because I found her in the brothel."

Even assuming that the Accused spoke these words, it is difficult to see what importance can be attached to them, as it is quite clear from the evidence for the prosecution, which is accepted by the Trial Court, that not only had the Accused been aware for long past that his wife was a prostitute but at one time he had actually been taking a share of her immoral earnings. The fact, therefore, that he found his wife in a brothel cannot have been even a mild surprise, still less a shock, to the Accused, and as a motive for murder such a discovery can have had no force whatever. It would seem to be probable either that his statement was taken down incorrectly or that the Accused was talking at random.

Another matter that has caused us difficulty is the following sentence in the judgment :—

> "We believe that the Accused desired to persuade his wife to come back to him, failing which he intended to kill her, and with this intention he induced her to go to the school to see the child."

Counsel for the Appellant argues that the inference which the Court drew that failing his wife's return the Accused intended to kill her is not based upon any evidence and cannot, therefore, be supported. This would appear to be so and we feel a certain sympathy with the Appellant on this matter.

Taking the evidence as a whole however — and the findings of fact of the Trial Court are, in our opinion, just adequate to cover the matter — it would seem that there is sufficient material to satisfy the statutory requirements of premeditation. The fact that the Accused had a lethal weapon with him ; that the attack on the deceased was of a remarkable savagery (the dead woman having sustained many and horrible wounds) and that the Trial Court disbelieved the evidence of the Accused as to immediate provocation, seems to us to be sufficient to support the conviction.

For all these reasons we are of opinion that the appeal should be dismissed and the conviction and sentence confirmed.

Delivered this 31st day of January, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 8/42.

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

BEFORE : Gordon Smith, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Said Muhammad Yasin. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder — Appellant not informed of his right to appeal — Motive — Premeditation — Sufficiency of evidence — Alibi not proved.

In dismissing an appeal from the judgment of the Criminal Assize Court sitting at Nablus, dated the 15th day of January, 1942, in Criminal Assize Case No. 57/41, whereby the Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. As the Appellant had lodged an appeal no miscarriage of justice had occurred by his not having been informed by the Court below of his right to appeal.

2. From the facts of the case the Court below was fully entitled to infer premeditation.

3. There was ample evidence to justify the conviction and the Court below was entitled to disbelieve Appellant's evidence as to an alleged *alibi*.

ANNOTATIONS :

1. See, on the first point, CR. A. 78/38 (1938, 2 S. C. J. 112).
2. On premeditation *cf.* CR. A. 4/42 (*ante*, p. 19).

FOR APPELLANT : Khoury.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

The main reason for this appeal is that it is a capital charge. There is no substance in the third ground of appeal. There was a technical omission on the conclusion of the case, in that the Court did not inform the Accused of his right to appeal. That is got over by reason of the fact that the Accused is here and has made an appeal. There has, therefore, been no miscarriage of justice in that respect. The second ground of appeal was that there was no motive proved by the prosecution to justify the sentence. If that means that there was an absence of premeditation then it is clear that premeditation can be amply

presumed from the facts of the case. As to the first ground of appeal that there was no evidence to support the findings of fact made by the Court below, the fact is that there were two eyewitnesses of the actual crime and the actual shooting. The Accused appears to have way-laid the deceased and watched for him and as he approached along the path came out, pointed a gun at him and fired killing him. On those facts which were detailed more extensively in the judgment of the Court below, the Court below found the Accused guilty and specifically dealt with the evidence. The Accused's defence was that he was not the man who committed this crime at all as he was at Haifa at the time. He gave evidence to that effect on his own behalf, and there were no witnesses called in support of that *alibi*. The Court is entirely justified in disbelieving that *alibi*. There is no other course open to us but to dismiss his appeal.

Delivered this 30th day of January, 1942.

Chief Justice.

CRIMINAL APPEAL No. 146/41.

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

BEFORE : Gordon Smith, C. J., Edwards and Khayat, JJ.

IN THE APPLICATION OF :—

1. Itzhak Soriano,
2. David Soriano. APPLICANTS.

v.

The Attorney General. RESPONDENT.

and

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

1. Itzhak Soriano,
2. David Soriano. RESPONDENTS.

Conspiracy and false pretences, C. C. O., Sec. 34 and 301 — Compensation obtained for fire to store — Enquiry under Fire Enquiries Ordinance, 1937 — Accused tried for arson and acquitted — Plea of autrefois acquit, R. v. Barron — Ingredients of offence of false pretences — Admissibility of evidence allegedly proving charge on which

accused had been acquitted, R. v. Ollis — Proof of guilty knowledge — False pretence continuing from submission of claims to Insurance Company until receipt of payment — Attempt — Corroboration of evidence of an accomplice — Liability of person who did not sign the claim forms — Sentence.

In dismissing an application for leave to appeal from the judgment of the District Court of Jerusalem, dated the 23rd of December, 1941, in Felony No. 306/41, whereby the Applicants were convicted of conspiracy to commit a felony, contrary to Section 34 of the Criminal Code Ordinance, and of obtaining money by false pretences, contrary to Section 301 of the Criminal Code Ordinance, and sentenced to one year's imprisonment, and in dismissing an appeal by the Attorney General from the same judgment :—

HELD : 1. (Following R. *v.* Barron) : An acquittal on a charge of arson was not a bar against a subsequent trial for conspiracy to defraud and false pretences in connection with the same fire.

2. The necessary ingredients of the offence of false pretences were present in this case, *i. e.* (a) a false pretence of a matter of fact ; (b) knowledge by the Accused of its falsity ; (c) an obtaining of money or money's worth by means thereof ; and (d) an intent to defraud.

3. (Following R. *v.* Ollis) : The evidence of Lederman was admissible as it went to prove the guilty knowledge of the Accused and it had not been admitted to prove arson against the Accused.

4. The false pretence was a continuing one and the Accused were not misled by the form in which the charge was laid, namely that the date of the offence was stated to be 21.6.1939, *i. e.* the day on which the Accused had received the money from the Insurance Company.

5. The Court below were justified in their findings as to the sufficiency of the evidence adduced and they had been aware of the necessity for corroboration of Lederman's evidence as that of an accomplice.

6. The second Accused was fully responsible he knew and approved of the claims and had signed the receipt for the insurance money.

7. The sentence, although a lenient one, would not be interfered with.

FOLLOWED : R. *v.* Barron, 1914, 2 K. B. 570 ; R. *v.* Ollis, 1900, 2 Q. B. 758.

ANNOTATIONS :

1. On the principles of the plea of *autrefois acquit* see CR. A. 14/41 (1941, S. C. J. 53) and note 2. *Cf.* CR. A. 71/41 (*ibid.*, p. 200).

2. See, on the elements of the offence of false pretences, CR. A. 63/38 (1938, 2 S. C. J. 40) and note.

3. On corroboration of the evidence of an accomplice, *vide* CR. A. 65/41 (1941, S. C. J. 194) and note.

FOR APPLICANTS (RESPONDENTS) : No. 1 — Levitsky.
No. 2 — Abcarius.

FOR RESPONDENT (APPELLANT) : Junior Government Advocate — (Salant).

JUDGMENT.

This matter came before us on the 19th January, by way of motion for leave to appeal, and the hearing was taken as being the appeal itself, as well.

Both Accused had been convicted on two counts by the District Court of Jerusalem on the 23rd December, 1941, after a trial lasting nineteen days, their father having been acquitted and discharged during the course of the trial, and a younger brother was acquitted at the conclusion of the trial.

The two Accused were sentenced to one year's imprisonment, and each ordered to pay LP. 75 towards the costs of the prosecution, but it is not clear to which count the sentence refers, there being one count of conspiracy to defraud (Sec. 34, C. C. O.) and one count of obtaining money by false pretences (Sec. 301, C. C. O.).

The material parts of the first count are that the Accused conspired together on various dates between February, 1938, and June, 1939, with intent to defraud to obtain money by false pretences from the Eagle Star Insurance Co., Ltd.

As regards the second count, the material parts are that the Accused, on the 21st June, 1939, at Jerusalem, with intent to defraud, obtained from the Insurance Company LP. 1,950.— by falsely pretending that goods — the property of Soriano Brothers at their store at Jaffa Gate — were destroyed by an accidental fire, when in fact, to their knowledge, such fire was not accidental.

I have set out these counts in detail, more particularly the second count, as on the appeal before us, as well as before the District Court, objection was taken to the form of the second count.

Before dealing with this or any other matters, it is desirable to set out certain facts and relevant dates.

On the 15th March, 1938, a fire broke out at the Accuseds' store at Jaffa Gate, Jerusalem, about 6.20 *p. m.*, when a considerable quantity of stock was destroyed. The Fire Brigade was soon on the scene, and the fire — which appears to have had more than one origin — was put out by about 7.30 *p. m.*

On the 10th April, 1938, two formal claims were filed with the

Insurance Company, there being two policies in respect of two warehouses, the total sum claimed being LP. 3,539.869, out of a total stock of LP. 7,000.—.

These forms are identical in that they were both signed by the first Accused, "For Soriano Bros.", and both state that a "fire broke out at warehouses occasioned to the best of our knowledge and belief by accident."

The Police being justifiably suspicious as to the origin and nature of the fire, an enquiry under Ordinance No. 7 of 1937 was held, the Magistrate giving his decision on the 21st May, 1938. The finding was as follows :—

> "that this fire started in various parts of the store room in the upper part of the premises in possession of the firm of Soriano Bros., and that it must have been unlawfully set."

As a result of a preliminary enquiry the two Accused, together with their father and younger brother, were committed for trial on a charge of arson, but at such trial they were, on the 15th March, 1939, all four acquitted.

In the meantime, however, not only had a question of the amount of the loss being ascertained by arbitration arisen, but also the question of liability at all had not been admitted, *vide* Exhibits D. 7, D. 8, D. 9 and D. 10. The local representative of the Insurance Company, Mr. Levin, had forwarded all relevant documents and the findings of the Magistrate at the fire enquiry, to the Head Office in London, for consideration.

Apparently an award was made in the arbitration proceedings, and further negotiations took place, with the result that, on the 21st June, 1939, Mr. Levin handed a cheque for LP. 1,950.— to the Accused in his office, against a full receipt and discharge (Ex. p. 8) signed by both Accused.

Further evidence having subsequently come to light as to the origin and nature of the fire, the same four Accused were charged with conspiracy and obtaining money by false pretences before the District Court, with the result detailed earlier.

Against this conviction of the two Accused an appeal has been lodged, on the hearing of which Mr. Levitsky appeared for the first Accused, Abcarius Bey for the second Accused, and Mr. Salant appeared on behalf of the Attorney General.

One can combine the arguments put forward on behalf of both Accused as follows :—

1st. That the District Court wrongly over-ruled the plea in bar and otherwise raised at the trial, of *autrefois acquit*, that is in effect, that the charges of false pretences were the same and raised the same issues as in the charge of arson, in respect of which the Accused had ben acquitted.

2nd. That there was no false pretence at all.

3rd. That the evidence of a witness, Lederman, was wrongly admitted.

4. That the charges were not strictly proved, and that the second charge as laid could not stand.

5. That there was no sufficient evidence entitled to any degree of credence upon which the Court could convict, and that there was no corroboration as required by law of the evidence of Lederman — a self-confessed accomplice and blackmailer.

And generally, that the District Court misdirected itself on these points and also as to matters of fact.

Before dealing with these points it is desirable to analyse the judgment of the District Court in relation thereto. It extends to eleven typewritten pages, and refers to the length of the trial (it lasted 19 days) and the number of persons giving evidence (39). It then details those facts which were undisputed or undisputable, and then goes on to consider the relevant evidence in the case, more particularly that of Lederman, whom the Court itself described as an accomplice and self-confessed blackmailer. The Court advised itself of the necessity for a close scrutiny of his evidence and that of other witnesses, and of the need for corroboration of Lederman's evidence, and discusses these matters throughout three and a half pages. It cannot be said that the Court was not aware of the danger of accepting the testimony of an accomplice, or of the need for material corroboration of such testimony, and in fact the Court gives the names of those witnesses in whose evidence such corroboration does, in a more or less degree, exist. Moreover, a great deal of Lederman's evidence and the case for the prosecution was, as stated in the judgment, not denied, and was even admitted. How far much of his evidence is really material to the charge of false pretences is another matter, but, in many respects, the Court preferred the evidence of Lederman to that of the two Accused.

The judgment then discusses the case as against the younger brother, Nissim, and finds him not guilty, and he is discharged.

Following on that, the judgment discusses the admissibility of the evidence as to the outbreak of the fire, which all tended to prove

guilty knowledge and intention of the Accused on the false pretence charge. The Court found as a fact that this was continuing as from some date prior to the 10th April, 1938, when the claim was made, down to the date of payment, on the 21st June, 1939. The judgment then sets out the facts which it considered proved, and which are essential to a conviction on this charge, and follows this by referring to the legal and technical submissions which it had mostly ruled upon during the course of the hearing, and upon which the Court had held or did hold in favour of the prosecution, on such submissions.

The first point taken on the appeal before us is that of *autrefois acquit*. We did not call on Counsel for the Respondent to argue this point, as we were unanimously of the opinion that there was no substance in the arguments put forward for the Appellants.

The maximum punishment for the crime of arson is imprisonment for life, whereas that for false pretence is five years — a rather big distinction. Besides, the two offences are in their very natures so different and distinct and the evidence required to support them must respectively and necessarily be so very different that we cannot see how an acquittal for arson can be a bar to a subsequent charge of false pretence. Nor can we possibly agree with the submission that in this false pretence trial the two Accused were in fact being retried for arson, on which charge they had previously been acquitted. Also see Rex. *v.* Barron, 1914, 2 K. B., 570. That an acquittal on the arson charge necessarily involved an acquittal on the false pretence charge cannot be maintained.

The second point was that there was no false pretence at all. The necessary ingredients of the offence of false pretence are four : (a) a false pretence of a matter of fact ; (b) knowledge by the accused of its falsity ; (c) an obtaining of money or money's worth by means thereof ; and (d) an intent to defraud.

The false pretence is that the Accused alleged that the fire was caused accidentally in the formal claims against the Insurance Company, dated the 10th April, 1938, and that they maintained that attitude throughout cannot be disputed, and there is, therefore, every justification for the finding of fact by the District Court that this was continuous down to the date of payment of the claims, which took place on the 21st June, 1939.

Did the Accused know of its falsity ? We have the finding by the Magistrate at the Fire Enquiry dated the 21st April, 1938, that this fire started in various parts of the store room in the upper part of the premises of Soriano Brothers, and that it must have been unlawfully

set. But this finding in no way absolved the Insurance Company from payment of the claim and was quite irrelevant to the question of the Company's liability. On the evidence before it the District Court found as a matter of fact that the second Accused deliberately and falsely represented to the Company that the fire was caused accidentally, and that he knew at the time of this representation that it was false and untrue. We can see no reason or cause for thinking that the District Court was wrong or erred in coming to this conclusion. It is not disputed that the money was obtained, and it cannot be disputed that if these premises are correct, then there was a deliberate intent to defraud. The necessary ingredients for maintaining a charge of false pretences were, therefore, in the opinion of the District Court, all present and proved sufficiently.

The third point was that the evidence of Lederman was wrongly admitted. Objection was taken at the trial to the admission of this evidence, but the Court over-ruled it. The grounds were that such evidence was irrelevant and that, as it tended to show that Accused were guilty of arson, on a charge for which they had been acquitted, therefore, such matter was *'res judicata'* and that estoppel by record applied. Against this it was argued that Reg. *v.* Ollis, 1900, 2 Q. B. D., p. 758, applied, and that such evidence was admissible for the purpose of proving guilty knowledge. Quite briefly the facts in Reg. *v.* Ollis were that, having already been acquitted on a charge of false pretence in respect of a "worthless" cheque, on a subsequent trial of the same man, in respect of other similar cheques, evidence of the facts in the first case and on which the accused was acquitted was admitted for the purpose of proving guilty knowledge. It might be mentioned that the arguments of Mr. Levitsky closely followed those of Counsel for Ollis, such arguments being over-ruled. As this case was the subject of considerable argument and controversy before us, it is desirable to examine it at some length, as the prosecution largely relies on it.

The case was twice argued before the Court of Crown Cases Reserved, on the second occasion before the Lord Chief Justice and seven other Judges. The Lord Chief Justice in his judgment said :—

> "The only point for our present determination is, whether that evidence was legally admissible on the ground that the facts disclosed in it were relevant to the subsequent charges. It does not appear to have been argued that it was not relevant as shewing guilty knowledge, if it were not inadmissible on the grounds suggested — namely, that the facts sought to be given in evidence had already been given, and that the accused had already been acquitted of the charge to which they related. It is clear that there was no estoppel ; the negativing by the jury of the charge of fraud on the first

occasion did not create an estoppel ; nor is there any question arising upon the maxim *'Nemo debet bis puniri pro uno delicto'*. The evidence was not less admissible because it tended to show that the accused was, in fact, guilty of the former charge. The point is, was it relevant in support of the three subsequent charges ? In the opinion of the majority of the Court, and in my own opinion, it was relevant as shewing a course of conduct on the part of the accused, and a belief on his part that the cheques would not be met."

Grantham, J., said :—

"The real test is, was the first charge the same as that on which the prisoner is being charged again, or, was the evidence necessary to support the second indictment sufficient to prove a legal conviction on the first ? If not, the evidence on the first charge can be used again, because it is being used in a different case, and on a different charge.

For these reasons, in my judgment, our answer must be 'Yes — the evidence was admissible'."

Wright, J., said :—

"In the present case the use at the subsequent trial of Ramsey's evidence was not an attempt to reopen the question of the prisoner's innocence on the charge on which he had been acquitted, or to defeat the immediate and direct object of the former acquittal on that charge.

Lastly, it may be observed that the defence of *autrefois acquit* seems never to have been rested on the ground of estoppel. Both that defence, as well as the defence of *autrefois convict,* has always been rested on the rule that a man shall not be twice put in jeopardy for the same matter — a rule which has not been violated in this case."

Darling, J., also ruled that the evidence was admissible, and said :—

"To hold otherwise seems to me to rule that evidence which has been given once shall never be produced again against the same defendant ; yet it is plain that up to a certain point the evidence must often be the same, although the defendant is accused of wrongs done to two distinct persons, and that in different suits or forensic proceedings."

Channell, J., said that if the evidence was otherwise admissible it was not the less so by reason of the former acquittal.

The remaining two Judges were of the opinion that the evidence was not admissible.

I would observe here that in this Ollis case the evidence given by Ramsey at the first trial was given again by him exactly in the same terms at the subsequent trial. In our case Lederman did not give evidence at all in the arson charge against the Accused, and had he done so, it might well be that the result would have been different.

In our case the evidence of Lederman went to prove the guilty knowledge of the Accused, *i. e.* that the fire was not accidental and it was not admitted for the purpose of proving arson against the Accused. The substance of Lederman's evidence was that he himself had deliberately set fire to the Accuseds' premises with their knowledge and consent and at their instigation. In effect — direct proof as to the guilty knowledge of the Accused. In our opinion it was distinctly relevant, and was properly and legally admissible.

The weight to be attached to Lederman's evidence is a different matter.

The fourth point was that the charges were not strictly proved and that the second count as laid could not stand.

As to the first part, it will be convenient to consider this under the next and fifth point, and as regards the latter part, there is no doubt that the Accused were not misled by the form in which the charge was laid. The false pretence was definitely a continuing one, up to the 21st June, 1939, when the money was paid, and until such date there was no obtaining of money by false pretences, although it might be conceded that a charge of attempt would have lain prior to this date.

The fifth point was that there was no evidence to which any degree of credence could be placed, and that there was no sufficient independent corroboration of Lederman's evidence, who was an accomplice and self-confessed blackmailer.

There appears to have been some misconception as to the substance or reason for Lederman's evidence. It was not brought for the purpose of showing that the Accused were guilty of arson, a crime in respect of which they had already been charged and acquitted. But it was brought in for the purpose of proving one of the ingredients of the charge of false pretence, namely that the claim that the fire had been accidental was false, and false to the knowledge of the Accused.

The weight to be attached to his evidence was very carefully considered by the Court below, as also the need for corroboration of it, and the Court dealt with this point at length and it is impossible for us to say that the Court below erred in this respect. There was strong evidence before the Court below on all the material elements of a charge of conspiracy and false pretences, and these being questions of fact it is impossible for us to say that the conclusions by the Court below on these questions of fact were wrong. Nor do we think that the Court below misdirected itself either on these questions of fact or on any points of law. It is no argument to say that the Insurance

Company also knew that the fire was not accidental. They could not prove it — although extremely suspicious as to its origin — and they had before them the necessary declaration by the Accused that the fire was accidental. These were the *pro forma* foundations of the claims against the Company, and although payment was delayed for various reasons, it is clear that, on the acquittal of the Accused on the arson charge and under threat of civil proceedings, the Company felt bound to pay. Mr. Levin stated that had Lederman's evidence come to light before payment, such would not have been made.

It was also argued on behalf of the second Accused that as he himself had not signed the declarations of claim, therefore, he was absolved from liability. He however signed the receipt for the Insurance money, together with the first Accused, and we have no doubt that it was with his full knowledge and approval that the claims were signed by his brother, on behalf of Soriano Brothers, and that he was fully conversant with all that took place in regard to the claim. We can see nothing to distinguish his guilt from that of his brother.

I would observe that this point does not appear to have been taken in the Court below and it is raised for the first time on appeal before us.

For these reasons we are of the opinion that the appeal must be dismissed and the convictions will stand.

On the appeal by the Attorney General against sentence, although a lenient sentence we feel that we should not interfere.

This appeal is, therefore, dismissed.

Delivered this 29th day of January, 1942.

Chief Justice.

CRIMINAL APPEAL No. 5/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

'Abed Deifallah Hussein. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Robbery, C. C. O., Sec. 287 — Credibility of witnesses — Sentence of

five years in consideration of numerous previous convictions — Commencement of sentence.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 22nd day of December, 1941, in Crime No. 308/41, whereby the Appellant was convicted of robbery contrary to section 287 of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment :—

HELD : 1. The credibility of the prosecution witnesses was a matter for the Court of trial and there was evidence which, if believed, supported the conviction.

2. In view of Appellant's numerous previous convictions the sentence of five years was not excessive.

3. Although the normal rule, in the event of an appeal being dismissed, was for the conviction to date from the appeal, in this case the original sentence would not be interfered with and the term would run from the date of arrest.

ANNOTATIONS :

1. See, on the first point, C. A. 36/41 (1941, S. C. J. 142) and note 1.
2. On the third point compare CR. A. 54/41 (1941, S. C. J. 183 on p. 186).

APPELLANT : In person.

FOR RESPONDENT : Junior Government Advocate — (Gavison).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, convicting the Accused of robbery *contra* Section 287 of the Criminal Code Ordinance, 1936. The Appellant contends that the case for the prosecution was fabricated by personal enemies of his. That of course is entirely a matter for the Court of trial and there is clearly evidence on the record which, if believed, would entitle the Court to come to the decision to which it did.

As to sentence, it must be borne in mind that the Accused had had no less than 13 previous convictions for offences of theft, vagabondage and possession of stolen property, the latest of which was one of three months passed as recently as the 20th of July, 1940. In these circumstances we do not think that the sentence of five years is excessive. The appeal is, therefore, dismissed and the conviction and sentence affirmed. The normal rule, in the event of an appeal being dismissed, is for the conviction to date from the appeal. In this case, however, we propose not to vary the original sentence which is that the term should run from the date of arrest namely the 29th of August, 1941.

Delivered this 26th day of January, 1942.

British Puisne Judge.

CIVIL APPEAL No. 236/41.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

Palestine Kupat 'Am Cooperative Society Ltd. — APPELLANT.

v.

1. Hussein Abdul Rahman el Batal,
2. Musbah Hussein el Batal. — RESPONDENTS.

Disagreement of Judges in Land Court, Establishment of Courts Order, Art. 3(c), P. C. 21/40 — No analogy from provisions applying to District Courts, Courts Ord., Sec. 12(3)(a) — Defendant failing to discharge onus as to prescriptive possession.

In allowing an appeal from the judgment of the Land Court of Haifa, dated the 30th day of October, 1941, in Land Case No. 31/38, and in entering judgment for the Appellant :—

HELD : 1. It was upon the Respondent (Defendant) to prove the defence of prescriptive possession.

2. (Referring to P. C. 21/40) : The provisions as to District Courts contained in the Courts Ordinance could not be applied to Land Courts and as the Respondent had failed to satisfy the Court or a majority of it on the issue of prescriptive possession judgment had to be entered against him.

REFERRED TO : P. C. 21/40 (1940, S. C. J. 334).

ANNOTATIONS : *Cf.* C. A. 237/37 (1939, S. C. J. 46) and second — fifth paragraphs of annotations, C. A. 8/39 (*ibid.*, p. 86), C. A. 81/39 (*ibid.*, p. 419), C. A. 95/39 (*ibid.*, p. 531) and C. A. 23/41 (1941, S. C. J. 271 at p. 273).

FOR APPELLANT : Eliash & Margolin.

FOR RESPONDENTS : Atalla.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Haifa. Three issues were framed upon which it appears that the case was contested. On the first issue, to whether the parcels in question are covered by the Appellant's *kushans*, Judge Shems gives a specific and Judge Curry an implied finding in favour of the Appellant that in fact the parcels were covered by the *kushans*. With regard to the third

issue as to whether or not the Appellant was a purchaser in good faith, both Judges find not only that there was no proof of bad faith but affirmatively that the Plaintiff bought in good faith.

It has been urged before us that the latter finding is wrong. It is clear that the learned Judges applied their minds to the right considerations in deciding this question, and that being so we do not see how we can possibly interfere with their finding.

With regard to the second issue, as to whether the Defendants have been able to establish prescriptive possession, there was a disagreement between the learned Judges. Judge Curry found that the Defendant had established his defence by prescription ; Judge Shems found that he had not, and an interesting point therefore arises as to what is the result of this situation.

At the time this action was instituted, the matter was covered by Article 3(c) of the Establishment of Courts Order which says that the Court should be constituted by the President of the District Court of Haifa and one or more Judges as the President may, from time to time, determine. He in fact elected such one Judge. This question as to what happens in the event of a disagreement is referred to by Lord Atkin in the case of the Heirs of Prince Mohamad Selim *v.* Attorney General of Palestine, reported in the P. L. R. Vol. 8 at p. 181. At p. 184 he says :—

> "The interesting question as to what judgment should be given where the party upon whom the onus of proof rests satisfies one of two Judges composing a Court and fails to satisfy the other, does not form one of the grounds of the judgment of the Supreme Court and, therefore, is not now discussed".

The position, therefore, is left open.

Counsel for the Respondents has argued before us that the learned President should have applied by analogy the provisions of Section 12(3)(a) of the Courts Ordinance, 1940, which lays down that, as regards District Courts, when in actions tried by two Judges there is a disagreement, the President shall appoint a third judge and the action shall be reheard. It does not seem to us to be seriously arguable that one can apply to a Land Court this section which, on the face of it, is inapplicable.

There can, in my opinion, be no doubt — and it is not seriously disputed by counsel for the Respondent — that the onus was upon the Defendant in respect of the prescription issue. The learned President, after stating that he himself found in favour of the Respondent, said : "As my learned brother disagrees with me it follows that the Plaintiff's action is dismissed."

This conclusion seems to me to be fallacious. In my opinion, in order for the Respondent to have succeeded it was necessary for him to satisfy the Court (or a majority of it) on the issue upon which the onus was on him. Having failed to do so, it seems to me to be clear that judgment must be entered against him.

For these reasons we are of opinion that the appeal must be allowed and the judgment of the Land Court set aside and judgment entered for the Plaintiff with costs here and below. The costs of this appeal to be on the lower scale and to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 4th day of February, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 10/42.

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

BEFORE : Rose, Edwards and Abdulhadi, JJ.

IN THE APPEAL OF :—

Abdul Rahman el Sheikh Salim Abdul Rahman. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal Procedure — Person appointed to act as British Puisne Judge entitled to sit as member of Court of Criminal Assize, Courts Ord., Sec. 10 and 14(2) — Acting Chief Justice may exercise all powers of Chief Justice — Credibility of witnesses — Requisites for additional evidence on appeal — Premeditation.

In dismissing an appeal from the judgment of the Criminal Assize Court sitting at Nablus, dated the 13th day of January, 1942, in Criminal Assize No. 64/41, whereby the Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. A person acting as British Puisne Judge was in every respect in the same position as a person holding the substantive post and could, therefore, sit as member of the Court of Criminal Assize.

2. It had been the practice over many years that a person who was acting in the office of Chief Justice had all the powers of the substantive holder.

3. The Court below had given sufficient reasons for disbelieving one witness and for believing another one.

4. The Court of Criminal Appeal would not take action on evidence adduced after the trial unless they were satisfied, firstly, that the evidence could not have been available to the defence at the trial, and, secondly, that the evidence was of such importance that it must have had a pronounced effect upon the mind of the Trial Court. Neither of these requirements were present in this case.

ANNOTATIONS :

1. On the effect of continuous practice see H. C. 58/41 (1941, S. C. J. 392) and note 4.

2. On the third point *vide* CR. A. 5/42 (*ante*, p. 31) and note 1.

3. See on the last point CR. A. 33/41 (1941, S. C. J. 153) and note 1.

FOR APPELLANT : Moghannam.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Nablus convicting the Accused of murder. A preliminary point has been taken by counsel for the Appellant that the Court was improperly constituted. The presiding Judge was His Honour Judge Plunkett, who holds the substantive post of President of a District Court, but was appointed by the Acting Chief Justice to act as a British Puisne Judge of the Supreme Court from the 5th to the 19th of January, 1942, inclusive. This period covers the time during which this particular trial took place.

The appointment purported to be made under section 14(2) of the Courts Ordinance, 1940. It has been suggested that while it is in order to appoint a President of a District Court to act as a Judge of the Supreme Court, there is no power to appoint him to sit as a member of a Court of Criminal Assize, the composition of which is specifically prescribed by Section 10 of the Ordinance. We do not think that there is any substance in this point as, in our opinion, a person who is acting as a British Puisne Judge is in every respect in the same position as a person holding the substantive post.

It is further argued that under section 14(2) it is only the Chief Justice himself who may make such an appointment, and that the powers provided by this subsection cannot be exercised by a person acting as Chief Justice. We are unable to accede to so inconvenient a proposition for the reason, amongst others, that the practice over many years has depended on the view that a person who is acting in the office of Chief Justice has all the powers of the substantive holder.

We think, therefore, that there is nothing in the point that the Court was improperly constituted.

With regard to the merits of the case, this would seem to be largely a matter of the credibility of the witnesses. The Court of Trial appears to have believed the evidence of two alleged eyewitnesses who say that they saw the Accused shoot the deceased. That evidence, if believed, would seem to be sufficient to dispose of the matter.

It is urged on behalf of the Appellant that the sister of the deceased, a woman called Amneh, who deposed that her mother (one of the eyewitnesses) was not present at the scene, should have been believed by the Court, and that no sufficient reason was given by the Court for disbelieving her evidence. On this matter the Court says :—

> "The evidence of Amneh, the sister of the deceased, cannot be believed. It is in direct contradiction to her statement made to the police the day after the event, and her demeanour in the witness-box was most unsatisfactory."

It is apparently correct that her statement to the Police made on the day after the event was in direct contradiction to her evidence. Which, if either, of these two statements is true, it is, of course, impossible for this Court to say, but the two grounds given by the Trial Court for disbelieving her evidence are, in our opinion, sufficient and reasonable.

It has also been urged that there were no sufficient positive reasons for the Court to believe the evidence of Hassan Jawad, another eyewitness, particularly in view of the fact that there was considerable delay before he gave his information to the Police. On that matter the Court, after stating that it believes his evidence, says that it accepts his reasons for delay in coming forward because, while the Accused was still at large, the witness was afraid to give such a statement. That seems to us to be a reasonable conclusion to which the Court might properly come.

A further point raised by the Appellant is that he now has two witnesses who were not available before, whose evidence, he says, might, and in fact should, strongly influence the Court. The first of these persons is a man called Abdul Rahman el Haj Ghabin who swore an affidavit on the 20th January, 1942, to the effect that Rajeh Safiya, the first eyewitness for the prosecution, could not possibly have been at the scene. Counsel for the Appellant urged upon us that this evidence was available to the prosecution, in view of the fact that this man made a statement to the Police on the actual day of the shooting, and that the prosecution improperly concealed the subject-matter of his evidence from the defence. Learned Crown Counsel has shown us the statement that this man made to the Police on the day of the incident and it is quite clear that it is a perfectly colourless statement

expressing ignorance as to what occurred. Nobody reading that statement would have any reason to suppose that the witness would be in a position to give the evidence contained in his affidavit of the 20th January, 1942.

There is a second man, one Abdul Qadir Hamdan el Haj Ghabin, who also swore an affidavit to the same effect. There is no suggestion in his case that there was any suppression on the part of the prosecution, who in fact knew nothing about him.

Before the Court of Criminal Appeal will take action on evidence adduced after the trial, it must be satisfied of two things : first, that the evidence would not have been available at the trial to the defence, even if it had exercised reasonable diligence, and secondly that the evidence is of such importance that it must have had a pronounced effect upon the mind of the Trial Court. We do not think that either of these requirements has been satisfied in this particular instance.

It has not been suggested by the Appellant that, on the facts as found by the Trial Court, the three elements of premeditation are not present.

For all these reasons the appeal must be dismissed and the conviction and sentence confirmed.

Delivered this 31st day of January, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 3/42.

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

BEFORE : Gordon Smith, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

Muhammad Ahmad Abu Khadra. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder — Evidence as to premeditation, C. C. O., Sec. 216.

In dismissing an appeal from the judgment of the Criminal Assize Court sitting at Haifa, dated the 8th day of January, 1942, in Criminal Assize Case No. 50/41, whereby the Appellant was convicted of murder contrary to section 216 and punishable by section 215 of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : The facts found by the Court of trial showed that there was sufficient premeditation to fulfil the requirements of Section 216 of the Criminal Code Ordinance.

ANNOTATIONS : *Cf.* CR. A. 4/42 (*ante*, p. 19).

FOR APPELLANT : Koussa.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

We have considered the arguments addressed to us by counsel for the Accused in this matter, and we have come unanimously to the opinion that this appeal must be dismissed. As frankly admitted by counsel for the Accused, the only real point on which he could argue this appeal was on the absence of sufficient premeditation. The Court below not only examined and went into, very carefully, the evidence before it, but also specifically dealt with this question of premeditation. We feel that there are also other and stronger grounds for holding that there was sufficient premeditation as required by section 216 of the Criminal Code. There were undisputably five wounds on the deceased and the fact that two of those were deep, apart from the fatal wound, tends to show that there was strong resolve on the part of the Accused to kill the deceased and also after the quarrel had taken place, the Accused followed the deceased. Then there was a further distinction to be made between the physique of the Accused and the deceased. To what extent there was a serious quarrel does not appear to be very satisfactorily given in evidence. There was a quarrel but that is all, and what were the reasons for that quarrel is really immaterial.

For these reasons we feel that we must dismiss the submissions of counsel for the Accused that there was no premeditation in this case.

Delivered this 29th day of January, 1942.

Chief Justice.

CIVIL APPEAL No. 251/41.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Yehiel Meir Mandelzis. — APPELLANT.

v.

Misbah Shikifi. — RESPONDENT.

Claims to land — Whether land included in kushan — Question of fact, Land Courts Ord., Sec. 4(1) — Laches.

In dismissing an appeal from the judgment of the Land Court of Haifa in Land Case No. 71/33, dated 16th May, 1940, delivered in absence of Appellant and served on him on 24th November, 1941 :—

HELD : 1. The finding of the Court below as to the area not being covered by Appellant's *kushan* was a reasoned finding of fact which should not be interfered with.

2. *Quaere* whether the appeal could be entertained at all in view of the provisions of Section 4(1) of the Land Courts Ordinance.

ANNOTATIONS :

1. See, on the first point, C. A. 188/41 (1941, S. C. J. 605) and note.
2. On the second point *cf.* C. A. 109/40 (1940, S. C. J. 302) and note 1.

FOR APPELLANT : Weinshall.

FOR RESPONDENT : Moghannam.

JUDGMENT.

This is an appeal from the judgment of the Land Court of Haifa. It appears that the Plaintiff was claiming the ownership of a piece of land which was not actually in his possession but in the possession of the Defendant. The question which the Court had to consider was whether the Plaintiff-Appellant, who was in possession of a *kushan,* had established that the land referred to in the *kushan* was the same as the land in dispute. On that, the Court made a most detailed finding. It inspected the land, accompanied by the advocates for both sides, and set out in considerable detail what it saw there and its reasons for its conclusion. The judgment states : "The Plaintiff has failed to convince us that the land registered in his name is the land in dispute," and contains a full description of what the Court regarded as being the land in dispute.

It may be, I cannot say, that the Court came to a wrong conclusion on that, but it seems to me that this is a perfectly clear example of a reasoned finding of fact with which this Court should not interfere. It would indeed seem to be doubtful whether we can entertain the appeal at all in view of the provisions of Section 4(1) of the Land Courts Ordinance.

There is one other matter, which perhaps I should mention, concerning the merits, and that is that it seems to be strange that the Appellant, if he really thought very much of his chances of success, should have allowed so much delay to have occurred in this case. The action was filed in 1933. Various experts were then consulted, who apparently

made conflicting reports, and the case was actually heard in April, 1940, when (on 22nd April) the Court reserved judgment. We are told that between the 22nd April and the 16th of May, on which day judgment was given, the Appellant was anxious to get the judgment delivered and in fact made applications to the Court about it. On the 16th May judgment was delivered in the presence of the Respondent and in absence of the Appellant. There may or may not be good reasons why the Appellant was unable to attend on that day, but what is astonishing is the fact that although the case was finished on the 22nd April and the Appellant asked the Court to expedite the delivery of the judgment, he made no effort at all to find out what the judgment was until December of the following year, when he served a copy of the judgment on himself and decided to appeal. That, of course, is not conclusive one way or the other but it certainly weakens the force of any *ad misericordiam* appeal.

For these reasons the appeal must be dismissed with costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 5th day of February, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 7/42.

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

BEFORE : Gordon Smith, C. J., Edwards and Khayat, JJ.

IN THE APPEAL OF :—

1. Muhammad Ali Hamad 'Alya,
2. Muhammad Suliman Ahmad el Abed. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Murder — Identity — Admissibility of dying statement — Discrepancies between witnesses' evidence to the Police, before the Magistrate and at the trial — Weight of evidence.

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Jerusalem, dated the 14th of January, 1942, in Criminal Assize Case No. 72/41, whereby the Appellants were convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936 ; the first Appellant being

sentenced to death, and the second Appellant sentenced to be detained during the High Commissioner's pleasure :—

HELD : 1. The evidence of the *Mukhtar* as to the statement by the deceased had properly been admitted as made very shortly after the crime and the medical evidence showed that the deceased's injuries would not have prevented him from saying a few words.

2. There were no substantial differences between the evidence of the witnesses at the trial and their statements to the Police and before the Magistrate.

ANNOTATIONS : See, on the admissibility of dying statements, CR. A. 39/38 (1938, 1 S. C. J. 244) and CR. A. 49/38 (*ibid.*, p. 314).

FOR APPELLANTS : Salah.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

We are unanimously of the opinion that this appeal must be dismissed. Counsel for both Accused has put forward every argument and every submission that could possibly have been put forward in this case.

In his grounds of appeal he alleged that there is not sufficient and adequate evidence on which the Assize Court could convict. The Court below considered that there was ample evidence as to the identity of these two Accused. There was the evidence of an eye witness, the wife, Sarah; there was the evidence of the deceased himself admitted by way of statements made to the *Mukhtar,* and the evidence of the son. This evidence of the *Mukhtar* was, in our opinion, properly admitted. It was made, or must have been made, quite shortly after the crime, because Sarah went straight away to the *Mukhtar,* and he was the proper person to summon as being the nearest person in authority to whom one would naturally give credibility.

The Court specifically referred to the evidence of the *Mukhtar* and said that his evidence made a favourable impression on them. Then again it is said that there had been discrepancies between what the witnesses said in the Court of Trial, before the Magistrate and to the Police. Counsel for the prosecution referred to remarks made by a former learned Lord Chief Justice of England in a case some years ago. Those remarks have all the greater force where interpretation is necessary. There was no substantial difference in any case, between what they said at the Court of Trial and what they said on these other occasions.

Then again it is urged that the Court attached too great weight to certain parts of the doctor's evidence. It was of course entirely for

the Court of Trial to assess the weight to be attached to the whole of his evidence or any particular part of it, and the doctor specifically said that the injuries alone would not, physically, have prevented him saying a few words. It is not that evidence was admitted of a long conversation by the deceased, but it was only of a few words addressed to him as to who had done it, and in reply he gives the names.

The Court of Trial in its judgment went carefully and very closely into all the matters relevant to the charge against these two Accused. We have no reason to think that such judgment was anything but exhaustive, careful and correct, and we see no reason to disagree with it. The appeal must, therefore, be dismissed.

Delivered this 29th day of January, 1942.

Chief Justice.

CRIMINAL APPEAL No. 9/42.

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

BEFORE : Rose, Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Ahmad Musa el Muhammad. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder — Armed presence at scene of murder, C. C. O., Sec. 23 — Intention — Evidence of motive important to prove common enterprise — Findings of fact not based on evidence — Court of Criminal Appeal will not draw inferences.

In allowing an appeal from the judgment of the Criminal Assize Court, sitting at Nablus, dated the 15th day of January, 1942, in Criminal Assize Case No. 71/41, whereby the Appellant was convicted of murder contrary to section 214(b) and section 23 of the Criminal Code Ordinance, 1936, and sentenced to death, and in discharging the Appellant :—

HELD : 1. There was no finding that the Appellant had himself fired or that he had threatened to do so.

2. There was no evidence of motive or common enterprise to support the Trial Court's finding that the Appellant was present with the intention to assist the actual murderer.

3. The judgment of the Court below was inadequate and the

Court of Criminal Appeal would not draw inferences which were not warranted by the evidence.

ANNOTATIONS :

1. On failure to give reasons for a judgment *cf.* CR. A. 49/40 (1940, S. C. J. 167) and note.

2. See, on the second point, CR. A. 83/41 (1941, S. C. J. 266) and note 1.

3. On motive see CR. A. 96/37 (P. P. 12.x.37, 2 Ct. L. R. 108, Ha. 18.xi.37) and the case therein cited. *Cf.* CR. A. 8/42 (*ante*, p. 21).

FOR APPELLANT : Moghannam, Zu'yter and Abbasi.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the Criminal Assize Court, sitting at Nablus, convicting the Accused of murder. The case for the prosecution, as presented by three eye-witnesses, was perfectly clear and simple. It was that the deceased with his wife was picking figs on the morning of the 24th September, 1941 ; that two men appeared with rifles, the Accused and one other ; that both of them fired at the deceased and that the other man, Husni, was the one whose shot proved fatal.

Now, that case, if believed by the Court, would seem to be an unanswerable case of murder against both the persons concerned. The Court of Trial, however, does not make findings to that effect. After reciting in its judgment the evidence of the wife and referring to the fact that in her statement to the Police at an earlier stage she had said that it was Husni who had fired first and hit her husband, and it was only after the deceased had fallen that the Accused fired, it made the following finding : "We have some doubt whether the Accused actually fired."

That may seem to be a somewhat surprising finding in view of the fact that the Court stated that it believed the evidence of the prosecution witnesses in other and closely related matters, but nevertheless we are, of course, bound by it and from the point of view of the Appellant, as counsel urges, it is tantamount for the purposes of this appeal to a finding that he did not fire. There is, further, no finding that he made any threatening gesture with his rifle as if he was intending to fire. Nor was there any suggestion that after the shooting of the deceased he threatened anybody with his rifle or otherwise in such a way as to lead people to fear that he might fire.

The defence was a denial and an *alibi*. The Court stated quite definitely that it disbelieved the Accused on that matter and this appeal

has been argued before us on the basis that the Accused was present but did not fire.

The question as to whether the fact that a person is present, and armed on the scene of a murder, makes that person liable as a principal depends, of course, on certain inferences to be drawn from the facts. The law is quite clearly set out in section 23 of the Criminal Code Ordinance. Subsection (c) says that every person is guilty of the offence who, whether or not he is present, aids another person in committing the offence, and it goes on to say :—

> "A person is deemed to aid if he is present at the place where an offence is committed for the purpose of overawing opposition or of strengthening the resolution of the actual perpetrator or of ensuring the carrying out of an intended offence."

On this matter the Court made the following finding :—

> "We believe that the Accused Ahmad was present on the scene armed with a rifle with the full intention of assisting the other man in the murder of Abdul Hamid Muhammad el Hussein."

The question is whether there was evidence upon which it could properly make such a finding.

The first three prosecution witnesses gave evidence to the effect that, as far as the Accused was concerned, there was no enmity whatever between him and the deceased. The Court says : "We believe the evidence of the prosecution witnesss." We may, therefore, assume that it believed these three witnesses when they said that there was no enmity.

Now, motive is not always important in a murder case ; but in our opinion it becomes of great importance in a case like this when one is considering whether there was any common enterprise or common purpose as between the two persons concerned. There is no finding as to the existence of a common-enterprise. There is no suggestion or finding to the effect that the Accused had any reason to wish for the death of the deceased and there is no finding that he took any but an utterly passive part in what occurred.

We have been invited by Mr. Rigby to infer that the mere presence with a rifle within a few yards of the man who committed the murder imports assistance and support sufficient to bring the Accused within the purview of section 23. The matter is eminently arguable and, particularly as the Trial Court has not stated that to be its reason for drawing its inference, we are certainly not prepared on our own motion to draw any such inference. The Court of Trial has merely made a bald statement that it has drawn the inference without giving any indication or assistance as to how it arrived at its conclusion. It is not for this Court to speculate as to the reasons which may have

prompted the Court of Trial to come to its conclusion. It is for the Court of Trial to give reasonable grounds for the inferences that it draws.

It may well be that the Accused has been fortunate in that the judgment of the Assize Court is inadequate, but the fact remains that, in our opinion, this conviction cannot stand.

The appeal is, therefore, allowed ; the conviction and sentence quashed. The Accused must be discharged unless he is detained on any other charge.

Delivered this 31st day of January, 1942.

British Puisne Judge.

CIVIL APPEAL No. 241/41.

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

BEFORE : Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Abdul Qadir Deeb el Hassan. RESPONDENT.

Action by Attorney General on recognizance, C. C. O., Sec. 46 — *Form of bond — Respondent convicted for various offences by District Officer during validity of bond, C. C. O., Secs.* 98, 100 *and* 102 — *Attorney General need only prove breach of any one of conditions of recognizance — Costs.*

In allowing an appeal from the judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 22nd of July, 1941, in Civil Appeal No. 51/41, and in entering judgment for the Appellant :—

HELD : All the Attorney General had to prove in order to recover upon the bond was that the Respondent had not complied with all the terms of the bond, in the present case, that he had not been of good behaviour during the year ; that onus the Attorney General had discharged by showing that the Respondent had during the year been convicted of certain offences including affray.

ANNOTATIONS :

1. *Cf.* — as to actions in connection with bonds under the Immigration Ordinance — C. A. 241/38 (1939, S. C. J. 62) and C. A. 22/39 (*ibid.*, p. 131).

2. See, on the enforceability of a bond to be of good behaviour, C. A. D. C. Ja. 20/40 (P. P. 21.v.40).

FOR APPELLANT : Junior Government Advocate — (Akel).

RESPONDENT : In person.

JUDGMENT.

This is an appeal by leave 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 in a civil action in which the Attorney General had sued the present Respondent for the recovery of LP. 5. Shortly stated, the facts are as follows :—

On the 12th of April, 1940, the Respondent was found guilty by one of the Magistrates of Haifa in Civil (*sic*) Case No. 3815 of 1940, of the offence of affray. The Magistrate decided not to inflict any punishment but instead ordered the Accused to enter into security in the sum of LP. 5 to be of good behaviour for one year. The Magistrate did not (as he should have done) specifically state that he was acting under Section 46 of the Criminal Code Ordinance, but it is clear that he could not have purported to act under any other provision of law. The Accused signed a bond, which is a Government bond on a Government of Palestine form, headed "Legal No. 87" in the three official languages, the appropriate portion being filled in and signed in Arabic. That bond does not follow strictly the provisions of Section 46, and perhaps the appropriate authorities may take the matter up with a view to having the present forms altered so as to comply with Section 46, subject to the present exigencies due to shortage of paper, or, when the present stock of forms is exhausted, having a fresh form drawn up which will follow and comply with Section 46.

On the 21st August, 1940, the present Respondent was convicted by a District Officer (along with several other accused) of certain offences including affray, and was fined LP. 2. He seems to have pleaded guilty before the District Officer. He was convicted under certain other sections of the Criminal Code Ordinance, and it is quite inaccurate to suggest that the District Officer acted under the Collective Punishments Ordinance. In fact, paragraph 4 of the judgment of the District Court makes it quite clear that the Court was satisfied that the convictions were under Sections 98, 100(b), 102(1) and 102(2) of the Criminal Code Ordinance, and that the Respondent had pleaded guilty. Now, that being the state of affairs, it is quite clear that during the year, from the 12th April, 1940, it could not be said that the Respondent had been of good behaviour. The Attorney General there-

upon sued in a civil action in the Magistrate's Court of Haifa for the recovery of LP. 5, the sum mentioned in the bond. The defence of the present Respondent to that action was that it was necessary for the Crown to prove that he had not been of good behaviour, and that it was necessary that the authorities should have called upon the Respondent to appear before the Court which had originally convicted him, and that it was necessary for the Government to prove that the Respondent had failed so to appear or had disobeyed an order so to appear. That argument found favour with the Trial Court and also with the District Court on appeal, and the Government's action was accordingly dismissed. Against those judgments the Attorney General now appeals.

Now, we are of opinion that all that the Appellant had to prove to the satisfaction of a Magistrate's Court (*vide* Section 46(6)), was that the Accused had not been of good behaviour. Now, turning to the form of the recognizance and the conditions of the recognizance signed by the Respondent, the recognizance was void only if all the conditions of the bond were fulfilled. There were several specified conditions, and it is clear to us that if he failed to observe any one of those conditions the bond remained in full force.

In our view, both the Courts below were wrong in holding that the Attorney General is not entitled to succeed in recovering the sum of LP. 5. We accordingly allow the appeal and set aside the judgments appealed against, and we enter judgment for the Plaintiff, the present Appellant, in the sum of LP. 5, with costs here and in the Courts below. With regard to the costs of this appeal we limit the costs to a sum of LP. 5 as fixed costs.

Delivered this 13th day of January, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 2/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Mordechai Rubinstein. APPELLANT.

v.

The Attorney General. RESPONDENT.

Stealing by clerk, C. C. O., Sec. 275 — Receiving or stealing — Joint trial not objected to in first instance — N. A. A. F. I. a single organisation throughout Palestine — Sentence — Special treatment, C. C. O., Sec. 40.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 19th day of December, 1941, in Crime No. 201/41, whereby the Appellant was convicted of stealing by clerks of the property of their employers contrary to section 275 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, and in directing special treatment :—

HELD : 1. The taking of sixteen cases from the lorry and subsequently disposing of them was stealing and not only receiving.

2. No application for separate trials had been made to the Court below and no injustice had resulted from the joint trial of the Appellant with some other person.

3. The N. A. A. F. I. was a single organisation with separate branches and a man who was an employee of one branch was an employee of the whole organisation.

4. Although the sentence of three years was on the high side there was no reason to interfere with it.

5. The Appellant would be granted special treatment.

ANNOTATIONS :

1. On stealing by clerks *vide* CR. A. 22/39 (1939, S. C. J. 240) and note.
2. See, on special treatment, CR. A. 148/41 (*ante*, p. 4) and note 2.

FOR APPELLANT : Goitein and Kaiserman.

FOR RESPONDENT : Junior Government Advocate — (Gavison).

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa by which the Accused was convicted of stealing as a clerk contrary to section 275 of the Criminal Code Ordinance. Various points have been raised on behalf of the Appellant and the first is that on the evidence

before the Court the Accused should only have been convicted of receiving.

The facts, shortly, would appear to be as follows : The Accused and the man who was charged with him and who was acquitted, were employees of N. A. A. F. I. Certain goods — such things as cigarettes, bear, chocolate in cases — arrived by ship at Haifa for distribution to the various N. A. A. F. I. centres throughout the country. It appears that Greifman — and this seems to be common ground between the prosecution and the defence — actually received the goods with which we are concerned in this case, that is 62 cases of N. A. A. F. I. goods, in his capacity as a clerk of that concern ; that these 62 cases were then placed on a truck or lorry and that the driver, one Goldberger, was given instructions to take them outside the Port area and at a certain place to meet the Accused Rubinstein, who incidentally appears to have been known to the driver as a clerk in the employ of N. A. A. F. I. Now, on the day before the incident the Accused had apparently rented an empty basement room in a certain street in Haifa in which room, a few days later, some of these goods were discovered. When the lorry arrived at the spot indicated, Rubinstein was there and appears to have selected or indicated 16 out of the 62 cases for removal. These were removed, we are told, some by hand and others placed in another vehicle which, in due course, took these goods to his room.

Mr. Goitein contends that on these facts Greifman, if anybody, did the stealing and that Rubinstein did the receiving. We cannot accept that. It is at least open to doubt whether Greifman had committed any criminal act at all up to that stage, because in receiving the 62 cases he was acting in accordance with his duties. Whether or not there was anything sinister in his instructions to the driver to go to a certain place to meet Rubinstein is of course open to considerable doubt, but on that point the Court found in his favour. As regards Rubinstein, there seems to be not a shadow of doubt that the taking of the 16 cases from the lorry and subsequently disposing of them is stealing. This ground of appeal therefore fails.

Further points were raised. One was that there was a miscarriage of justice as a result of the joint trial of these two persons. If counsel for the defence considered that his client was prejudiced by the joint trial, it was open to him to object and to apply for separate trials. No such application was made and we are definitely of opinion that no injustice in fact resulted to Rubinstein as a result of the joint trial.

A further point was taken that the Accused was only an employee of the Haifa Branch of N. A. A. F. I. and not of the Sarafand Branch

of N. A. A. F. I., to which the stolen goods were consigned. We do not think that there is any substance in this point. We consider the correct view to be that N. A. A. F. I. is in fact a single organisation with separate branches and a man who is an employee of one branch is an employee of the whole organisation. For these reasons we think that the Accused was rightly convicted of the offence with which he is charged and the appeal must be dismissed.

The normal rule is, of course, that the sentence of the Trial Court should not be interfered with unless there are substantial reasons. It is true that in the present case the Accused has no previous convictions and that the stolen property was recovered. At the same time, the maximum sentence under the section is 7 years imprisonment. Further the value of the goods stolen (at N. A. A. F. I. prices) was nearly LP. 400.—. It may be that the sentence of three years is on the high side but in all circumstances we see no reason to interfere.

One point remains as to special treatment. Mr. Goitein has asked us to make an order under Section 40 of the Criminal Code. In all the circumstances we think that we can properly accede to this request and we so order. The sentence will run from the date of conviction.

Delivered this 26th day of January, 1942.

British Puisne Judge.

HIGH COURT No. 7/42.

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

BEFORE : Gordon Smith, C. J., Edwards and Frumkin, JJ.

IN THE APPLICATION OF :—

Hubert Olles. PETITIONER.

v.

Superintendent of Detention Camp, Mazra, near Acre. RESPONDENT.

Detention of enemy aliens — Affidavit averring that Petitioner a prisoner of war — Previous similar applications, H. C. 108/40, *H. C.* 67/41, *H. C.* 82/41 *— Limitations on Prerogative, Defence Regulations, Reg.* 17, *A. G. v. de Keyser's Royal Hotel Ltd. — Exercise of Royal Prerogative, Halsbury, Vol.* 6, *Palestine O. in C., Arts.* 8 *and* 46, *Royal Instructions — Emergency Legislation, Palestine (Defence) O. in C.,* 1931, *Emergency Powers (Defence) Act, Arts.* 1(2)(*a*) *and* 9, *Emer-*

gency Powers (Colonial Defence) O. in C., Arts. 3 and 4, Defence Regulations, Reg. 17, 17A and 85 — Prisoner of war not entitled to writ of habeas corpus, Rex v. Vine Street Police Station Superintendent — No implied power to detain enemy aliens — Successive applications for habeas corpus — Abuse of Process — Power of High Court to review previous decisions, H. C. 27 & 28/40, Smith's case — Enquiry into exercise of Royal Prerogative, Musgrave v. Pulido, Stephen's Commentaries on the Law of England — Petitioner to be released.

In allowing an application for a summons to issue directed to the Respondent calling upon him to show cause why he should not produce the body of Hubert Olles, the Petitioner, before this Court on a date to be fixed for the purpose of his release, and to await the further order of this Court, and in ordering the release of the Petitioner ;

In reviewing the previous decisions in respect of the detention of enemy aliens :—

HELD : (*Per Gordon Smith, C. J.*) :

1. (Referring to H. C. 67/41) : The High Commissioner could not exercise on behalf of His Majesty any Prerogative of the Crown unless the power so to do had been delegated to him expressly or by implication by virtue of his commission and by his being the personal representative of His Majesty in Palestine.

2. (Following A. G. *v.* de Keyser's Royal Hotel Ltd. ; H. C. 108/40 ; Referring to Rex *v.* Vine Street Police Station Superintendent ; H. C. 67/41 ; Overruling H. C. 82/41) : The Prerogative to arrest and detain any person, whether as an enemy alien or as a so-called prisoner of war or otherwise, did not exist either in the High Commissioner or in the Executive Government of Palestine, unless such power had been expressly delegated, and in such case such power had to be exercised strictly in accordance with such delegation and within the limits and restrictions imposed by the legislation containing such delegation.

3. A distinction had to be drawn between the exercise of the Royal Prerogative in Palestine and its exercise in England, and from the fact that it had been exercised in England under circumstances prevailing there, it did not necessarily follow that it could be exercised under similar circumstances in Palestine.

4. Except in the case of the personal Royal Prerogative, which, *e. g.* as regards the power to pardon, could be and had been delegated to the High Commissioner personally, no distinction could be drawn between the High Commissioner and the Executive, and powers specifically or impliedly conferred upon the High Commissioner could, unless a contrary intention appeared, be equally exercised by the Executive.

5. Where a person had been detained under a nebulous, undefined, alleged or implied Prerogative the Courts could enquire into such alleged or implied Prerogative and a writ of *habeas corpus* lay.

6. There was no implied power to arrest any person without bringing any charges against that person and to detain such person

indefinitely without bringing him before any Court or Tribunal of Enquiry by simply averring that such person was a prisoner of war.

7. (*Obiter*) : The Emergency Powers (Defence) Act, 1939, as applied to Palestine, provided amply for the detention of any person whose detention appeared to the High Commissioner to be expedient in the interests of public safety or the defence of the territory, but the regulations made for that purpose had to be complied with. In such event, it would appear that action thereunder could not be questioned by *habeas corpus* proceedings.

8. Successive writs of *habeas corpus* could be issued, but there is an inherent power in the Court to prevent an abuse of its own process.

9. In the circumstances of this case the High Court was entitled to review its previous decisions.

(*Per Edwards, J.*) :

10. (Referring to South Durham Iron Co., *re* Smith's case ; H. C. 27 & 28/40) : The decision in H. C. 82/41 was not binding inasmuch as that decision was partly based upon the assumption that the Petitioner had already appeared before the Advisory Committee set up under Regulation 17(2) which assumption had turned out to be erroneous, and, secondly, the *dictum* of Rose, J., in H. C. 82/41 as to the Executive Government's implied power to take measures necessary for the defence of the realm, though possibly a correct statement of the law in the United Kingdom, rested on the assumption that the Royal Prerogative existed in Palestine.

11. (Referring to Musgrave *v.* Pulido) : Although the actual exercise of the Prerogative could not be enquired into in a Court of Law, the limits of the Prerogative are a matter of Common Law and could be investigated into by the Courts.

12. An affidavit to the effect that a person is detained as a so called prisoner of war was not a sufficient answer to an application for a writ of *habeas corpus*.

(*Per Frumkin, J.*) :

13. The finding in H. C. 67/41 to the effect that in the case of an enemy alien it was a complete answer to an application for a writ of *habeas corpus* to aver that the petitioner was detained as a prisoner of war, upon which finding the decision in H. C. 82/41 rested, could be regarded as *obiter* since the case in question had been argued on the basis of the Prerogative of the Crown.

FOLLOWED : Attorney General *v.* de Keyser's Royal Hotel Ltd., 1920, A. C. 508 ; H. C. 108/40 (1940, S. C. J. 509).

REFERRED TO : Rex *v.* Vine Street Police Station Superintendent, *ex parte* Liebmann, 1916, 1 K. B. 268 ; 85, L. J. K. B. 210 ; 113, L. T. 971 ; Musgrave *v.* Pulido, 1879, 5 A. C. 102 ; 49, L. J. P. C. 20 ; 41, L. T. 629 ; South Durham Iron Co., *re* Smith's case, 1879, 11 Ch. D. 579 : 48, L. J. (Ch.) 480 ; 40, L. T. 572 ; H. C. 27 & 28/40 (1940, S. C. J. 116).

REFERRED TO AND DISTINGUISHED : H. C. 67/41 (1941, S. C. J. 321).

OVERRULED : H. C. 82/41 (1941, S. C. J. 547).

ANNOTATIONS :

1. See H. C. 108/40, H. C. 67/41 and H. C. 82/41 cited in the order.
2. On the eighth point *cf.* H. C. 1/41 (1941, S. C. J. 8).
3. See, on the question as to how far the High Court is bound by its previous decisions, C. A. 158/38 (1938, 2 S. C. J. 126, especially at pp. 133 *seq.*) ; *cf.* H. C. 27 & 28/40 (*supra*) and notes, CR. A. 111/41 (1941, S. C. J. 378, at pp. 381—2) and CR. A. 119/41 (1941, S. C. J. 559, at p. 562).

FOR PETITIONER : Goitein and Weyl.

FOR RESPONDENT : Crown Counsel — (Rigby).

ORDER.

Gordon Smith, C. J. : This is an application in the nature of a *Habeas Corpus* made on behalf of Hubert Olles, after a rule *nisi* had been issued on the 23rd January, 1942.

It is the second application made by the same person and of the same nature, the first being that which is reported in Volume 8, P. L. R., p. 429, H. C. No. 82/41. This earlier application is referred to in Section 7 of the petition, and in paragraph 8 it is stated that the law on the questions of the Petitioner's status has since been changed, and for this and other reasons the Petitioner is being detained unlawfully without proper authority.

In reply, an affidavit dated the 6th February, 1942, by the Superintendent of the Mazra' Detention Camp has been filed, which merely states that the Petitioner is an enemy alien and a prisoner of war and is detained as such by the Executive Government. After this affidavit in reply had formally been referred to by Mr. Rigby, Crown Counsel for the Respondent, the Court called on Mr. Goitein to substantiate his case.

It is desirable, before discussing the arguments to refer to recent local cases of a similar nature and examine these in order to see what is the effect of the decisions therein. The earliest is High Court No. 108/40, P. L. R. Vol. 7, p. 617, which I will call the *Steindler case*. By consent, this application was taken as one for a rule in the nature of a *Habeas Corpus,* but strictly speaking the original application had been to shew cause why the Petitioner should not be served with the notice and form of objection in accordance with the Restriction and Detention Orders (Objection) Rules, 1939. It was contended for the Respondent that the Petitioner was detained by virtue of the prerogative powers vested in the High Commissioner and not by virtue of or under Regulation 17 of the Defence Regulations, 1939. *The*

decision was that the Petitioner was improperly detained because if there was any such prerogative power (which point was not decided) *then such power was in view of the decision in A. G. v. De Keyser's Royal Hotel, Ltd.* (A. C. 1920, p. 508) *limited and restricted by Regulation* 17.

The next case is High Court No. 67/41, P. L. R. Vol. 8, p. 363, which I will call the *Birnstiel case* and which came before the Full Bench. It was of a similar nature and the affidavit of the Respondent in reply stated that the Petitioner "is detained by virtue of the Prerogative, as a subject of a State at War with His Majesty."

The decision confirmed the Steindler case as far as that went, and then decided that (a) *where the power of the Crown to interfere with the liberty of the subject has been directly regulated by legislation the Executive must exercise the restrictions imposed by the legislation, following A. G. v. De Keyser's Hotel Case (supra)* ; and (b) *the High Commissioner could not exercise the Royal Prerogative unless the power to do so had been expressly delegated to him.* It was not disputed that the Petitioner was an enemy alien, nor was it disputed that she had not been detained as such under Defence Regulation 17, although it was decided that the words "any particular person" in such regulation were wide enough to cover enemy aliens. The concluding paragraph of the judgment reads as follows :—

> "This Territory is in a peculiar position with regard to enemy aliens, owing to the provisions of the Order-in-Council and the Immigration Ordinance and Regulations. In my view an enemy alien who is entitled to the protection of Government and who is not stated to be a prisoner of war can only be detained under Regulation 17. No such statement having been made in this case I think that this order should be made absolute and that Miss Birnstiel should be released."

I have quoted this because Mr. Goitein argued that paragraph 3 of the head note to this case in our reports was not strictly accurate, and that it was founded on remarks in the judgment which were *obiter,* but that all the case decided was what I have stated above.

The last case is High Court No. 82/41, P. L. R. Vol. 8, p. 429, in which the Petitioner is the same as now, and which I will call the first Olles case. It came before the Acting Chief Justice, Rose and Khayat, JJ. Two affidavits were filed in reply to the Order *Nisi,* one stating the Petitioner to be an enemy alien and a prisoner of war, and the material passage in the other affidavit reads :—

> "In accordance with the War Defence Scheme, His Excellency the High Commissioner has given a general direction to officers of the Palestine Police Service to take and intern all enemy aliens,

> including the Petitioner, who has been so taken and interned and informed accordingly."

In this first Olles case it was held *that the statement by the Executive Government that the Petitioner was a prisoner of war whether in the military or civil sense, was sufficient for his lawful detention,* but that the grounds set forth in the second affidavit could not possibly justify the action taken. Again, in view of certain arguments addressed to us I would quote a short passage from the judgment appearing on page 435 as follows :—

> "The effect of the decision of this Court in *ex parte* Birnstiel was that though the Prerogative did not run in this country, there was an implied power vested in the Executive Government to take measures necessary for the defence of the realm, and such a power must exist. Following the ruling in that case a person who is an enemy alien and a prisoner of war may be detained as such."

With the greatest respect I can find no specific reference whatsoever to any powers so implied in the Executive as apart from the Royal Prerogative. It may be that such statement has reference to a remark in the judgment on page 368, as follows :—

> "but there was no need for the learned Judges to draw a distinction between the power of the Crown and an implied power vested in the Executive Government to take measures necessary for the defence of the realm."

That remark was made in the course of a consideration of the judgment in Rex *v.* Vine Street Police Station Superintendent, 1916, I K. B., 268, which, *inter alia,* decided that a civilian enemy alien who in the opinion of the Executive Government is a person hostile to the welfare of the country and is on that account interned, might properly be described as a prisoner of war, although not a combatant or a spy. It also confirmed the point of law that no writ of *habeas corpus* will be granted in the case of a prisoner of war and that as Liebmann was in fact a prisoner of war, therefore his application must fail.

I can now come to the arguments and submissions put forward by Mr. Goitein on behalf of the Petitioner, and which fall into two categories. Firstly, is this same Petitioner entitled to come again to this Court on the same matter, and if so, is this Court able to review its earlier decision and express a contrary view to that already expressed. I will refer to these submissions later on. Secondly, it was submitted that the right to detain persons as prisoners of war is one of the Royal Prerogatives. Assuming that to be so, then it is submitted that such Royal Prerogative cannot be exercised by His Excellency the High Commissioner in Palestine unless the same has been expressly

conferred by Royal Instructions or by Statute, and I would add, local statute or otherwise. Further, it was submitted that if power to arrest and detain any person is given by statute, then such power must be exercised in accordance with such statute.

Now, I think it is very desirable, in discussing this question of the Royal Prerogative, to state that, in my opinion, it may be that in the exercise of the Royal Prerogative a distinction should be drawn between its exercise in Palestine and its exercise in England, or in other words, that from the fact that it has been exercised in England under circumstances prevailing there, it does not necessarily follow that it can be exercised under similar or somewhat similar circumstances in Palestine. The Royal Prerogative has been defined as being that "preeminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of his regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law." (Hailsham, Vol. 6, p. 43, s. 511). And again, (*vide* De Keyser's Royal Hotel case *per* Lord Dunedin, 1920, A. C. at p. 526) : "The Prerogative is defined by a learned constitutional writer as 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'."

To quote Hailsham again, paragraph 512 :—

> "The Prerogative is thus created and limited by the Common Law and the Sovereign can claim no Prerogatives except such as the law allows, nor such as are contrary to *Magna Carta*, or any other statute, or to the liberties of the subject."

If the exercise of the Royal Prerogative is disputed the Courts have jurisdiction to enquire into its existence, extent or limit, in the same way as the Courts enquire into and decide any other question of law.

All executive acts are done in the Sovereign's name by virtue of this Prerogative or by virtue of statutory powers conferred upon him, or they are done by his ministers by virtue of statutory powers conferred upon them in their capacity of ministers.

Similarly in regard to a Governor of a Colony, the authority for the exercise of the Prerogative is derived from Orders-in-Council, Royal Instructions or Statutes, either local or Imperial, and the powers to be so exercised are those contained in such instruments and in accordance therewith.

It is clear, therefore, that the Sovereign can delegate his Royal Prerogative, and this must necessarily be so, otherwise Government could not be carried on, and he can do this personally under his Sign Manual, as in Orders-in-Council and Royal Instructions, or it can be done by statute, to which of course he assents.

It is a matter, therefore, of ascertaining to what extent such Prerogative has been delegated to the High Commissioner and Government of Palestine firstly, generally, and then in particular as regards the matter in question. Generally, and in the case of Colonies, the fount of such delegation is the Order-in-Council and Royal Instructions accompanying it, in our case the Palestine Order-in-Council, 1922, as from time to time amended, and the accompanying Royal Instructions (which were replaced by those dated the 1st January, 1932). It is unnecessary to refer at length to their provisions although they differ somewhat in detail to those applied to British Colonies, in view of the fact that Palestine is a Mandated Territory. But they provide a constitution for Palestine with an Executive, Legislature and Judiciary, and there are special provisions as to deportation, immigration, official languages and other incidental matters, and as to the laws to be applied. In the latter respect, subject to other laws declared to be in force or subsequently enacted, the substance of the common law, the doctrines of equity and the powers vested in Courts of Justice in England were declared by Article 46 to be in force, so far as local circumstances permitted. From time to time additional Orders-in-Council have been promulgated. It might however be noted that the power of pardon (see Article 8) is specifically reserved to the High Commissioner personally, and cannot be exercised by his Deputy, and in some other respects the High Commissioner is precluded from delegating powers conferred upon him.

In time of war, or other emergency, it may be necessary to extend such powers, as has been done by the Palestine (Defence) Order-in-Council, 1931, and more recently by the application of the Imperial Powers (Defence) Act, 1939. It is necessary to examine this latter provision in more particularity as it is under its provisions that relevant regulations have been issued. It was extended to Palestine by the Emergency Powers (Colonial Defence) Order-in-Council of 1939 which necessarily had to define or interpret certain expressions and words used in the Imperial Act in its application to this and other Territories ; for example, the expression "Secretary of State" used in the Act is to be interpreted here as meaning the High Commissioner, and again where the word "realm" is used in the Act, in its local application it means the territory of Palestine.

It follows, therefore, from Section 1, sub-section (2)(a) of this Act that the High Commissioner may make regulations, *inter alia*, for "the apprehension, trial, punishment of persons offending against the Regulations and for the detention of persons whose detention appears to the High Commissioner to be expedient in the interests of the public

safety or defence of the territory." It is also to be noted that by Section 9 of the Act, the powers conferred are to be "in addition to, and not in derogation of, the powers exercisable by virtue of the Prerogative of the Crown." It is however also to be noted that although this Section 9 is expressly excluded from being applicable to the Territory yet Article 4 of the Order-in-Council itself provides that the powers conferred shall be "in addition to, and not in derogation of, any other powers possessed by the High Commissioner." In consequence, the Defence Regulations, 1939, came into force on the 26th August, 1939, and it is desirable to set out Regulation 17 as amended subsequently, which reads as follows, as far as is pertinent :—

> "17(1) The High Commissioner, or any person authorised by him by order, if satisfied, with respect to any particular person, that with a view to preventing him from acting in any manner prejudicial to public safety or defence, it is necessary so to do, may make an order :—
>
> (a) (as to possession of articles)
>
> (b) (as to other restrictions)
>
> (c) directing that he be detained."

There are subsequent safeguarding provisions included.

A further Regulation 17A was subsequently added in 1941, which dealt with aliens sent to this Territory by competent Naval, Military or Air Force Authority, but I do not think that this regulation is of any particular relevance to the matters in issue, except that it would presumably cover prisoners of war sent here for detention.

It is somewhat difficult to envisage a more comprehensive or all embracing power to interfere arbitrarily with and restrict the liberty of the subject, than that contained in this regulation.

Regulation 85 repeats, in effect, what is contained in Article 4, quoted above.

But it is not contended by or on behalf of the Respondent that the Petitioner has been detained under Regulation 17.

Neither is it contended that the Petitioner was sent here under Regulation 17A.

Therefore, Mr. Goitein argues, he must have been detained under the Royal Prerogative, which, so it was held in the Birnstiel case, could not be exercised in Palestine unless the power to do so had been expressly delegated to the High Commissioner.

For the Respondent two submissions were made : (a) that a writ of *Habeas Corpus* will not be granted in the case of a prisoner of war, following Bailhache, J. in the Vine Street Case ; and (b) that the detention of the Petitioner was not in exercise of the Royal Prerogative but was in exercise of an implied power vested in the Executive to

take all necessary steps for the security of the realm, and arose out of a doctrine of political necessity and expediency.

I, therefore, ask myself the questions, what is this alleged implied power ; how does it arise, and in whom is it vested, and how is it to be exercised ?

Presumably, it is an implied power to arrest any person without bringing any charges against that person or without bringing that person before any Court or Tribunal of Enquiry, and to detain such person indefinitely. In other words, it is the complete abrogation of the liberty of the subject, enabling the absolute curtailment of freedom and without question.

From what source is such alleged power implied ? It cannot be from the Royal Prerogative, as I think I have already shown. It cannot be implied from the Emergency Powers (Defence) Act and the Defence Regulations made thereunder, because all these necessary steps for the safety of the realm are either contained therein or can be obtained thereunder, and I know of no other source of law from which it might be implied.

In whom is it vested ? According to the submission to us, it is in the Executive. All we know is what is contained in the affidavit of a Superintendent of a Detention Camp, and one would have expected the production of some order or warrant signed by some member of the Executive authorising such detention. One can only conclude that such Order or Warrant does not exist. Nor have we any information as to how such implied power is to be exercised.

Assuming such implied power to exist, I have seriously asked myself the question as to what is to prevent my own arrest, after delivering this judgment, my detention without charge, enquiry or trial, for an indefinite period, and without any remedy whatsoever, provided that some official or member of the Executive has sworn an affidavit that I am detained as a prisoner of war.

It is clear from the foregoing that in my considered opinion no such implied power exists.

Let us now turn back to the Birnstiel case and the first Olles case, for a moment.

I have already set out previously what these cases decided, and it would appear that if it had been stated that Miss Birnstiel had been detained as a prisoner of war, then her detention would have been lawful and the rule *nisi* would have been discharged. As, however, she was stated only to have been detained by virtue of the Prerogative as an enemy alien and that she was not consequently detained under Defence Regulation 17, therefore her detention was unlawful and her

release was ordered. Further, the case decided that when the power of the Crown to interfere with the liberty of the subject had been regulated by legislation, the Executive must exercise the restrictions imposed by that legislation. I cannot see that, except as regards the personal Royal Prerogative, which admittedly can be and has been delegated to the High Commissioner, *e. g.* the power of pardon, there is any distinction to be drawn between the High Commissioner and the Executive. If there are powers implied in the High Commissioner then they must equally, in my opinion, be implied in the Executive. Similarly, if powers are specifically conferred upon the High Commissioner, then unless a contrary intention is expressed or appears, they can equally be exercised by the Executive.

The important point in my opinion is that part of the decision which applies the principle in the De Keyser Royal Hotel case, which principle limits the interference with the liberty of the subject by the Executive when such has been directly regulated and restricted by legislation.

I would quote Lord Dunedin at page 526 of the judgment in that case — "None the less it is equally certain that if the whole ground of something which could be done by the Prerogative is covered by the Statute, it is the Statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says, 'What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on its Prerogative ?' "

The first point is, therefore, do the Defence Regulations cover all the ground. I have already expressed an opinion on Regulation 17(1), and I would add that this Birnstiel case itself decided that "any particular person" was wide enough to cover enemy aliens, why not also "a prisoner of war" in view of the extended meaning applied to enemy aliens with prophetic vision by Bailhache, J. in the Vine Street Case, in 1916.

It seems to me that the Court in the Birnstiel case either went too far, on the one hand, or not far enough, on the other, and it was left for the Petitioner in the first Olles case to obtain a final ruling as regards a so-called prisoner of war.

In this latter case there appears to have been a slight misunderstanding of the facts as set out at the commencement of the judgment, and which the Petitioner has referred to in his affidavit in support of the Rule *Nisi* in the case now before us. We understand that it is correct that the Petitioner has never been before the Advisory Committee provided for under Regulation 17 of the Defence Regulations. I have already referred in detail to the judgment in this first Olles case and would merely refer briefly to paragraphs (1) and (5) of

the head note as correctly reported and which briefly and in effect state, (1) the detention by the Executive Government of an enemy alien as a prisoner of war is lawful ; and (2) the power so to detain in the Executive Government is an implied and necessary power and cannot be questioned by *Habeas Corpus*.

With the greatest respect I feel bound to say that I do not agree with such rulings. As I regard this matter to be of extreme importance, it is desirable to set forth exactly and categorically what in my view is the present and prevailing law on the subject in Palestine, even if it may be that I am repeating myself to some extent.

(1) I agree with paragraph 2 of the head note to the Birnstiel case but would add that in my opinion there may be Prerogatives of the Crown, of a personal nature, exercisable personally by the Crown which may have been delegated to the High Commissioner by implication and by virtue of his commission and by being the personal representative of His Majesty in this Territory.

(2) I am of the opinion that the Prerogative to arrest and detain any person whether as an enemy alien, or as a so-called prisoner of war or otherwise, without charge, trial or enquiry, does not exist either in the High Commissioner or the Executive Government of Palestine, unless such power has been expressly delegated, and in such case such powers must be exercised strictly in accordance with such delegation. In other words, where such power is delegated by or is contained in legislative enactment, the High Commissioner or Executive Government must exercise such power in accordance with such legislation and within the limits and restrictions imposed thereby.

(3) Where a person has been detained under a nebulous, undefined, alleged or implied Prerogative, then the Courts can enquire into such alleged or implied Prerogative, and a writ of, or in the nature of, *Habeas Corpus,* will lie.

(4) As *obiter dicta* only, I express the view that the Imperial Defence Act, 1939, as applied to the Territory, amply provides for the detention of any person whose detention appears to the High Commissioner to be expedient in the interests of the public safety or the defence of the territory, but that regulations for that purpose made thereunder must be complied with.
In such event, it would appear that action thereunder cannot be questioned by *Habeas Corpus* proceedings.

It will be apparent, therefore, that in my view the first Olles case was wrongly decided and I, therefore, come to the two other sub-

missions made by Mr. Goitein. Without going into the authorities, I think it is clear that successive writs of *Habeas Corpus* may be issued, and I would merely add that there is an inherent power in the Court to prevent an abuse of its own process. I am, therefore, of opinion that this matter is properly before the Court and, for the reasons given earlier, can be entertained and considered by the Court. Also, it is clear, from other decisions, that this Court has previously reviewed its earlier decisions and expressed contrary views subsequently. I am of course fully cognisant of the undesirability of adopting such a course, generally, but in this particular case, and holding the views I do, I should be doing an injustice to my own conscience, if I attempted to rule that the Petitioner was still being lawfully detained.

For all these reasons I am, therefore, of the opinion that the rule should be made absolute and the Petitioner should be released, unless otherwise detained.

I think that the Petitioner is also entitled to costs to include LP. 10 advocate's fee.

Delivered this 27th day of February, 1942.

Chief Justice.

Edwards, J.: I agree. The only matter about which, at one time during the argument, I had some doubt was as to whether we should not have considered ourselves bound by the decision in H. C. 82/41. In view, however, of certain statements both of fact and of law, in the judgments in that case, to which I shall presently refer, and in view of the *dictum* of Bramwell, L. J. in Smith's case, 11 Ch. D. (1879), page 596, my doubts have been resolved. There is, moreover, the authority of two recent cases of this Court, namely, H. C. 27/40 and H. C. 28/40. It is impossible for one to guess to what extent the mind of Copland, J. may have been affected by his belief that Olles had appeared "before *the* Advisory Committee" (See top of p. 431 Vol. 8 P. L. R.) whereas we now know that Olles never did appear before *the* Advisory Committee, that is, before the Advisory Committee set up under Regulation 17(2). Moreover, with respect, I am unable to regard as correct law the statement at p. 435, that though the Prerogative does not run in this country, there is an "implied power vested in the Executive Government to take measures necessary for the defence of the realm and such a power must exist." Once it is admitted that the Prerogative does not exist I fail to see how any powers can exist except such powers as are given by regulations. Crown Counsel (Mr. Rigby) frankly admitted to us that he rested his case solely on the allegation that Olles was a "prisoner of war". It may

be that Mr. Rigby felt that he was on sound ground because of the *dictum* of Rose, J. at page 435. Now, that *dictum* may be a correct statement of the law in the United Kingdom ; but it, of course, rests on the assumption that the Royal Prerogative exists in Palestine as it does in the United Kingdom. In this connection I would refer to the decision in the Musgrave case, 5 A. C. 102 (1879), cited by Mr. Goitein. I would here quote from Stephen's "Commentaries on the Laws of England" 19th Edition, Vol. 4, p. 276, "Although the actual exercise of the Prerogative cannot be inquired into in a Court of law, the limits of the Prerogative are a matter of Common Law, and it is the duty of the Courts to investigate, if called upon for that purpose, any claim of the Crown to exercise a discretion by virtue of its Prerogative, and, if they find that there is no warrant for the claim at Common Law, to disallow it."

In my view, one really comes back to the decision in H. C. 67/41, P. L. R. Vol. 8, p. 363. I fail to see how it can be said that the answer in the affidavit produced by the Government in that case (p. 365) "Miss Birnstiel is detained by virtue of the Prerogative as the subject of a State at War with His Majesty" is in essence different from the affidavit produced in the present case "Olles is an enemy alien and a Prisoner of War and is detained as such by the Executive Government." The sole question, therefore, is whether in Palestine the reply that a person is detained as a so-called prisoner of war is a sufficient answer to an application for a writ of *Habeas Corpus*. With this matter My Lord has sufficiently dealt. I agree with the order proposed by my Lord.

British Puisne Judge.

Frumkin, J. : I agree and would like to add only a few words distinguishing this case from the Birnstiel case. It is true that in this case there is an apparent departure from the Birnstiel case insofar as it laid down, in the words of Rose, J. in the first Olles case : "That in the case of an enemy alien not being entitled to the protection of Government, it is a complete answer on the part or the Executive Government to aver that the person in question is detained as a prisoner of war." But the Birnstiel case was argued on the basis of the Prerogative of the Crown and the finding cited above might, therefore, be regarded as *obiter*. It was only in the first and in the present Olles case that the position in law in this country of an enemy alien as prisoner of war was exhaustively argued and it has not been established that the High Commissioner can exercise over so-called prisoners of war a Prerogative which he cannot exercise over enemy aliens in general.

Puisne Judge.

CIVIL APPEAL No. 226/41.

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

BEFORE : Copland, A/C. J. and Khayat, J.

IN THE APPEAL OF :—

1. Menachem Lebov,
2. Rivka Lebov. APPELLANTS.

V.

1. Zvi Gaber,
2. Eliezer Berkovitz. RESPONDENTS.

Action on P/N — Absence of consideration — Plaintiff not giving evidence, Bills of Exchange Ordinance, Sec. 29 — No power of Appellate Court to reverse Magistrate's finding as to credibility of witnesses.

In allowing an appeal from the judgment of the District Court of Tel-Aviv, (appellate capacity), dated the 10th October, 1941, in Civil Appeal No. 144/41, and in restoring the judgment of the Magistrate :—

HELD : A Trial Court is the sole judge of facts and if it says that it believed the witnesses, then an Appellate Court should not interfere unless the tale as told by the witnesses is so preposterous that no reasonable Court could possibly have believed it. In the present case there was nothing to justify the District Court in overriding the Magistrate on the question of belief and the fact that the District Court might possibly not have believed the witnesses was irrelevant.

ANNOTATIONS : *Cf.* C. A. 36/41 (1941, S. C. J. 142) and note 1, C. A. 106/41 (*ibid.*, p. 482), CR. A. 5/42 (*ante*, p. 31) and CR. A. 10/42 (*ante*, p. 35, on p. 37).

FOR APPELLANTS : Launer.

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

JUDGMENT.

This is an appeal by leave from an appellate judgment of the District Court, in which that Court reversed the judgment of the learned Magistrate and found that the Appellant was liable on a promissory note. The appeal raises the question as to when and in what circumstances an Appellate Court can upset or vary a judgment of a Trial Court. A Trial Court is the sole judge of facts. A Trial Court hears the

witnesses, and if it says that it believes those witnesses, then an Appellate Court should not interfere unless the tale as told by the witnesses is so preposterous that no reasonable Court could possibly have believed it.

In this case the action was on a promissory note. The Plaintiff did not apparently give evidence but contented himself with putting in the note, relying upon Section 29 of the Bills of Exchange Ordinance. The defence called the first two Defendants, who both gave evidence saying that there was no consideration for the note, and that it had been given purely as a security for the debts. A third witness was called, who supported the tale that there was no consideration. The learned Magistrate said that he believed the first and second Defendants, and their evidence was strengthened by that of the third witness. He also said that he disbelieved the third Defendant, who was the son-in-law of the Plaintiff, and the Magistrate then gave judgment for the Defendants.

Now, the Magistrate, as we have already said, is the sole judge of the fact whether to believe or not to believe the witnesses. He is not bound to give reasons why he believes or disbelieves. He need not have believed the Defendants ; he might have held that their evidence was not to be believed — he would then have given judgment of course for the Plaintiff. But he says "I believe", and there is nothing in the case to justify an Appellate Court in overriding the Magistrate in such questions of belief. Quite possibly, if the learned Judges had tried the case themselves, they might not have believed the Defendants. That however is not the point. They were not entitled to set aside the judgment of the learned Magistrate on the ground which they gave.

This disposes of the case. The appeal must be allowed, the judgment of the District Court set aside, and the Magistrate's judgment restored. The Appellants will have their costs on the lower scale, both here and in the District Court, and we certify the sum of LP. 10 advocate's attendance fee on the hearing of this appeal, to be paid by the first Respondent.

Delivered this 2nd day of January, 1942.

Acting Chief Justice.

CRIMINAL APPEAL No. 143/41.

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

BEFORE : Copland, A/C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Ni'man Ali Darwish Ja'bari & 3 others. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Form of information — Grievous bodily harm, C. C. O., Sec. 238 — No necessity to join C. C. O., Sec. 23 in case of several Accused — Scope of the section — Sentence.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 10th December, 1941, in Felony No. 291/41, whereby the Appellants were convicted of doing grievous harm, contrary to Sec. 238 of the Criminal Code Ordinance, 1936, and of assault, contrary to Sec. 250 of the Criminal Code Ordinance, 1936, and sentenced to fifteen months' imprisonment each :—

HELD : Section 23 of the Criminal Code Ordinance need not be joined in an information as it is only explanatory in defining who can be charged as principal offenders and does not create an offence.

ANNOTATIONS : *Cf.*, on Section 23 of the Criminal Code Ordinance generally, CR. A. 9/42 (*ante*, p. 43) and note 2.

FOR APPELLANTS : Elia.

FOR RESPONDENT : Wa'ary.

JUDGMENT.

The four Appellants were convicted before the District Court of Jerusalem of doing grievous bodily harm to a person inasmuch as they assaulted two persons, one of whom as a result of the attacks on him had his leg broken.

The main ground of appeal is that since there was only one blow which broke the leg, the prosecution should have charged the Appellants, in addition to the charge under Section 238, also under Section 23 of the Criminal Code. The Court is of opinion that it is quite unnecessary to join this section in an information. This section is explanatory inasmuch as it merely defines who can be charged as principal offenders. It does not in any way create an offence.

With regard to the second point taken, that the sentence is excessive, the Court is of opinion that so far from its being excessive it is comparatively light. The appeal is dismissed.

Delivered this 8th day of January, 1942.

Acting Chief Justice.

CIVIL APPEAL No. 255/41.

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

BEFORE : Gordon Smith, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Sheikh Muhammad 'Ubeid. APPELLANT.

v.

1. Zahwa Hamid 'Ubeid,
2. Badawi Mujahid Hallaq. RESPONDENTS.

Claim by beneficiary for share of rent of waqf property — Jurisdiction of Civil Courts — Interpretation of waqfieh — Failure to produce documents.

In dismissing an appeal from the judgment of the District Court of Jerusalem, sitting as a Court of Appeal, dated the 24th day of November, 1941, in Civil Appeal No. 10/41 :—

HELD : 1. The Civil Courts had jurisdiction to decide whether a party was a beneficiary in a *waqf* or not.

2. The Appellant had had ample chance to produce the original *waqfieh* and had failed to do so.

ANNOTATIONS : On the jurisdiction of the Civil Courts in connection with *waqfs* see C. A. 100/40 (1940, S. C. J. 477) and note.

FOR APPELLANT : Asal.

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

JUDGMENT:

Khayat, J. : This is an appeal from the judgment of the District Court of Jerusalem on appeal from the judgment of the Magistrate's Court, Hebron. The first Respondent (Plaintiff) claimed from the Appellant (Defendant) the sum of LP. 2 being her share in the rent of a store for the year 1355 *A. H.* which was dedicated as a *waqf* by her grandfather. The Magistrate gave judgment in her favour in the sum claimed after he was satisfied from the document produced, *i. e.* the *waqfia* dated 1328 *A. H.*, that the Plaintiff is a beneficiary and is entitled to a share in the said *waqf*. On appeal, the District Court confirmed the judgment of the Magistrate. Hence this appeal by leave.

The Appellant before us raised three points which shortly are : first, that the Civil Courts have no jurisdiction to entertain this action, since

the dispute in this case is whether the first Respondent is a beneficiary in the *waqf* or not, and argued that this question falls entirely within the exclusive jurisdiction of the *Sharia* Court. Secondly, if the Civil Courts are entitled to decide this question, then the documentary evidence before the lower Courts was not sufficient to prove that the first Respondent is a beneficiary. Thirdly, that both Courts misinterpreted the terms of the second *waqfia* which on the face of it contradicts the allegation of the first Respondent.

This Court thinks that the arguments of the Appellant are not supported in law, nor did he cite any authority in support thereof. If he relies on the original *waqfia* dated 1211 *A. H.*, he had ample chance to produce it but never did so. Furthermore, his interpretation of the second *waqfia* is contrary to the explicit terms of the *waqfia* itself.

For these reasons the appeal must be dismissed with costs on the lower scale and we certify the sum of LP. 10.— advocate's attendance fee to the first Respondent.

Delivered this 10th day of February, 1942.

Puisne Judge.

CRIMINAL APPEAL No. 144/41.
CRIMINAL APPEAL No. 145/41.

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

BEFORE : Copland, A/C. J., Edwards and Khayat, JJ.

IN THE APPLICATIONS OF :—

CR. A. No. 144/41.

Subhi Ibrahim Abu Jarad. APPLICANT.

v.

The Attorney-General. RESPONDENT.

CR. A. No. 145/41.

Musa el Jarusheh. APPLICANT.

v.

The Attorney-General. RESPONDENT.

Criminal Procedure — False evidence, Criminal Procedure (Evidence) Ord., Sec. 4 *— Whether committal proceedings are "criminal proceed-*

ings" — Committal of witnesses for false evidence after committal of accused persons for trial.

In refusing two applications for leave to appeal from the judgments of the District Court of Jaffa, sitting at Gaza, dated the 15th December, 1941, in Misdemeanour Nos. 192/41 and 193/41, whereby the Applicants were convicted of giving false evidence contrary to section 4 of the Criminal Procedure (Evidence) Ordinance and sentenced in each case to pay a fine of LP. 10.—, or two months' imprisonment in default :—

HELD : 1. Committal proceedings were criminal proceedings within the meaning of Section 4 of the Criminal Procedure (Evidence) Ordinance.

2. Section 4 of the Ordinance empowered the Magistrate to commit a witness for false evidence before or after the committal for trial of the accused persons at whose trial the witness had given evidence.

ANNOTATIONS : See, on the first point, H. C. 30/41 (1941, S. C. J. 160) and note 1.

FOR APPLICANTS : Shihadeh.

FOR RESPONDENT : Junior Government Advocate — (Akel).

JUDGMENT.

We do not need to hear you, Mr. Akel.

These are two applications for leave to appeal from two convictions before the District Court sitting summarily in Jaffa (*sic*), of two persons who have been charged with giving false evidence contrary to Section 4 of the Criminal Procedure (Evidence) Ordinance. They were fined LP. 10 each or in default two months' imprisonment.

The first point in the application is that committal proceedings before a Magistrate are not criminal proceedings before a Magistrate's Court within the meaning of Section 4 of the Ordinance. Committal proceedings are just as much criminal proceedings as any criminal case in a Magistrate's Court and a Magistrate sitting, holding a preliminary enquiry, is a Magistrate's Court. That point, therefore, fails.

The second point is that the Magistrate had no power to commit a witness for trial after he had committed the accused persons in respect of whom the witness had given false evidence. There is nothing in Section 4 of the Ordinance to warrant the construction which the Applicants' counsel seeks to put upon it. The Court sees no reason why a witness who had given false evidence should not be committed for trial after the accused persons, at whose trial he has given evidence, were committed, in the same way as he might be committed for trial before the others. The applications in both cases are therefore refused.

Delivered this 13th day of January, 1942.

Acting Chief Justice.

HIGH COURT No. 3/42.

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

BEFORE : Edwards and Khayat, JJ.

IN THE APPLICATION OF :—

Tova Ben Ami. PETITIONER.

v.

1. Local Council Kfar Jona,
2. Inspector General of Police and Prisons,
3. Police Inspector of Kfar Jona. RESPONDENTS.

Refusal of licence to open café — No objections by Inspector General of Police or by Director of Health, Trades & Industries (Regulation) Ord., Sec. 6, Amendment Ord., 1939, Secs. 3 and 4 — Whether discretion vested in Local Council, H. C. 12/40, H. C. 7/36, Local Councils Ord., Sec. 2, Local Councils (Kfar Yona) Order, para. 10(m),(o) and (p) — Limitation of number of cafés — No priority according to time of application — "Approved zone" in place not a town planning area, Trades & Industries (Regulation) Ord., Sec. 7 as amended — Allegations as to Petitioner's character — Whether discretion properly exercised — Vested interests — Costs.

In refusing an application for an order to issue directed to the first Respondent (or any officers acting for it) calling upon it to show cause why it should not forward the application for a café, heretofore filed by the Petitioner, to the second or third Respondents for their approval and thereafter to sign and issue to the Petitioner a licence to keep a café in the abovementioned premises of the Petitioner at Kfar Jona :—

HELD : 1. (Referring to H. C. 12/40 ; following H. C. 7/36) : The Local Council had a discretion to grant or refuse a licence for a café.

2. The Local Council had power to limit the number of cafés and the restriction of their number to twenty was not unreasonable.

3. The mere fact that the Petitioner was one of the first persons to apply for a licence was no reason why she should have been given preference.

4. The Local Council had power to decide whether cafés should be situated in a particular area and could for that purpose approve a zone although no Town Planning scheme had yet been made for the area within their jurisdiction.

5. The question whether the Petitioner was a suitable person to be granted a licence was one for the Local Council to decide and there was nothing to show that the Local Council had acted capriciously or with bias or from improper motives or for other wrong reasons.

FOLLOWED : H. C. 7/36 (C. of J. 1934—6, 907 ; P. P. 29.iv.36).

REFERRED TO : H. C. 12/40 (1940, S. C. J. 182).

ANNOTATIONS :

1. On the discretion of licensing authorities *cf.* the annotations to H. C. 12/40 (*supra*) and the cases therein cited ; see also H. C. 53/40 (1940, S. C. J. 526).

2. As regards the "costs to be taxed on the lower scale" note that there is no scale of costs applicable to the High Court ; *cf.* H. C. 8/39 (1939, S. C. J. 265).

FOR PETITIONER : E. Z. Fellman.

FOR RESPONDENTS : No. 1 — M. Goldberg.
Nos. 2 & 3 — No appearance — served.

ORDER.

This is a return to a petition or application for an order of *mandamus* directed to the Local Council of Kfar Yona, calling upon them to show cause why they should not be ordered to issue to the Petitioner a licence for the opening and keeping of a café in Kfar Yona. Originally, the Inspector General of Police was a party to the petition ; but, on the return date, the representative of the Inspector General of Police said that he did not oppose the petition. There was no request that the application be forwarded to the Director of Health under Section 6 of Cap. 143, *i. e.,* Trades and Industries (Regulation) Ordinance (see also Sections 3 and 4 of Ordinance 7 of 1939). For the purposes of this petition we assume that the Petitioner had satisfied the requirements of the Director of Health and the Inspector General of Police under the Ordinance.

Now, it is argued by Mr. E. Fellman, advocate for the Petitioner, that once a Petitioner had satisfied both those parties, the Local Council of Kfar Yona had no power to refuse to grant the licence. In this connection, Mr. Fellman has referred us to High Court Case No. 12/40 and he suggests that a former Chief Justice (Sir Harry Trusted) doubted the existence of the discretion but it is clear that he admitted that that point had not been argued in that case. Now, there is a series of authorities — in particular High Court 7 of 1936, Rotenberg, Vol. 9, p. 907, — which make it clear that this Court has held that the discretion exists ; but, in any event, this matter must be decided in accordance with the statute law on the subject. Under Section 2 of the Local Councils Ordinance (Cap. 84), the High Commissioner, in making an order constituting a local council, must specify the composition and functions of such council and its powers and obligations and its area of jurisdiction. In respect of Kfar Yona Council Order No. 202 of 1940 namely the Local Councils (Kfar Yona) Order 1940

was made (Palestine *Gazette*, Supplement No. 2, 1940, page 1679, paragraph 10(m), (o) and (p)). The Council have been given wide powers which, in our view, enable them to control even the number of cafés for which licences may be granted in the area under their jurisdiction. We lay particular stress on the words in paragraph 10(p) "to regulate and control the establishment of businesses"; this in our view gives them power to limit the number of cafés. Although Mr. Fellman suggests that the Council limited the number to 12, Mr. Goldberg, advocate for the Respondent Council, assured us that, in fact, the number of cafés approved is 20 and although it may well be that one or two of those 20 people have not yet taken out their licences, yet licences for 20 have in fact been granted. Now, of course, one question which at once arises is whether it is a reasonable exercise of the discretion to limit the number to 20 having regard to the population of Kfar Yona. From what we have heard, we are not prepared to say that 20 is too small a number and we think that there is nothing before us to show that the Local Council exercised a wrong discretion in so limiting the numbers. The Petitioner complains, however, that she is one of the first persons to have applied for a licence, that is to say, one of the first of the 20; and she accordingly feels she has a legitimate grievance in having been refused. Now, the mere fact that she was one of the first of a large number of applicants to apply is no reason why she should have been given preference provided always the Local Council did not act capriciously or with obvious bias or from wrong motives. Now, there is no suggestion that any member of the Local Council was biased against this particular Petitioner or that she has suffered because of any personal animosity. The main attack of the Petitioner is really against some of the reasons given by the President of the Council, Mr. Rosenzveig, in his affidavit in reply.

Apart from the question of numbers, with which we have already dealt, it is suggested that a wrong reason was given, namely that the café of the Petitioner is outside what the Local Council calls the "approved zone". It is urged by Mr. Fellman that, having regard to Section 7(1) of the Trades and Industries (Regulation) Ordinance as amended by Section 4 of Ordinance 7 of 1939, such considerations are only relevant when there is a Town Planning scheme in force. That, however, does not, in our view, prevent a Local Council in the exercise of its powers under para. 10(o) and (p) from deciding whether cafés should be situated in a particular area; in other words, they may for such purposes approve a zone even although no Town Planning scheme has yet been made for the area within their jurisdiction. It is also said that, in view of the fact that the Police had no objection

to this lady's character, the Local Council should have been satisfied. Now, there is an allegation made in paragraph 9 of Mr. Rosenzveig's affidavit. What is said there may be ambiguous, but, in fairness to the Petitioner, we may say that we gather that no affirmative allegations were made regarding her character ; and, in fairness to Mr. Rosenzveig, we would point out that in paragraph 9 Mr. Rosenzveig does not say that her character was bad. The real question before the Local Council seems to have been whether the Petitioner was a suitable person to have a licence for a café having regard to the fact that she was only one of apparently many candidates for a licence the number of which the Council had, in our view, every right to restrict to 20. Now, that question of whether she was a suitable person, or less suitable than others of the candidates, was, of course, one for the Local Council to decide, and, apart from the matters with which we have dealt, there is nothing before us to show that the Local Council acted capriciously or with bias or from improper motives or for other wrong reasons.

It is to be noted that this is not a case where a person has already been running a café and then, all of a sudden, fresh legislation is passed which might have the effect of depriving her of a livelihood which had accrued to her by reason of vested interests. She had no vested interests in a café and it is not the hard case of a closing order served on a person who has for a long time owned a café.

For the foregoing reasons, we hold that the Order *Nisi* must be discharged with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 5.

Given this 12th day of February, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 12/42.

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

BEFORE : Rose, Edwards and Abdulhadi, JJ.

IN THE APPEAL OF :—

Faris Mahmoud Abu el 'Adas. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder — Credibility of witness convicted once for false evidence —

Direction of bullets — Witness not coming forward at once and making statement to the Police in secret — Judgment not dealing with all points raised — Proof that Appellant had access to rifle from which the shots were fired — Premeditation.

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, dated the 17th day of January, 1942, in Criminal Assize No. 52/41, whereby the Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. The fact that the principal witness for the prosecution had once been convicted of false evidence was a matter to be taken into consideration by the Court below, but whether or not to believe him was a question for the Trial Court alone.

2. The fact that the bullet had struck the deceased on the right side was sufficiently explained by the evidence as to the deceased's turning round on seeing the Appellant.

3. Courts of Trial in a murder case should deal with all the important points of the defence and give reasons for their findings.

4. The fact that the principal witness for the prosecution did not make an immediate statement to his relatives or to the *Mukhtar,* but made only later on a statement to the Police in secret was not a conclusive reason for disbelieving his evidence.

5. As the Appellant had himself led the Police to a place where the rifle from which the shots had been fired was hidden the Trial Court could reasonably draw the inference that the Appellant had access to this rifle.

6. From the facts that threats had been made a day or two before the shooting, that the deceased was unarmed and that the Appellant had fired without any immediate provocation there was ample material to draw the inference of premeditation.

ANNOTATIONS :

1. See, on the first point, C. A. 226/41 (*ante,* p. 65).

2. On inadequate judgments *cf.* CR. A. 9/42 (*ante,* p. 43).

3. See, on the fourth point, CR. A. 10/42 (*ante,* p. 35) on p. 37. *Cf.*, on failure to make an immediate statement, CR. A. 75/39 (1940, S. C. J. 11).

4. On premeditation *vide* CR. A. 4/42 (*ante,* p. 19) and note 1, CR. A. 8/42 (*ante,* p. 21) and CR. A. 3/42 (*ante,* p. 38).

FOR APPELLANT : Cattan.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Nablus, convicting the Accused of murder. The circumstances in which the deceased met his death are really common ground between the prosecution and defence ; that is to say, that about 2

hours before sunset on the 17th June, 1941, he was riding on a donkey with two other men, one on foot and one on a donkey, when he was shot at and killed by a man. The eye-witnesses aver that two shots were fired and the medical evidence supports that supposition.

The point of importance, of course, is whether it was the Accused who was the man who did the shooting. The defence states that it was an unknown assailant. Now, it is urged on behalf of the Appellant that the prosecution case depends almost entirely on the evidence of one witness, a man called Yasin. It is suggested, in the first place, that he is not a witness who should be believed at all in view of the fact that once, about twenty years ago, he was convicted and fined LP. 4 for giving false evidence. That no doubt is a matter to be taken into consideration by the Trial Court, but whether or not to believe this witness was, it seems to us, a question for it alone.

It is further suggested that his evidence is materially contradicted by other evidence for the prosecution. It is said that as his statement was to the effect that the man who shot was to the North and the victim was proceeding East, one would have expected the bullets to have struck on the left side. This point is specifically dealt with by the Trial Court. It says :—

> "The suggestion was made by the defence that as the Appellant came from the North and the deceased was going East the deceased could not have been hit on the right side ; this is explained by Yasin's evidence that both he and the deceased on seeing the Accused, turned round west thus exposing the right side to the North."

That point is, of course, entirely a matter for the Trial Court and there seems no reason to differ from its finding.

It has further been stressed, and we are told that it was also stressed in the Court below, that this man, Yasin, did not make an immediate statement to his own relatives or to the *Mukhtar* ; but he said that he made a statement on the same night in secret to the Police. It is obvious that there are many good reasons why, at that time, a man would not make a statement except in secret but it is a pity that as this point was evidently stressed at the trial, no reference whatever is made to it in the judgment. To put the matter at its lowest, it is a convenient practice for a Court of Trial in a murder case to deal with all the important points of the defence and to give its reasons for its findings.

Be that as it may, we certainly are of opinion that the fact that Yasin did not tell his relatives or the *Mukhtar* can be no ground for allowing this appeal, because it is clearly not a conclusive reason why the Court should have disbelieved his evidence.

The point is further taken by Mr. Cattan, who has put forward every possible argument on behalf of the Appellant, that it is not safe in a murder charge to depend upon the evidence of a single witness. But in this case there is an important connecting link. Two empty cartridges were found on the scene and when the Accused was arrested he led the Police immediately to a place where a rifle and ammunition were hidden. Upon tests being made it was proved that these two cartridges were fired from this particular rifle. Mr. Cattan argues that it is not fair to draw an inference from that that the rifle belonged to the Accused. That may be so, but at least it is reasonable for a Court to draw an inference from that evidence that the Accused had access to this rifle, even if not exclusive access. This fact, coupled with the evidence of the witness Yasin, is very damning against the Accused.

It is further contended that there was insufficient evidence of premeditation. It is true that the Court of Trial gave no express reasons for their having found that there was premeditation, but it seems to us that on the evidence and on the findings of fact that it made, it could not possibly have come to any other conclusion. There was the fact of threats having been made a day or two before the shooting ; that the deceased and his companions were unarmed and the Accused, who was dressed in what is described as a greenish uniform, had with him a rifle with which he fired the shots without a shadow of immediate provocation. We think that these facts were ample for the Court to draw the inference that the three elements of premeditation were present.

For these reasons the appeal must be dismissed and the conviction and sentence confirmed.

Delivered this 4th day of February, 1942.

British Puisne Judge.

CIVIL APPEAL No. 224/41.

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

IN THE APPEAL OF :—

Abdul Wahhab Abu Askul. APPELLANT.

v.

1. Sarah Bint Ibrahim el Jirbi of Bash-shit

(deceased), her sole heir being her son Rabah Muhammad Jaber 'Askul, of unknown residence,

2. Rabah Ibn Muhammad Jaber 'Askul of Bash-Shit village, unknown residence. RESPONDENTS.

and

IN THE APPEAL OF :—

Abdul Wahhab Abu 'Askul. APPELLANT. (RESPONDENT).

v.

Ibrahim Khalil el Haj & 7 ors. RESPONDENTS (CROSS-APPELLANTS).

(By order of the Supreme Court dated the 15th of January, 1942).

Land Settlement — Prescriptive possession negatived by oral agreement to hand back the land, Land Code, Art. 20 — Case remitted on one point only, no necessity for rehearing — Registration of possessory title, Land (S. of T.) Ord., Sec. 52 — Court of Appeal not concerned with events taking place after the trial — Cross-appeal — Failure to give seven days' notice, C. P. R., Rule 339 — Good cause — Costs.

In dismissing an appeal and cross-appeal from the decision of the Settlement Officer, Ramleh Settlement Area, dated the 18th day of September, 1941, in Case No. 19/32/Bash-Shit, No. 2/39/Bash-Shit (Rehearing) :—

HELD : 1. As the Land Court had remitted the case to the Settlement Officer on one point only there was no necessity for a re-hearing.

2. The Settlement Officer was not bound to register a possessory title as the provisions of Section 52 of the Land (S. of T.) Ordinance were discretionary and in the circumstances of the case he was right in his refusal.

3. The Court of Appeal was concerned only with the correctness of the Settlement Officer's decision at the time and the subsequent death of one or more parties would not be taken into consideration.

4. In view of the word "shall" the seven days' notice of cross-appeal required by Rule 339 of the Civil Procedure Rules was mandatory and the Respondents had failed to show good cause for the delay.

ANNOTATIONS :

1. See, on the first point, C. A. 70/41 (1941, S. C. J. 470) and note 1.

2. On the interpretation of the word "may" see CR. A. 133/41 (1941, S. C. J. 501) and note 1.

3. See C. A. 50/37 (1937, S. C. J. 281, P. P. 29.vii.37) on the interpretation of the word "shall".

4. On failure to show good cause for a defect *cf.* C. A. 260/41 (*ante*, p. 6) and note 1.

FOR APPELLANT : Haddad.
FOR RESPONDENTS : Shihadeh.
FOR THE ADMINISTRATOR OF RABAH : Dajani.

JUDGMENT.

This is an appeal by leave from a decision of the Land Settlement Officer of Ramleh in Case No. 19/32/Bash-Shit, No. 2/39/Bash-Shit (Re-hearing). The re-hearing referred to had been ordered by the Land Court of Jaffa sitting as a Court of Appeal in Land Settlement Appeal No. 92/37. The whole facts of the history of the land are set out in the judgment of the Land Court of Jaffa dated 28th July, 1939, and it is unnecessary for us to restate them here. Only one point had been remitted by the Land Court namely to enquire into an alleged agreement between the Appellant and Sarah Bint Ibrahim with regard to the share of her absent son Rabah. In the first judgment of the Settlement Officer dated the 3rd August, 1937, he found that the Defendant, that is the present Appellant, has admitted that he had taken three *kirats* of Mohammed, son of the deceased Jabir Ahmed, when he died as he had no male heir present and that the Appellant had said to the Land Settlement Officer that he was willing to hand over these three *kirats* to Rabah, the absentee, on his return and in view of this admission the Land Settlement Officer held that there was no adverse possession within the meaning of Article 20 of the Land Code. This would appear to be so. We find it, therefore, rather difficult to understand why the Land Court of Jaffa found it necessary to refer back to the Land Settlement Officer the question of the value of an alleged verbal agreement as to a promise by the present Appellant to maintain the woman Sara until the return of her son Rabah. Be that as it may, the matter did go back to the Land Settlement Officer and he gave a decision on the 18th of September, 1941. Against that decision the present Appellant Abdul Wahhab Abu Askul now appeals.

The first ground of appeal is that the Land Settlement Officer gave the Appellant no opportunity of proving anything ; but in answer to a question by the Court Rashid Eff. Haddad, the present Appellant's advocate, said that the Land Settlement Officer did hear the parties and it is apparently not suggested that the Land Settlement Officer refused to hear witnesses or refused any adjournment for that purpose. In fact it does not seem that the Appellant asked the Land Settlement Officer to hear witnesses ; in any event the judgment of the Land Court

did not really order a rehearing but merely ordered the Land Settlement Officer to consider this question of the agreement and give a fresh judgment thereafter. It does not appear to us that the Land Settlement Officer acted improperly or omitted to do anything he should have done and we fail to see how the judgment can be attacked on that ground.

The next ground of appeal is that the Land Settlement Officer should have acted under Section 52 of the Land (Settlement of Title) Ordinance ; we refer to the words "may enter" in Section 52 which show that it is purely discretionary ; but, in any event, in view of the undertaking by the Appellant to hand back these three *kirats* to Rabah on his return, we think that the Land Settlement Officer would have been wrong in registering these three *kirats* in the name of the Appellant. We, therefore, find that there is nothing objectionable in the decision of the Land Settlement Officer which must be affirmed. Since the judgment of the Land Settlement Officer of 18th September, 1941, it seems that Sarah had died. This may be so ; but, as we are a Court of Appeal, we are merely concerned with the correctness of the decision of the Land Settlement Officer at the time and parties must take the usual steps consequent on the death to have the necessary alterations in the land register by way of producing the necessary certificates of succession *etc.* Aziz Eff. Shehadeh, the advocate acting on behalf of the heirs of Sarah, has asked the Court to presume the death of Rabah and in support thereof has asked us to look at a certificate of succession in favour of the heirs of Sarah according to which it would seem that this Land Settlement *Qadi* was satisfied that Rabah had died and that Sarah had succeeded to all his shares. Here again the answer is the same. We are not concerned with whether Rabah has or has not died on 18th of September, 1941. The Land Settlement Officer treated him as being still alive or as an absentee. We see no reason to or need to alter that decision. There the matter must remain so far as this appeal is concerned.

At the commencement of the hearing of this appeal, Aziz Eff. Shehadeh, advocate on behalf of the heirs of Sarah, asked to be allowed to argue a cross appeal. He admitted that he had not given the necessary 7 days' notice to the other side as is required by Rule 339. The advocate for the Appellants, Rashid Eff. Haddad, who was only served yesterday with the notice, told the Court that he was not prepared to argue any cross appeal. Now, in view of the word "shall" in line 4 of Rule 339, the 7 days' notice is mandatory. The only possibility, therefore, was for us to grant an adjournment if we thought fit. The reason given by Aziz Eff. Shehadeh for the delay was that he had found

some difficulty in obtaining the signature of one of the heirs of Sarah on his power of attorney. We were not satisfied that this was a good ground for the adjournment of the appeal and we accordingly refused Aziz Eff.'s application. In the result the appeal against the decision of the Land Settlement Officer of the 18th of September, 1941, is dismissed with costs as follows: The Appellant will pay to Aziz Eff. Shehadeh's clients costs to be taxed on the lower scale to include an advocate's attendance fee of LP. 10. Aziz Eff. Shehadeh's clients will pay to Daoud Eff. Dajani's clients a sum of LP. 5 inclusive costs as fixed costs. The cross appeal is dismissed without costs.

Delivered this 5th day of February, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 11/42.

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

BEFORE: Gordon Smith, C. J., Edwards and Khayat, JJ.

IN THE APPEAL OF:—

Khalil Ahmad Ihlihil. APPELLANT.

v.

The Attorney General. RESPONDENT.

Possession of dangerous drugs — Constructive possession.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 20th day of January, 1942, in Criminal Case No. 331/41, whereby the Appellant was convicted of being in possession of dangerous drugs contrary to section 7 of the Dangerous Drugs Ordinance, 1936—41 and section 23 of the Criminal Code Ordinance, 1936 and sentenced to fifteen months' imprisonment:—

HELD: Although the hashish was not actually and physically in the Appellant's possession it was in possession of his relative just a few yards behind him and he was, therefore, rightly convicted.

ANNOTATIONS: *Cf.* CR. A. 124/41 (1941, S. C. J. 451) and note 1.

APPELLANT: In person.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

We do not need to hear you, Mr. Rigby.

We have read through the record. The Appellant was convicted, on

very clear evidence, of possession of hashish. Although not actually and physically in his possession it was in possession of his relative just a few yards behind him. He told the policeman who found it that it was not their own hashish but it was given to them to hand over to somebody who would give them wages. In his own evidence he denied that he was there at all. He said he was in Haifa, clearly lying when he gave evidence.

His appeal is dismissed and the sentence will stand. Sentence to run from the date of conviction.

Delivered this 9th day of February, 1942.

Chief Justice.

CIVIL APPEAL No. 259/41.

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

BEFORE : Gordon Smith, C. J. and Khayat, J.

IN THE APPEAL OF :—

Dr. Leopold Baer. APPELLANT.

v.

The Palestine Building Syndicate, Ltd. RESPONDENT.

Claim for building materials sent from Germany to Respondent by virtue of contract between Appellant and German firm — Provision for agreement to be entered into between Appellant and Respondent in Palestine — No such agreement made — German law as to specification of goods — Clause entitling Appellant to claim back his money from German firm — Waiver — Respondent not party.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 30th of November, 1941, in Civil Case No. 65/40 dismissed.

The Appellant had entered into an agreement with the "Export Bau und Handelsgesellschaft" of Berlin, providing that, after having paid RM. 40.000,— to the German firm, the Appellant should within a given time sign a building contract with the Respondent Company for the construction of a so-called "Boehler" house. That building contract had never been made but the German firm did actually supply the Respondent with building materials of the kind contemplated in the agreement and the Appellant sued the Respondent for those materials or their value. The District Court, after considering the relevant clauses of the above agreement (which are cited in the judgment of the Court of Civil Appeal) and after hearing evidence on German law found as follows :—

1. The building materials sent by the German firm to the Respondent were

not specific at the time of signing the agreement in Germany nor at any other time.

2. The building materials had been sent to the Respondent — not for the Appellant — but for the building of a house through the Respondent.

3. If the materials had ever been in the nature of a trust with the Respondent, then in trust for the German firm and not for the Appellant.

4. There had been no waiver of the condition stipulating for a contract to be entered into between the Respondent and the Appellant.

5. So long as the Appellant had not signed a contract with the Respondent he could not sue the latter since the Respondent was not a party to the agreement made between the Appellant and the German firm.

HELD: 1. Foreign law is a question of fact for the Court to decide after hearing expert evidence.

2. The building materials had not been delivered to the Appellant, nor had it been proved that they were ever specific, and the Appellant's remedy was to sue the German firm for the refund of his money in accordance with the agreement between them.

ANNOTATIONS: See, on the first point, C. A. 123/41 (1941, S. C. J. 354) and note 2.

FOR APPELLANT: Rottenstreich and Caspi.

FOR RESPONDENT: Smoira and Rosenblueth.

JUDGMENT.

This was a case arising out of an agreement between the Plaintiff and a firm in Germany, and to which the Palestine Building Syndicate Ltd. was made Defendant. The matter came before the District Court, and they, after the issues were settled, gave judgment thereon, after hearing expert evidence on what was the German law in regard to this contract.

I referred a few moments ago to what most probably were the underlying reasons for the deposit of the 40,000 Marks made by the Plaintiff with the German firm — I need not dwell on that — but that agreement was made between the Plaintiff and the German firm in Germany, to which the Defendants were not parties, and probably at the time of the making of the agreement had no knowledge whatsoever of it. I cannot say at all definitely as to that point, but probably it was so, and it is now sought to hold the Defendants liable under that agreement.

As stressed by Dr. Smoira for the Defendants, the important clauses in that agreement are clauses 7 and 8. In clause 7 the Plaintiff states that he is under an obligation to enter into a building agreement with the Defendant firm, and that such agreement was to be con-

cluded not later than the 30th September, 1938, and it provides that the period may be extended by mutual consent. Then it states in clause 8 (one can reverse the words a little) and by leaving out the legal provisions it reads that, if he shall not be in a position to submit not later than the 30th September, 1938, the said building agreement, then the German firm is free from their obligation to supply the materials, and in this latter case the Plaintiff shall at once be repaid such amounts as had been paid by him, with the deduction of 3%.

The agreement was not supplied to them, was not entered into, and, as is common ground, has never been entered into, and yet after that date the German firm does in fact send supplies to the Palestine Building Syndicate, and it is claimed by the Plaintiff that those building supplies belong to him and that the Defendant firm is liable to him for the cost of those building supplies, but there is the provision in clause 8, if the agreement is not entered into then the Plaintiff shall receive back his money deposited with this German firm.

The District Court heard expert evidence and, as I ruled earlier, foreign law is a question of fact for the Court to decide after hearing expert evidence, and they came to various conclusions on the case after hearing such witnesses and examining documents, and we cannot say by any means that the Court below has gone wrong in these respects. It may be that goods were not specific at the time of the entering into the agreement or at any other time. The goods were certainly delivered to the Defendant and not to the Plaintiff, and the materials were kept by the defendant company for their own purposes, more particularly of course for the erection of this particular class of house. I understand from Dr. Smoira that many houses of this type were being erected at the time by the Defendant, and naturally they would welcome the receipt of these goods at this time.

The remedy it seems to us is clear, and that is as provided in the agreement, the Plaintiff should sue the German firm for the refund of his money. There is in our opinion no question about the option being an option in clause 8, or that clause 8 has been waived. I cannot see where waiving comes into it, it is all specific as between the Plaintiff and this German firm.

For these reasons we must dismiss the appeal, with the usual consequences as regards the costs to include the LP. 10 advocate's attendance fee.

Delivered this 16th day of February, 1942.

Chief Justice.

HIGH COURT No. 100/41.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPLICATION OF :—

Elia Shubeita. PETITIONER.

v.

1. Chief Execution Officer, Jaffa,
2. Alice Shubeita. RESPONDENTS.

Jurisdiction of Religious Court — Judgment by Melkite Court for alimony — Petitioner adopting Melkite religion before his marriage and reverting afterwards to Greek Orthodox Community, Religious Community (Change) Ord., Sec. 4(2) — Respondent (Plaintiff before Religious Court) belonging to Latin Community before her marriage and never registering the change, Religious Community (Change) Ord., Sec. 2 — No jurisdiction of Melkite Court as Respondent not a member of Melkite Community, Palestine O. in C., Art. 54 — Consent immaterial.

In allowing an application for an Order to issue to the first Respondent directing him to show cause why his order dated the 7th day of November, 1941, in Jaffa Execution File No. 205/41, should not be set aside and a stay of proceedings in the file be ordered :—

HELD : 1. As the Petitioner had properly registered the change of his religious community upon his marriage he would be subject to the jurisdiction of the *Melkite* Court notwithstanding his subsequent reversion to the Greek Orthodox Community.

2. The *Melkite* Court had no jurisdiction in the matter as the second Respondent (Plaintiff before the *Melkite* Court) had never registered her change from the Latin to the *Melkite* Community ; nor could her consent clothe the *Melkite* Court with jurisdiction since jurisdiction could only be given over persons who are members of the community.

3. The other matters raised by the Petitioner were eminently matters for the Ecclesiastical Court and the High Court was not a Court of Appeal from the Ecclesiastical Court.

ANNOTATIONS :

1. On change of religious community see S. T. 1/41 (1941, S. C. J. 214) and note 3.

2. On the second point *vide* C. A. 246/40 (1941, S. C. J. 17) and note.

3. *Cf.*, on the third point, H. C. 102/41 (1941, S. C. J. 595).

FOR PETITIONER : Goitein.

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

ORDER.

Edwards, J. : This is the return to an order directed to the Chief Execution Officer, Jaffa, calling upon him to show cause why an order made by him on the 7th November, 1941, in Execution file No. 205/41 directing execution of a judgment of the Greek Catholic *Melkite* Court of Appeal dated 15th March, 1941, should not be set aside. The Religious Court of Appeal ordered the present Petitioner to pay to the second Respondent the sum of LP. 5.— monthly, as ny. The learned Chief Execution Officer (Judge Shaw) gave easons for his order. It seems that the present Petitioner his marriage to the second Respondent in 1933, a member Orthodox Community, and, when he intended to get second Respondent, he changed his religion and was in the register of the Greek Catholic *Melkite* Com- the marriage he has reverted to the Greek Orthodox ut, of course, in view of the provisions of Section 4(2) ous Community (Change) Ordinance, Cap. 127, that , for the purposes of these proceedings, avail him. This d exhaustive arguments by Abcarius Bey, advocate for the Respondent, and by Mr. Goitein, advocate for the Petitioner. ere it not for one fact (to which we shall presently allude), we might have held that the grounds given by the learned Chief Execution Officer were in every way sound and we would have found that his order could not be attacked. At the hearing before us, however, Mr. Goitein pointed out that the second Respondent, before her marriage, was a member of the Latin Community ; and, in support of that statement, he attracted our attention to the affidavit sworn by Bishop Athinasios Mughabghab, *Locum Tenens* of the Greek Catholic Patriarch in Palestine, and President of the Court of Appeal of the Greek Catholic Community in Palestine and Syria, in the following terms, the relevant parts of which are :—

> "I know Madame Alice Shbeita. Before her marriage to Mr. Elias Shbeita she was of the Latin Community and when she intended to get married to Mr. Elia Shbeita, the latter changed his religious community (Greek Orthodox) and was registered in the Register of the Greek Catholic Community. After that I permitted our Priest in Jaffa to conclude the marriage ceremony of Mr. Elia Shbeita to Madame Alice Shbeita. That was in the year 1933

> From that date till now both Madame Shbeita and her husband Mr. Elia Shbeita are of the members of the Greek Catholic Community."

We were also referred to the affidavit of Father Boneventura Akiki, Head of the Latin Community in Jaffa, which is in the following terms :—

> "I am the head of the Latin Community in Jaffa. I know Madame Alice Shbeita. She was married to Mr. Elia Shbeita in the year 1933 in the Greek Catholic Church in Jaffa. Before her marriage to the said Mr. Elia she was of our community and upon her marriage with Mr. Elia Shbeita in the Greek Catholic Church, she became of the said community and I do not regard her to be one of our community."

It is quite clear, therefore, that the second Respondent remained a member of the Latin Catholic Community until her marriage to the present Petitioner, and if she ever became a member of the Greek *Melkite* Community it was only coincidentally with her marriage. Now, Mr. Goitein has argued that the Greek *Melkite* Ecclesiastical Tribunal can have jurisdiction only if the second Respondent and the Petitioner are members of that Community and he points to the word "their" in line 2 of Article 54(1) of the Palestine Order-in-Council, 1922. There can, of course, be no question that the present Petitioner would be subject to the jurisdiction of the Greek *Melkite* Community, as he properly changed his religion and gave the requisite notice required by Section 2 of the Religious Community (Change) Ordinance, and (notwithstanding his subsequent reversion to the Greek Orthodox Community) he would still be subject to the jurisdiction of the Greek Catholic Community Church Court, by reason of the provisions of Section 4(2). It seems, however, that the second Respondent never registered her change of religious community as required by Section 2 of Cap. 127. The question, then, is "Can the Greek Catholic *Melkite* Church Court have jurisdiction in view of her non-compliance with Section 2 ?" Mr. Goitein argues that it cannot and he says that the consent of the second Respondent to that jurisdiction cannot clothe the Court of the Greek *Melkite* Church with jurisdiction. We think that this contention of Mr. Goitein is correct, and that this is so is borne out by the appearance of the word "such" in Article 54(2) of the Order-in-Council ; in other words, jurisdiction can only be given over persons who are members of the community. Now, as the second Respondent never took the proper legal steps to change her religion, we fail to see how the Court of the Greek Catholic Church could have jurisdiction in the matter. It is not clear that this matter was sufficiently brought to the notice of the learned Chief Exe-

cution Officer, although Mr. Goitein assures us that he, who himself argued the matter before the Chief Execution Officer, *did* mention the fact to the Chief Execution Officer. Mr. Goitein says that what was behind Judge Shaw's reasoning was the alleged consent. Although, because of the view we take of the matter, this question is not now very relevant, we think that it is at least doubtful whether the present Petitioner even when he was before the Ecclesiastical Court of First Instance, ever gave his consent. This would seem to be implicit from paragraph 5 of the type-script of the summary of the objections of the present Petitioner when he was before the Ecclesiastical Court of Appeal. Now, were it not for the question of the second Respondent never having properly ceased to be a member of the Latin Catholic Community, we might have held that there is little substance in any of Mr. Goitein's other objections to the order of the Chief Execution Officer. At the hearing before us Mr. Goitein did suggest that the order compelling his client to pay LP. 5.— a month was contrary to natural justice because there had been no specific request by the second Respondent for anything other than an order that the Petitioner be made to return to her and be ordered to give her a reasonable allowance while staying with her. All such matters, however, were eminently matters for the Ecclesiastical Court and this Court is not a Court of Appeal from the Ecclesiastical Court.

In the result, we hold that the Ecclesiastical Court had no jurisdiction and that the consent of the second Respondent could not confer jurisdiction, inasmuch as she was never properly a member of the Greek *Melkite* Community. We accordingly make absolute the Rule *Nisi*. The second Respondent will pay to the Petitioner a sum of LP. 5 as fixed costs, that is, inclusive of advocate's costs.

Given this 27th day of February, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 6/42.

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

BEFORE : Gordon Smith, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Asa'ad Ibn Haj Said el Khalil. APPELLANT.

v.

The Attorney General. RESPONDENT.

Insanity — Law governing defence of insanity, C. C. O., Sec. 14, Rex v. McNaughton — Difference between medical and legal insanity, Rex v. True — Uncontrollable impulse — Requisite evidence to establish insanity, Rex v. Sodeman — Expert evidence and ordinary witnesses, Rex v. Lloyd — Appellant suffering from epileptic fits — Offence committed during post-epileptic confusion — Appreciation of medical evidence — Evidence as to Appellant's abnormal behaviour — Preliminary enquiry postponed on account of Appellant's insanity — Absence of motive — Verdict of guilty but insane.

In allowing an appeal from the judgment of the Criminal Assize Court, sitting at Haifa, dated the 9th of January, 1942, in Criminal Assize Case No. 75/41, whereby the Appellant was convicted of murder, contrary to Section 216, and punishable under Section 215 of the Criminal Code Ordinance, 1936, and sentenced to death, and in finding the Appellant guilty but insane :—

HELD : 1. (Following Rex *v.* McNaughton) : The law as laid down in Section 14 of the Criminal Code Ordinance was a concise re-statement of the law of insanity as laid down in England in McNaughton's case.

2. (Following Rex *v.* True) : There was a big distinction between what amounts to medical insanity and legal insanity.

3. (Following Rex *v.* Sodeman) : It was upon an accused person to prove insanity but the burden was not higher than that which rested upon a plaintiff in civil proceedings.

4. (Following Rex *v.* Lloyd) : The evidence of ordinary witnesses was often more useful than that of experts in insanity cases.

5. There was definite evidence of the Appellant's abnormal behaviour and of his being an epileptic subject.

6. Medical experts were entitled and qualified to draw inferences from the Appellant's past history and the Court below was wrong in rejecting the medical evidence to the effect that the Appellant had committed the crime in a state of post epileptic confusion and when he could not differentiate between right and wrong.

7. Although it was not necessary to prove motive for a crime, the entire absence of motive was a matter for comment and consideration in a case of this nature.

8. From an appreciation of the evidence as to the Appellant's state of mind immediately prior and subsequent to the crime, and from the medical testimony it was clear that the proper verdict was guilty but insane.

FOLLOWED : Rex *v.* McNaughton, 1843, 10 Cl. & F. 200 ; Rex *v.* True, 1922, 16 CR. A. R. 164 ; Rex *v.* Sodeman, 1936, 2 All E. R., 1138 ; Rex *v.* Lloyd, 1927, 20 CR. A. R. 139.

ANNOTATIONS :

1. *Cf.* CR. A. 85/41 (1941, S. C. J. 247) and note.

2. On the question of motive *vide* CR. A. 9/42 (*ante*, p. 43) and note 3.

FOR APPELLANT : Cattan and Nakkara.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

In this case the Accused was convicted of murder, the defence being that of insanity, and on the appeal before us we had the benefit of a very lucid exposition of the facts and analysis of the judgment by Mr. Cattan, for the Appellant.

At the conclusion of the case, the Court unanimously allowed the appeal, substituting a verdict of guilty but insane, and the Court stated that it would give its reasons later, as the defence of insanity in murder cases raises matters of importance.

Although there was no real dispute as to the law in this respect, it is desirable to re-state what the law is on the subject. Section 14 of the Criminal Code Ordinance (73/1936) reads as follows :—

> "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

In effect, this statement of the law is a concise re-statement of the law of insanity as laid down in England and is what is known as the law in McNaughton's case, which has been considered over and over again in many leading cases during the last 100 years. It is only necessary to quote one. In R. *v.* True, XVI C. A. R., page 164, the Lord Chief Justice said :—

> "Now the rule that is founded upon the answers given by the learned judges in McNaughton's Case is as follows :—
> The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

The learned Lord Chief Justice went on to say :—

> "That is a sufficient and salutary rule. In order that the accused person may come within it it must first be shown that at the time of the committing of the act he was labouring under a defect of reason, from disease of the mind. Then, there is a choice of alter-

> natives. The word is not "and", but "or". It may be shown that, in consequence of defect of reason due to that disease, the accused did not know the nature and quality of the act he was doing, or did not know that he was doing what was wrong.

In True's case, and in which he was convicted of murder, at least two celebrated alienists stated in the witness box that they were prepared, then and there, to certify that the accused was insane. This sufficiently illustrates the big distinction there is between what amounts to medical insanity and legal insanity.

The defence of "uncontrollable impulse" in insanity cases is one not known to English law, and the only test is that, as stated and laid down in McNaughton's case, which has never been extended or relaxed by authoritative case law or by statute.

It was not and could not be disputed that the burden proving legal insanity was upon the Accused, but it was submitted that the evidence for the Accused had discharged this obligation. In this connection Counsel for the Accused cited the well known case of R. *v.* Sodeman, a Privy Council case and also an insanity case, reported in 1936 in 2 All England Reports, page 1138, in which it is stated in the judgment, at page 1140 — "but it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings." It is, therefore, a question of probability and if, on the evidence before it, the Court (or a Jury) comes to the conclusion that it is probable that at the time the accused committed the act, he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong, then that is sufficient to establish his defence of insanity.

Having stated what, in our opinion, is the law on the subject, it is necessary to consider the evidence in the case and the judgment of the Court below. The difficulty of obtaining affirmative medical testimony in this country was emphasized by Counsel, but, in this connection I would quote Avory, J. in R. *v.* Lloyd, XX Criminal Appeal Reports, at page 140, where he remarked, "The evidence of ordinary witnesses is often more useful than that of experts in these cases".

The bare facts of the killing were that the Accused shot his infant daughter aged about 17 months, some time after midnight about one kilometer from Arara, and he had put her body under a cairn of stones. He had been reunited with his wife the previous day, and

apparently both were happy and pleased at the reunion. He had parted from her about 9 *p. m.* when she had gone to sleep in her father-in-law's house near by, with the child, who slept with her. Apparently the Accused entered during the night and abstracted the child without waking his wife. There was no motive whatsoever for the crime, nor did the Accused deny that he had killed her but in his evidence stated that it was an accident. This evidence by the Accused was rejected by the Court, and it remained to consider the defence of insanity.

The Accused was a school teacher but there is definite evidence that he had, in the past, had a number of epileptic fits and was subject to them. There was definite evidence by the 7th Prosecution Witness, with whom he had left a suitcase containing his revolver and other things on the night in question, and of his coming at midnight for his case, of his acting in an extraordinary manner. There was definite evidence of extraordinary behaviour by the Accused the next morning and in fact, owing to his insanity the preliminary enquiry had to be postponed, and it was only months later that he was then certified to be sane and the enquiry proceeded.

There was also medical evidence for the defence by Dr. Kent Blumenthal, a specialist in nervous and mental diseases who had examined the Accused and who had heard the evidence given by the prosecution witnesses. Dr. Blumenthal stated that "he committed the crime in a state of post epileptic confusion and he would not be able to differentiate between right and wrong". In cross-examination he confirmed this view and gave the reasons for his conclusions as to the Accused's mental condition on the night of the crime. Dr. Michael Shedid Maloof, the Medical Officer in charge of the Bethlehem Mental Hospital, and who had examined Accused in December, 1940, also gave evidence and confirmed the views expressed by Dr. Blumenthal. Both doctors gave a considerable amount of evidence as to the conditions and characteristics of an epileptic subject and both were of the opinion that from the evidence of the witnesses and their own observations, the Accused had not only been subject to epileptic fits for some considerable time past but that he committed the crime while he was in a state of post epilepsy following such a fit, and that in such state he could not distinguish between right and wrong.

There can be no question, therefore, that if this medical testimony had been accepted by the Court below the verdict must clearly have been one of guilty but insane. Such evidence was not so accepted apparently for the reasons that the two doctors never actually saw the Accused in a fit, and that at the times of their examinations the

Accused could distinguish between right and wrong, and also because later in the afternoon following the shooting of the child, the Accused himself led the Police party to the spot where he had put the body of the child. For these reasons the Court considered that although it might well be that the Accused was an epileptic subject, it was quite unable to hold that the defence had proved affirmatively that the Accused was legally excused from the consequences of his act and that consequently the defence of insanity failed.

The main grounds of appeal submitted before us were (a) that the Court below failed to direct its mind to all the items of evidence as to insanity and in particular to that evidence of facts which immediately preceded and followed the shooting ; (b) that the Court below erred as to the burden of proof and placed upon the defence a more onerous standard of proof than that required by law ; and (c) that the Court below wrongly rejected that part of the evidence of insanity to which it did apply itself or, in other words, misdirected itself in this respect ; and (d) generally, that the evidence of insanity was sufficient to bring the Accused within the accepted legal principles of excusability.

Mr. Cattan in submitting the case to us grouped the evidence as to insanity, conveniently under six heads, as follows :—

I. Past history and evidence of fits of epilepsy.
II. Acts of Accused shortly before the commission of the offence.
III. Acts of Accused shortly after, the commission of the offence.
IV. Medical evidence by the two doctors.
V. Accused's subsequent certification of insanity and postponement of the preliminary enquiry.
VI. Entire absence of motive.

In its judgment, the Court below sets out a summary of the evidence and quotes extracts from that of some of the witnesses. It deals with items of evidence under Group I, and then jumps to the medical evidence in relation thereto and goes on to state, "There is no evidence that on or about the night of the crime the Accused was suffering from any epileptic seizure or from the effects of such a seizure". This is definitely incorrect. No. 1 Prosecution Witness gave evidence in detail of his questioning the Accused on the morning of the crime and states that although he looked normal he talked madly or foolishly and that he was incoherent. No. 3 Prosecution Witness found Accused in his father's house at 7.45 *a. m.* and asked after the child and Accused did not answer. He stated that when Accused saw the body, he was "like a fool with a vacant mind". No. 4 Prosecution Witness said that Accused was not normal the morning following the crime and gave

evidence of his incoherent answers. Similarly the 5th Prosecution Witness gave evidence of his condition early that same morning and in detail. The 7th Prosecution Witness, the woman in whose room the Accused's suitcase had been deposited, gives definite evidence as to his condition at midnight when he took this bag away, and how she was frightened at his strange behaviour. All this evidence was extremely relevant to the condition of the Accused at the time he killed the child, but nowhere does it appear to have been considered in the judgment in relation to the question of insanity, although mentioned in the earlier review of the circumstances and facts of the crime. Neither is the fact mentioned in the judgment that the preliminary enquiry had to be postponed owing to the Accused's insanity. It is true that it is not necessary to prove motive for a crime, but the entire absence of motive is a matter for comment and consideration in a case of this nature.

Apparently the Court below rejected the medical evidence because the doctors drew inferences from the past history of the Accused, but surely this is one of the things they must do and are qualified to do. Moreover, it was not correct, as stated in the judgment, that Dr. Maloof "merely concluded that the Accused showed signs of *dementia praecox* because the Accused told him that he was in the habit of seeing visions and hearing voices of people talking". It was on a whole consideration of the case and of observations made in December, 1940, and of the evidence given at the time itself that Dr. Maloof based his conclusions.

There is one other point in the judgment to which I must also refer, and that is that the Court apparently was of the opinion that to succeed in a defence of insanity, such state of mind must be proved affirmatively by the evidence. This is not so, as already stated in referring to the Sodeman case.

Had the Court below kept this in view and had it also directed its mind to those items of the evidence, more relevant than any others, as to the state of the mind of the Accused immediately prior to and subsequent to the crime, and had it appreciated the medical testimony in its relation to this and the other evidence, we are irresistably driven to the conclusion that upon a full and proper consideration of these points, there could have been no question but that the proper verdict was guilty but insane.

It was for these reasons that we allowed the appeal.

Delivered this 23rd day of February, 1942.

Chief Justice.

CIVIL APPEAL No. 252/41.

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

BEFORE : Gordon Smith, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

David Bronstein. APPELLANT.

v.

1. Chief Execution Officer, Tel-Aviv,
2. The firm Essinger & Kahn,
3. Shimon Shapira,
4. Jamal Imam. RESPONDENTS.

Res judicata — Action for ownership of motor car — Previous action between different parties for ownership of same car — Whether person properly joined as defendant — Res judicata in case of default judgments, New Brunswick Railway Co. v. British and French Trust Corporation — Privicy of parties — Failure to serve amended statement of claim in case of joinder of additional defendant — No res judicata since first judgment void for irregularities and incapable of performance — Parties not the same.

Appeal from the judgment of the District Court of Tel-Aviv, sitting as a Court of Appeal, dated the 14th of November, 1941, in Civil Appeal No. 171/41, allowed.

The following is the text of the appellate judgment of the District Court (C. A. 171/41) :—

This is an appeal by the Plaintiff from the judgment of His Worship Mr. Rigby dated 25th August, 1941, in Civil Case No. 1276/41.

The Plaintiff's claim for the delivery to himself of a motor car was dismissed on the ground of *"res judicata"*.

The ground of the appeal is that the learned Chief Magistrate was wrong in holding that there was an estoppel by record binding on the Plaintiff.

It is alleged that the parties in the two cases were neither the same parties, nor their privies. This depends partly on whether or not Imal Imam who was at first a third party in the former case afterwards became a defendant. The learned Chief Magistrate reads the record as meaning that Imam was joined as a defendant. I think that this is the obvious meaning of the record, and, in the absence of any affidavit to the contrary, this view must be accepted.

The present Plaintiff bought the car from Imam and is, therefore, his privy and is bound by the former judgment.

The former judgment clearly dealt with the ownership of the car since the Plaintiff in that case alleged ownership and prayed for the return of the car on that ground.

In the grounds of appeal it is submitted that no one is in law a privy unless he had knowledge of the pending action or judgment. I know of no authority for this proposition and it is obviously incorrect. Mr. Goitein for the Appellant, submitted that a judgment by default can never operate as an estoppel by record. This again is wrong, in the general form in which it is put. Mr. Goitein referred to New Brunswick Railway Co. *v.* British and French Trust Corporation (1939 A. C. 1). Lord Wright, on whose judgment Mr. Goitein relied, there said quite clearly: "A judgment by default if not set aside, ..., is binding on the parties ..... and constitutes *res judicata* in respect of the matter directly decided" — (at p. 35). The limitation with regard to default judgments which is laid down in that case is described by Lord Maugham, L. C., in the following words: "In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous action". Propositions, however, which can only be arrived at by inference from the judgment are not binding. In the case then fore the Court it was held that a judgment by default as to the interpretation one document did constitute an estoppel as to the interpretation of 922 other cuments containing identical wording.

In the previous action the second Defendants before the learned Chief Matrate had alleged their ownership of the car and claimed its return as against third and fourth Defendants. The present Plaintiff now stands in the shoes the fourth Defendant and cannot question the ownership of the second fendants.

I see no reason at all to interfere with the judgment of the learned Chief agistrate, which is very clear and, in my view, sound.

The appeal is, accordingly, dismissed, the second Respondent to have his bursements and an advocate's fee of LP. 5 (to include all advocate's profit sts). Respondents 3 and 4 were not served and did not appear.

HELD: 1. The irregularities in the earlier proceedings were such as to render the judgment null and void, in particular as it had been given in default of the fourth Respondent who was never properly made a defendant nor served with the statement of claim.

2. Moreover, the first judgment was incapable of performance by the then Defendants as neither of them had possession of the car which was in *custodia legis* by virtue of a provisional attachment which had been confirmed.

3. The parties to the present appeal were not the same as the parties in the previous judgment and there was no evidence that the present Appellant was a privy of the fourth Respondent.

4. It followed from the above that there could be no estoppel or *res judicata*.

ANNOTATIONS: On *res judicata* see CR. A. 1/42 (*ante*, p. 8) and the case cited in note 3 thereto. *Cf.* also H. C. 23/39 (1939, S. C. J. 233, at *pp.* 235—6).

FOR APPELLANT : Goitein and Hake.

FOR RESPONDENTS : No. 1 — Absent — served.
No. 2 — Benyamini & Vorchheimer.
No. 3 — In person.
No. 4 — Nashashibi.

JUDGMENT.

This was an appeal from the judgment of the District Court of Tel-Aviv, dated the 14th November, 1941, sitting as a Court of Appeal, and which dismissed the appeal of the present Appellant against the decision of the Chief Magistrate, dated the 25th August, 1941.

The facts refer to a certain motor car, No. 3456, and dealing therewith, and as is usual in such cases, the facts are complicated, neither are the judgments helpful in elucidating such facts. A preliminary objection seems to have been taken at the outset, and our old friend "*res judicata*" successfully pleaded, but it seems to have been admitted throughout that the Appellant had in fact purchased the car in question from the 4th Respondent, on the 31st December, 1940.

Closely bound up with this suit is another suit, namely Civil Case No. 7190/40, and it is necessary to refer to the facts of that case in some detail, as and how they appear to us from a copy of the record and the explanations afforded by the judgment now being appealed against, together with arguments of counsel before us.

In that case (7190/40) apparently the 2nd Respondents sued the 3rd Respondent for return of the car No. 3456 and also removal of an attachment, and on the first hearing before the Magistrate applied for an adjournment to summon a 3rd party in connection with the attachment. At the next hearing, on the 13th November, 1940, the 3rd party (*i. e.* the 4th Respondent) apparently having been summoned and all parties before the Court, considerable argument appears to have taken place as to the procedure, and the 3rd Respondent wanted an amended statement of claim delivered to him. The 4th Respondent seems to have been joined as a Defendant, but was otherwise ignored, and the Magistrate made an order allowing the Defendants (note plural) to file their defence within ten days, and the matter was adjourned to the 11th December, 1940. Apparently the statement of claim was never amended or re-served, nor was it served on the 4th Respondent. At the adjourned hearing on the 11th December, the Defendants did not appear, certain evidence was given by the 2nd Respondents from which it appears that they had been financing the

3rd Respondent in connection with the purchase of cars, and some documents, probably in the nature of hire-purchase agreements were exhibited. Anyhow the Magistrate gave judgment in the following terms :—

> "Decided to adjudge the Defendants (*i. e.* the 3rd and 4th Respondents) to return to the Plaintiff the car Oldsmobile, Model 1937, Registered No. 3456, and the Defendant Shapira to pay the Defendants' (*sic*) costs and LP. 3 advocate's fees, and to confirm the provisional attachment."

Now, Counsel for the Appellant in the appeal before us, stated that Shapira, the 3rd Respondent, had on the 23rd July, 1940, already sold the car to a purchaser who is not a party to any of these proceedings, that, on the 4th September, 1940, this 4th Respondent (who was also the 3rd party or Co-Defendant in these earlier proceedings) had, on the 31st December, 1940, sold the car to the present Appellant, such car having been previously registered in his (the 4th Respondent's) name.

Assuming these statements to be correct it becomes a little difficult to understand how the Magistrate could make the order he did, or how the Defendants could carry out the order, as one of them at least had neither title to nor possession of the car, and I am unable to follow how the other Defendant could do so either, as the Magistrate purported to confirm the provisional attachment.

However, the present Appellant filed his action 2476/41 in which he claimed, as set out at the commencement of the Magistrate's judgment therein, dated the 25th August, 1941. The Magistrate's judgment deals with the earlier proceedings at some length and then concludes :—

> "In my view both he (*i. e.* the 4th Respondent) and the present Plaintiff (*i. e.* the Appellant in this appeal) who derives his title to the car from him, are now estopped from disputing the then Plaintiffs' — the present Defendants' (*i. e.* the 2nd Respondents') title to the car. The plea of *res judicata* must, therefore, succeed and the Plaintiff's action must fail accordingly."

On appeal from this decision, the District Court upheld the Magistrate, but it appears to me that it did so on wrong inferences and on a misconception as to the nature and facts of the other proceedings and the effect of the decision therein.

In my opinion, the irregularities in the earlier proceedings were such as to render the judgment null and void, particularly in view of the fact that judgment was, in effect, given in default of appearance — a default that was justified, anyhow by the 4th Respondent who was

apparently never properly made a Defendant — nor was he, apparently, served with the statement of claim either un-amended or amended. Moreover, the judgment is ineffective, inasmuch as it was impossible of performance by the Defendants as neither of them had possession of the car which was apparently in *"custodia legis"*, and such *custodia legis* was confirmed.

It is obvious, therefore, that there can be no question of estoppel or *res judicata,* more particularly in view of the fact that the parties to the present appeal (Civil case 2476/41) are quite distinct to the parties in the other case (Civil case 7190/40) neither is there any evidence or authority to show that the Appellant was a privy of the 4th Respondent.

The case must go back to the Magistrate to adjudicate upon the first claim of the Appellant and any consequential relief he may become entitled to.

The appeal is, therefore, allowed and the Appellant is to have his costs of the proceedings against the 2nd Respondents both before us and in the Court below including LP. 10 advocate's fee. To be taxed on the lower scale.

Delivered this 25th day of February, 1942.

Chief Justice.

MISCELLANEOUS APPLICATION No. 2/42.

IN THE SUPREME COURT OF PALESTINE.

BEFORE : Copland, A/C. J.

IN THE APPLICATION OF :—

Otto Schnider. APPLICANT.

v.

The Attorney-General. RESPONDENT.

Application for special treatment — Sentence of three years' imprisonment after plea of guilty for burglary — Previous convictions — Applicant's antecedents and mental condition — Prisoner's health a matter for Medical Officer only.

In refusing an application for special treatment : —

HELD : 1. By reason of his previous convictions the Applicant had lost the special claim to consideration on account of his antecedents which he would have had on a first conviction.

2. The Law did not provide an other punishment but imprisonment ; the Applicant should, however, be kept under special observation to determine his actual mental state.

3. The medical condition of prisoners was a matter for the Medical Officer of the prison and was not one of the grounds which should be taken into consideration on an application for special treatment.

ANNOTATIONS : See, on special treatment, CR. A. 148/41 (*ante*, p. 4) and cases cited in note 2 thereto ; *cf.* CR. *A.* 2/42 (*ante*, p. 49).

FOR APPLICANT : Rand, by delegation.

FOR RESPONDENT : Junior Government Advocate — (Wa'ary).

ORDER.

This is an application for special treatment by one Otto Schnider, who has been sentenced on a plea of guilty by the District Court to three years' imprisonment for burglary. All applications for special treatment are difficult to deal with and this one is certainly no exception to that general rule. In this particular case the man, it is not disputed, is of a good family, used to be a man in a considerable way of business — it is stated that he had a business worth LP. 10.000 — and yet since March, 1938, he has served sentences varying from four months to nine months in respect of fourteen separate instances of theft and burglary.

Now it is obvious that this is an extraordinary case and it is quite possible, of course, that imprisonment is not the correct remedy, but, unfortunately, there is no other punishment provided in these cases. Whilst for the first of these cases special treatment might well have been awarded and in fact, I believe, was so awarded, yet a time must come when as a result of repeated convictions and sentences of imprisonment those special circumstances or antecedents can no longer be held to be of any avail. By his own actions the man must lose that special claim to consideration which he would have had on a first conviction and I am afraid that in this case that line has long since been passed. It is a difficult case, to my mind it seems more a case for treatment in a mental home, but, under the law as it is at the moment, the only remedy is imprisonment and I shall direct, at any rate, that the prisoner be kept under special observation to determine his actual mental state.

One further point has been submitted, that on medical grounds the Applicant should have special treatment. In my opinion, medical grounds are not such grounds as should be taken into consideration

in awarding special treatment or not. The medical condition of prisoners in the prison is under the control of the Medical Officer of the prison and if the medical officer is satisfied that special food is necessary for the prisoner's health, then that will be furnished. I am not a medical officer and I cannot possibly say whether he should have a special diet of not, that is a matter which must rest with the Medical Officer of the prison. In these circumstances I think the application will have to be refused.

Given this 9th day of January, 1942.

Acting Chief Justice.

CIVIL APPEAL No. 240/41.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

Nasrallah S. Khoury, in his personal capacity and on behalf of the heirs of Yusif Salim Khoury. APPELLANT.

v.

1. Munir 'Alami,
2. Philipe Bitar, in his capacity as one of the heirs of the late Yusif S. Khoury. RESPONDENTS.

Action on P/N and bills — Bills accepted by syndic in Appellant's bankruptcy — Syndic not entitled to accept bills according to Ottoman Commercial Code — Estoppel — Appellant personally not a party on the bill.

In allowing an appeal from the judgment of the District Court of Haifa, dated the 7th November, 1941, in Civil Case No. 92/40 :—

HELD : 1. According to the provisions of the Ottoman Commercial Code a syndic in bankruptcy had no power to accept bills.

2. The Appellant was not a party to the bills of exchange, nor did the case fall under the rules governing acceptance by a manifestly described agent on behalf of a principal.

ANNOTATIONS : See P. C. 59/38 (1940, S. C. J. 268) for another decision regarding the interpretation of the Ottoman bankruptcy law, arising out of the same bankruptcy proceedings.

FOR APPELLANT : M. Levin.

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

JUDGMENT.

Rose, J. : This is an appeal from a judgment of the District Court of Haifa. The Plaintiff (Respondent) claimed the sum of LP. 960 together with interest and costs, his claim being based on a promissory note and six bills drawn by one, Suleiman Katran, on the Syndic of the Firm of Salim Nasrallah Khoury, to the order of the Respondent and accepted by the Syndic. Mr. Levin, for the Appellant, urged that the Syndic had no authority to accept these bills, and in this respect he agrees with the opinion of the Trial Court, which came to the same conclusion, adding, however, that as the Syndic accepted the bills with the express approval and consent of the Appellant, the Appellant was therefore estopped from denying the authority of the Syndic to accept the bills.

Mr. Eliash, for the Respondent, conceded in the course of the argument that the estoppel point was a bad one, but contended that in the result the judgment of the trial Court was correct, as the Syndic had authority to accept these bills.

On this matter we are of opinion that Mr. Levin's contention and the opinion of the Trial Court is correct. In the Ottoman Commercial Code the rights and duties of a syndic are minutely described in a number of articles, yet in no one of these articles is he given authority to accept bills. We think this is sufficient to dispose of the appeal, but we are also of opinion that the Appellant is entitled to succeed on a further point, namely, that he is not a party to the bill and this case does not fall within the line of authorities relating to acceptance on behalf of a principal by an agent manifestly so described on the document itself.

For these reasons the appeal must be allowed and the judgment of the District Court set aside, with costs here and below, the costs of this appeal to include the sum of LP. 15 advocate's attendance fee.

Delivered this 10th day of March, 1942, in presence of Mr. Levin for Appellant and Mr. Scharf for first Respondent.

British Puisne Judge.

HIGH COURT No. 18/42.

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

BEFORE : Rose, Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

1. Mordechai Cohen,
2. Eliyahu Cohen,
3. Nissim Yaacov Misrachi,
4. Eliyahu Moshe Hotsha. PETITIONERS.

v.

1. The Chief Execution Officer, Jerusalem,
2. Sasson Nahum Misrachi. RESPONDENTS.

Landlords and Tenants — Dwelling house sold in execution — Meaning of "landlord", Rent Restrictions (Dwelling Houses) Ord., Sec. 2 — Tenants remain protected — C. E. O. entitled to exercise powers of Execution Officers, Rent Restrictions Ord., Sec. 8 — English legislation.

In allowing an application for an order to issue directed to the first Respondent calling upon him to show cause why his orders dated 31st January, 1942, and 9th February, 1942, in Execution file No. 397/40, Jerusalem, authorizing eviction of the Petitioners from their premises should not be set aside :—

HELD : 1. A purchaser in execution derived his title from the mortgagor, and not from the Execution Office, and was, therefore, a "landlord" within the meaning of Section 2 of the Rent Restrictions (Dwelling Houses) Ordinance. The tenants were, therefore, protected by the Ordinance.

2. There was nothing in the point that the Chief Execution Officer could not exercise the powers entrusted to Execution Officers by Section 8 of the Rent Restrictions (Dwelling Houses) Ordinance.

ANNOTATIONS : On landlords and tenants, generally, *vide* Gorali, Rent Restriction, *pp.* 29 *seq.* ; see especially H. C. 47/37 (*ibid.*, p. 33. P. P. 24.viii.37). For later decisions see H. C. 59/41 (1941, S. C. J. 305), C. A. 138/41 (*ibid.*, p. 434), C. A. 195/41 (*ibid.*, p. 599) and Tel-Aviv Judgments, 1940, *pp.* 64 *seq.*

FOR PETITIONERS : Meridor.

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

ORDER.

This matter raises an important point as to whether the tenants of a mortgagor who are residing in a dwelling house which has been sold

as a result of the mortgagor having failed in the fulfilment of his obligations to the mortgagee, are protected by the Rent Restriction (Dwelling Houses) Ordinance, 1940.

In this case the Petitioners, who are four in number, allege that they are tenants of a certain Shimon Moshe Misrachi, and they set out the details of their tenancy. These matters are not adequately denied in the affidavit of the Second Respondent and we therefore assume that the facts are as stated in the petition. Shimon Moshe Misrachi, the landlord of the Petitioners and the mortgagor of the property in question, having failed to comply with the terms of the mortgage, the property was sold in execution to the second Respondent.

In section 2 of the Ordinance, it says that the term "landlord" includes any person deriving title from the original landlord. Counsel for the Respondent says quite frankly that he does not adopt the argument that a person buying at a sale in execution derives his title from the Execution Office. He agrees that he derives his title from the mortgagor.

If that is a correct view of the law, and we think that undoubtedly it is, that would seem to dispose of the matter. The second Respondent in this case derives title from the mortgagor and is therefore a "landlord" within the meaning of the Ordinance. The Petitioners, on their own showing and it has not been denied, were tenants of the mortgagor. They are, therefore, within the meaning of the Ordinance, tenants of the present purchaser.

A legal argument has been addressed to us on the wording of section 8 of the Ordinance to the effect that a Chief Execution Officer cannot exercise the powers entrusted to an Execution Officer. We do not think there is anything in this point.

We would add, although strictly this is immaterial, that if we are to speculate as to what was the intention of the legislature, it is relevant to bear in mind that under the English Rent Restriction Acts, mortgagees, and, it naturally follows, persons deriving title from them, are subject to the same restrictions, including going into possession, as the landlord would be.

The rule must therefore be made absolute, the costs to be borne by the second Respondent and to include the sum of LP. 10 for advocate's attendance fee.

Given this 23rd day of February, 1942.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 9/42.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPLICATION OF :—

1. Emile Bey Baghous,
2. Michel Bey Massoud,
3. Nicola Eff. Zreik,
   All executors of the will of Iskander Saikaly, deceased,
4. Jamil Ibn Nakhleh Jammal,
5. Asma Bint Nakhleh Jammal,
6. Mary Bint Nakhleh Jamal,
   Heirs to the estate of Iskander Saikaly, on behalf of themselves and on behalf of the estate of Iskander Saikaly, deceased. APPLICANTS.

v.

The Palestine Land Development Co. RESPONDENT.

Exemption from Court fees, Court Fees Rules, Rule 19(2) *as amended — Question of poverty to be decided before enquiries into merits of appeal — Necessity of proving that individual Appellants without means, Misc. Appl.* 28/40 *— Affidavit by Jaffa mukhtar as to poverty of persons residing in the Lebanon — No particulars given — Lack of counter-affidavit immaterial — Costs.*

In refusing an application for exemption from Court fees on appeal from the judgment of the District Court of Jaffa dated 8.1.42 in Civil Case No. 236/35, whereby Applicants' case against the Respondent was dismissed :—

HELD : 1. In order not to prejudice the Applicants the question of poverty would be dealt with before an enquiry into the merits of the appeal.

2. (Following Misc. Appl. 28/40) : A mere allegation in an affidavit that a whole body of individuals are without means was not sufficient evidence as to the means of each individual Appellant.

3. Affidavits of means, or lack of means, should set forth in detail a list of the property owned or the means of the individual.

4. The absence of rebutting evidence was immaterial as, firstly, it was almost impossible to rebut a bare allegation of lack of means and, secondly, the Applicants had failed to satisfy the Court of their poverty.

FOLLOWED : Misc. Appl. 28/40 (1940, S. C. J. 447).

ANNOTATIONS :

1. *Cf.* Misc. Appl. 28/40 (*supra*) and the case therein cited.

2. See, on exemption from Court fees generally, Misc. Appl. 23/39 (1939, S. C. J. 344) and note ; see also C. D. C. T. A. 93/39 (Tel-Aviv Judgments, 1939, p. 135) and M. A. D. C. T. A. 167/40 (*ibid.*, 1940, p. 94).

3. On the last point compare C. A. 26/40 (1940, S. C. J. 207).

4. On costs in the case of a *pauper* litigant *vide* H. C. 88/41 (1941, S. C. J. 449) and note 4.

FOR APPLICANTS : Cattan.

FOR RESPONDENT : Scharf.

ORDER.

This is an application for exemption from Court fees in an intended appeal to this Court from the judgment of a District Court. The application is made under Rule 19(2), Court Fees Rules, 1935 as amended by the Court Fees (Amendment) Rules (No. 2) 1938. While the rule would seem to contemplate a decision by this Court on the question of whether the Appellant has reasonable ground for appealing before this Court enquires into the poverty or otherwise of the Applicant yet we think it desirable to deal firstly with the question of poverty. The reason is obvious because, if we decide against the Appellant on the grounds of poverty, he might later be able to raise or borrow the necessary court fees and it might be unfortunate for him were there on record an adverse finding on the question of reasonable ground for appeal. We accordingly now apply our minds to the question of poverty.

Now, the only material before us is an affidavit by a *Mukhtar* of the Greek Orthodox Community of Jaffa. It is admitted that all the six Appellants who are respectively as to three of them, executors, and as to three of them, heirs, of one Iskander Saikaly, deceased, reside in the Lebanon. Now, the affidavit merely states that the Appellants are unable to pay the Court fees, and that the estate of the late Iskander Saikaly has no funds. The question, however, is as to the means of each of the individual Appellants (see Miscellaneous Application No. 28/40, P. L. R. Vol. 7, Pages 361 and 363).

Now, a mere allegation that a whole body of individuals are without means is not sufficient nor can we understand how a *Mukhtar* in Jaffa can know about the means of persons living in the Lebanon. An affidavit of means, or lack of means, to be of any value should set forth in detail a list of the property owned or the means of the individual, *e. g.* whether he has nothing but his bedding and his working

tools or whether he has any land or houses, and if so, the value of such ; and whether he has any shop or shop goods and if so of what value ; and whether he has any cattle or sheep and if so their value ; and whether he has merely weekly wages, and if so, of what amount, and so on and so on.

It is contended by Mr. Cattan, advocate for the Appellants, that, in the absence of rebutting evidence by the Respondent, the Court should accept the affidavit. There are two answers to this contention, namely, that it is almost impossible for a Respondent to rebut a bare allegation of lack of means and that the Court itself must be satisfied that the allegation of poverty is true. Now, in the present case, on the material before us, it is quite impossible for us to say that the Appellants have satisfied us as required by the rule.

The application is accordingly dismissed ; and, as Mr. Sharf, advocate for the Respondents, asks for costs, we grant to the Respondents a sum of LP. 3 as fixed inclusive costs of the application.

Given this 10th day of March, 1942.

British Puisne Judge.

HIGH COURT No. 17/42.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Sheikh Mahmoud Atalla Surouri. PETITIONER.

v.

1. Chief Execution Officer, District Court, Jerusalem,
2. El Haj Hussein Mahmoud Abou Khater. RESPONDENTS.

Execution of order for costs of appeal — Execution ordered against mutawalli personally — Copy of judgment not served, C. P. R., Rule 279 — Petitioner heard by C. E. O. before order made — Mutawalli personally liable on account of his having spent all the waqf income without reserving anything in case of the appeal being allowed.

In refusing an application for an order to issue directed to the first Respondent, calling upon him to show cause why his order dated 12.1.42 in Execution Files Nos. 53/41 and 97/41, Jerusalem, whereby the Petitioner was ordered to pay the

amount of the judgment debt from his own personal property, should not be set aside and that all execution proceedings in the said Execution Files be cancelled for non service of the judgment and orders on Petitioner, as required by Rule 212 of the Civil Procudure Rules, 1938 :—

HELD : 1. In view of the provisions of Rule 279 of the Civil Procedure Rules and in view of the fact that the Chief Execution Officer had heard the Petitioner before making the order against him, there was no substance in the objection that the Petitioner had not been served with a copy of the judgment.

2. The Chief Execution Officer was justified in ordering the Petitioner to pay the costs of the appeal out of his own pocket since the Petitioner had spent the whole of the *waqf* income without reserving anything for the costs of the action then pending.

ANNOTATIONS :

1. The judgment awarding the costs in question is C. A. 203/40 (1940, S. C. 328).

2. On the *mutawalli's* personal liability for costs *vide* C. A. 84/40 (1940, at pp. 315—61). Compare C. A. 99/41 (1941, S. C. J. 297) and note 149/41 (*ibid.*, p. 395).

ER : In person.

NDENTS : No. 1 — Absent — served.
No. 2. — Kamal.

ORDER.

ase the Petitioner, who is the *Mutawalli* of a *Wakf*, brought in the Magistrate's Court, Jerusalem, about September, 1939, ich he claimed a certain sum as *"badl hikr"*. He won the action in the Magistrate's Court and the judgment of the Magistrate was upheld on appeal to the District Court ; but both judgments were reversed by the Supreme Court on appeal. In the result, the Petitioner was called upon to pay the sum of LP. 50 odd as total costs, that is, costs of the proceedings in the several Courts. His main complaint is that he has now been called upon by the Chief Execution Officer, Jerusalem, to pay this sum out of his own pocket. He contends that the *Wakf* at the moment have not sufficient funds to meet the sums due. He also has a formal complaint namely that he was not served with a copy of the judgment, but, in view of the provisions of Rule 279 of the Civil Procedure Rules and in view of the fact that the Chief Execution Officer or the Assistant Chief Execution Officer heard him and the present second Respondent before he made any order against him, there is no substance in this formal objection. As we have said, seeing that the action was brought by the present Petitioner in September, 1939, in our view, it was incumbent upon him to realise that he might

lose and that he might be called upon to pay the costs of the other side. A prudent person would therefore have reserved from the funds of the *Wakf* sufficient money to allow for the payment of those costs from *Wakf* funds. He admitted at the Bar before us that in the year 1940, (*Hejira* year 1359), the gross income of the *Wakf* was about LP. 300. He admitted that he spent this on the beneficiaries of the *Wakf*, including himself, but says that he himself received only LP. 20. In any event, it is clear that from this sum of LP. 300 he could well have reserved a sum of LP. 50. His suggestion is that the second Respondent should wait until the *Wakf* is again in funds. To that the second Respondent replies that he sees no reason why the Petitioner should not pay now and repay himself in the future from *Wakf* funds. This seems reasonable. The Petitioner has only himself to thank if he has to pay now from his own pocket because he had no right to spend all the LP. 300 without reserving sufficient funds to enable him to pay any costs that he might have to pay and, in the event, has now been called upon to pay.

We cannot say that the Execution Officer has misdirected himself in any way or has made a wrong order and we accordingly discharge the Rule *Nisi* with costs, that is, fixed inclusive costs of LP. 5.

Given this 9th day of March, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 14/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Mahmoud Hassan Yasin, *alias* Afouneh. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Criminal Procedure — Appellant brought from Syria by force and not in accordance with extradition agreement, ex parte Scott, Moore's Digest of International Law — Application for special constitution of Assize Court made by advocate not holding power of attorney, Courts Ord., Sec. 10, proviso — Accused to sign such applications himself — Successive informations, Criminal Procedure (T. U. I.) Ord.,

Sec. 28(5) *and* (8) — *Evidence regarding other criminal acts of Accused not connected with the charge, Archold's Criminal Pleading, Evidence and Practice — Failure to object against inadmissible evidence — Whether Court influenced by such evidence — Difference between judge and jury — Admission not fatal.*

In dismissing an appeal from the judgment of the Court of Criminal Assize sitting at Jerusalem, dated the 22nd day of January, 1942, in Criminal Assize Case No. 36/40, whereby the Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. (Following *ex parte* Scott) : A person arrested or surrendered otherwise than under an extradition treaty could not avail himself of the irregularities in procedure and could not set up in answer to the indictment the unlawful manner in which he had been brought within the jurisdiction of the Court.

2. As the Appellant was represented at the trial by the advocate who had made the application for the special constitution of the Assize Court and as he did not object to such constitution at the trial the application would be considered as having been made on behalf of the Appellant and with his consent and was, therefore, in order.

It would, however, be convenient to require the signature or thumbprint of the Accused himself, instead of or in addition to that of his advocate in the case of any such written application.

3. The first information against the Appellant and his co-accused remained upon the file until the beginning of the second trial and the second information, therefore, was only a replacement within the meaning of Section 28(8) of the Criminal Procedure (T. U. I.) Ordinance.

4. The evidence of certain photographs showing the Appellant, dressed in rebel uniform, carrying a rifle and in company with other armed and uniformed rebels was clearly inadmissible as those photographs had no relevance as regards the crime with which the Appellant was charged.

5. In judging the influence of evidence wrongly admitted a distinction had to be drawn between a jury and a bench of judges and it could be seen from a consideration of the record and judgment that the Court below had not been influenced by the evidence in question. The wrongful admission of this evidence was, therefore, not fatal to the conviction.

FOLLOWED : Scott, *ex parte*, 1829, 9 B. & C., 446 ; 109, E. R. 166.

ANNOTATIONS :

1. See, on the first point, Archbold, Criminal Pleading, Evidence and Practice, 30th ed., *p.*, 166 ; Digest, Vol. 24, *p.* 888, *No.* 145. For Palestine authorities on extradition generally, *vide* note 1 to H. C. 25/40 (1940, S. C. J. 384) ; later decisions : CR. A. 2/41 (1941, S. C. J. 15) and H. C. 52/41 (*ibid.* p. 258).

2. On written applications by an advocate not holding a power of attorney, *cf.* H. C. 76/41 (1941, S. C. J. 474).

3. On the thrid point compare CR. A. 111/41 (1941, S. C. J. 378).

4. The passage from Archbold cited in connection with the fourth point is taken from the judgment delivered by Lord Herschell, L. C., in Makin *v.* Attorney General for N. S. W., 1894, A. C. 57. *Cf.*, generally, Halsbury, Vol. 13, *pp.* 567 *seq.*, *Sub-sec.* 5 ; Digest, Vol. 14, *pp.* 371 *seq.*, *Sub-sec.* 2, B(a). See also CR. A. 146/41 (*ante*, p. 22).

5. See CR. A. 18/41 (1941, S. C. J. 51) on the difference between trials by jury and by a bench of judges. *Cf.* H. C. 30/41 (*ibid.*, p. 160).

6. See, on the last point, CR. A. 107/40 (1940, S. C. J. 481) and note 2 and CR. A. 77/41 (1941, S. C. J. 317).

FOR APPELLANT : Cattan.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Jerusalem convicting the Accused of murder. Mr. Cattan, who appeared for the Appellant and to whose able argument the Court is indebted, raised various legal points. First, he says that the requirements of the Extradition Agreement between this country and Syria were not complied with. Mr. Rigby, who appeared for the Attorney General put in an affidavit signed by the appropriate officer, setting out what actually occurred, and it appears that the Accused had escaped to Syria where he was arrested on the 20th October in Damascus by a British Sergeant Holman. It is to be remembered that at this time the occupation of Syria by the Allied Forces had already taken place. By the 23rd of October he had been conveyed from Damascus to the frontier, handed over the frontier, and arrested on the Palestine side of the border by Assistant Superintendent Campbell. Both these officers, incidentally, are members of the Palestine Police Force. There is no doubt that the passage of the Accused from Damascus to the frontier and his arrest were against his will. There is no suggestion to the contrary on the part of the Crown.

Extradition papers had, in fact, been prepared by the Palestine Authorities and forwarded to Syria, but they only arrived after the events which I have just described and were returned on the 1st November by Lieutenant Colonel Prosser, attached to the British Security Mission with an endorsement to that effect.

We now have to consider the legal position. If there is an extradition agreement between two countries and a request for extradition is made, the Government to whom the request is made must satisfy themselves that the formalities of the agreement have been complied with.

It is a matter for them and not for the Government which is making the application. When once the accused person has been handed over to the requesting Government, the position would seem to be that, subject to the limitation that he cannot be tried for an offence other than that for which he was extradited, he cannot avail himself of the plea that the Government to whom the request was made should not have extradited him at all because certain irregularities of procedure had occurred. Authority for this view is provided by the old case of *Ex Parte* Scott (1829) 9, B. & C. 446.

Counsel on neither side was able to refer us to any direct authority covering a case such as the present where a person has been irregularly apprehended not as a result of extradition proceedings at all. In our opinion, the law is correctly stated in volume 4 of Moore's Digest of International Law, at page 311. The authority is an American (State) case which, of course, is not binding on this Court. Nevertheless we adopt the language used, which is as follows —

> "Where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he can not, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court. It belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights."

Accepting that view of the law we think that there is no substance in the extradition point.

The next point taken by Mr. Cattan is highly technical and, were this not a capital charge, we should have said that it was not a worthy point to take. It is contended that the Court of Trial was improperly constituted in that the learned Chief Justice sat alone. What occurred was that a few days before the trial an application was made by Mr. Nazzal, advocate for the Accused, that the case should be tried by a British Judge sitting alone. The matter is covered by the proviso to Section 10 of the Courts Ordinance, 1940 and Mr. Cattan argues that the Accused himself must make the request and not his advocate. He further says that at the time of the application Mr. Nazzal did not hold a power of attorney authorising him to act for the Accused, although he was provided with this a day or so later and before the commencement of the trial. Mr. Nazzal actually appeared for the Accused at the trial and neither he nor the Accused himself made any protest against the constitution of the Court. In these circumstances we think that we should hold that the application was made on behalf of the Accused and with his consent and is therefore in order. We

would add that it might be a convenient practice in future, in order to avoid any such question, for the Court officials to require the signature or thumbprint of the Accused, instead of or in addition to that of his advocate on any such written application.

Thirdly, Mr. Cattan contends that the Information is defective. In the first instance, the Accused was charged with another person on an Information filed on the 5th October, 1940. Before the case came on for hearing, the present Accused escaped and the trial was proceeded with against his co-accused alone. The name of the present Accused in the original Information was deleted in ink, although such deletion bore no initial or comment. Mr. Cattan argues that the first Information must be regarded as dead and the second Information, filed on the 31st December, 1941, was therefore out of time and bad in view of Section 28(5) of the Criminal Procedure (Trial Upon Information) Ordinance.

The first Information, however, remained upon the file until the beginning of the second trial and Mr. Nazzal actually made an application at the trial for the Information to be withdrawn. We think, therefore, that the first Information was still alive and that the second Information was, as Mr. Rigby contends, a replacement within the meaning of Section 28(8) of the Ordinance.

This point therefore also fails.

That disposes of the preliminary technical points, but we now come to a much more serious matter, concerning certain inadmissible evidence. Sergeant Moody of the C. I. D. was called by the prosecution as a witness and produced certain photographs which included the Accused, dressed in rebel uniform, carrying a rifle and in company with other armed and uniformed rebels. There is no suggestion that these photographs had any relevance as regards this particular crime. Mr. Cattan says, and we agree with him, that this is almost a "copy-book" example of inadmissible evidence. Mr. Rigby frankly admits that the evidence is inadmissible but urges that the matter did not influence the Court. Oddly enough it does not appear from the record — and Mr. Cattan agrees that the record is correct on this point — that counsel for the defence objected to the admission of the evidence.

One of the most ungrateful tasks that any judge has to perform is to criticize advocates, especially in a murder-case where the strain and responsibility upon counsel on either side is very great, but it seems to us that in this matter the Court of Trial did not receive from either counsel that assistance which it is entitled to expect and without which the due administration of justice is most difficult. Not only

should this evidence, in our opinion, never have been adduced by the Crown, but, having been adduced it should certainly have been objected to by counsel for the defence. Had objection been taken, we have no doubt that the evidence would have been rejected. The principle is set out in a well-known passage in Archbold's Criminal Pleading, 28th Edition, at page 366, which reads as follows :—

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of Criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried."

That, of course, is an elementary rule of evidence which has been acted upon by British Courts for many years. Mr. Cattan contends that no reasonable person could fail to be influenced against the Accused by evidence of this nature, and relies on an equally famous passage in the same volume of Archbold at page 340 which reads :—

> "Where it is established that evidence has been wrongfully admitted the Court will quash the conviction unless it holds that the evidence so admitted cannot reasonably be said to have affected the minds of the jury in arriving at their verdict, and that they would or must inevitably have arrived at the same verdict if the evidence had not been admitted. In considering this question the nature of the evidence so admitted and the direction with regard to it in the summing-up are the most material matters."

Had this case been tried before a jury we think that there can be no doubt that unless the summing-up had contained an express direction to the jury to disregard this evidence, the appeal would have had to be allowed, but the considerations are not the same when a case is tried by a bench of judges or by a judge alone. In considering whether the mind of a judge is influenced by a certain piece of evidence it is, we think, permissible to look at the subsequent course of the trial. It does not appear from the record that any mention of this point was made either by Mr. Hogan or by Mr. Nazzal in their final speeches, although the matter is adverted to in the cross-examination of the Accused by Mr. Hogan. Further, there is no mention of the matter in the judgment, which is careful and exhaustive. Instead, the Court directs its mind to what is clearly the principal relevant issue as to the credibility of the witnesses as to identity. Mr. Cattan argues that the fact that this prejudicial evidence was admitted may have influenced the Court in making it more ready to believe the eye-witnesses for the prosecution. That is a powerful argument, but after giving the matter the most anxious consideration we are of opinion that the Court was

not influenced by this matter, regrettable as it was, but applied its mind clearly to the proper considerations with which it dealt in considerable detail.

We are of opinion therefore, that the wrongful admission of this evidence it not fatal to the conviction.

The remainder of the case raises pure questions of fact, on which there is undoubtedly evidence on the record which, if believed, entitled the Court to come to the conclusion to which it did.

For all these reasons the appeal must be dismissed and the conviction and sentence confirmed.

Delivered this 11th day of February, 1942.

British Puisne Judge.

CIVIL APPEAL No. 230/41.

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

BEFORE : Edwards, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Raphael Levy. APPELLANT.

v.

1. Dr. Haim Gittelman,
2. Leon Byer,
3. Land Registrar, Haifa. RESPONDENTS.

Action for cancellation of a mortgage — Application for registration of Egyptian judgment and for provisional attachment — No proper prayer for registration of Egyptian judgment, Reciprocal Enforcement of Judgments (Egypt) Ord., Sec. 3, C. A. 121/30 — Application placed before President and treated as application for provisional attachment only, Ottoman C. P. C., Arts. 271, 272 and 294 — Provisional attachment levied and later on cancelled ex parte, Ottoman C. P. C., Art. 280, Foreign Judgments Rules, Rule 3 — No valid attachment on the land since no proper application for registration of Egyptian judgment nor for confirmation of provisional attachment — Land Court refusing to hear evidence as to fiction of mortgages — Plaintiff entitled to lead evidence, C. P. R., Rule 189(1) — Decision on all issues to be given, C. A. 28/41, C. P. R., Rules 20, 21, 188 and 189 — Costs.

Appeal from the judgment of the Land Court of Haifa, dated the 23rd day of October, 1941, in Land Case No. 12/39, allowed.

The following is the text of the Land Court judgment :—

The facts very briefly in the case are as follows : Plaintiff obtained *ex parte* a provisional attachment on the property of Defendant. Subsequently *ex parte* an order was made cancelling that attachment. The Defendant 1 then mortgaged the property to Defendant 2.

Plaintiff alleges that the order of the release of the attachment was bad and the mortgages fictitious.

The Plaintiff objects that the release of the attachment is bad for the following reasons :—

(a) that it was made *ex parte* although the applicant for the removal of the attachment had paid fees for service. We hold that under the Law then existing — unsatisfactory though it may have been — there was nothing to prevent the President making the order *ex parte*.

(b) that the order of 25.6.37 was made on the basis that there was no application for confirmation of attachment and registration of the foreign judgment whereas in fact both these applications had been made.

We have studied the application and whilst it is headed "Application for Registration of an Egyptian Mixed Court Judgment and for a provisional attachment against judgment debtor", the application itself only refers throughout to the provisional attachment and nothing else. It is true at the back of the application it appears fees were paid for statement of claim and confirmation of attachment but payment of fees does not in our opinion alter the nature of the actual application. The Judge considered the application one for provisional attachment only and so dealt with it and we cannot say he was wrong in so doing.

We, therefore, hold the order of 25.6.37 releasing the attachment was good and therefore at the time the mortgages were made there was no attachment on the property. We, therefore, see no good reason for hearing lengthy evidence as to whether or not the mortgages were fictitious. Plaintiff's claim must, therefore, be dismissed with costs and an inclusive advocate's instruction and attendance fee of each LP. 10 for 1st and 2nd Defendants.

HELD : 1. (Referring to C. A. 121/30) : The proper document to be filed was an application under Section 3 of the Reciprocal Enforcement of Judgments (Egypt) Ordinance which would have come before the District Court for an order to be made *ex parte* for the registration of the Egyptian judgment.

2. The President District Court had been justified in cancelling the provisional attachment since there was before the District Court neither a proper application for the registration of the Egyptian judgment, nor one for confirmation of the provisional attachment, nor had a case been filed within the prescribed period of eight days.

3. The Civil Procedure Rules entitled a plaintiff not only to state his case but also to produce his evidence.

4. (Following C. A. 28/41) : Once issues have been framed and the case has been set down for hearing the Land Court had to decide all the issues and was not entitled to decide the case on one issue only.

5. As the Court below had of its own motion refused to hear Appellant's evidence each party would pay its own costs of the appeal.

REFERRED TO : C. A. 121/30 (1, P. L. R. 589, C. of J. 918).

FOLLOWED : C. A. 28/41 (1941, S. C. J. 133).

ANNOTATIONS :

1. On foreign judgments see C. A. 210/40 (1940, S. C. J. 540) and note 1.

2. On provisional attachments under the Ottoman Code of Civil Procudure *cf.* C. D. C. T. A. 258/39 (Tel-Aviv Judgments, 1939, p. 109), C. D. C. T. A. 215/38 (*ibid.*, p. 136), C. D. C. T. A. 120/40 (*ibid.*, 1940, p. 96), C. D. C. T. A. 136/40 (*ibid.*, p. 99) and C. A. 153/41 (1941, S. C. J. 398).

3. On the fourth point see, in addition to C. A. 28/41 (*supra*), C. A. 117/40 (1941, S. C. J. 343).

FOR APPELLANT : Maman.

FOR RESPONDENTS : No. 1 — Weinshall.
No. 2— Heth.
No. 3 — Absent.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Haifa, whereby the Plaintiff's claim for the cancellation of a mortgage entered into between the first and second Respondents was dismissed. Seven issues were framed in the Land Court. We intend in this judgment to deal with issues Nos. 2, 3 and 4. It seems that on the 29th of May, 1937, the present Appellant filed in the District Court of Haifa a document headed :—

> "Application for registration of an Egyptian Mixed Court of Appeal of Alexandria Judgment in accordance with the Reciprocal Enforcement of Judgments (Egypt) Ordinance, 1929, and for a provisional attachment against judgment debtor".

But neither in the body of the document nor in the prayer was there any application for the registration of the Egyptian judgment. Now, it is clear, that the proper document to have filed in the District Court was an application under Section 3 of the Ordinance, namely, Cap. 73. That application would have come on for hearing had it been properly filed, as a case before the District Court. In the ordinary course of events an order would have been made *ex parte* for registration of the judgment as laid down by this Court in Civil Appeal No. 121 of 1930, P. L. R., Vol. 1, p. 589. This document was not brought before the District Court of Haifa, but was placed before the learned President of that Court and it seems that he regarded it as an application for provisional seizure made under Articles 271 and 294 of the Ottoman Code of Civil Procedure. Now, it is clear that Article 272 of that Code does not apply to this case because registration of the judgment had not been made nor had it been asked for in the application of

29th May, 1937. One of the complaints of the Appellant before this Court is that the President, District Court, Haifa, cancelled the attachment without giving the Appellant an opportunity to be heard. It is, however, quite clear from the order of the learned President of 25th June, 1937, that he made the order under Article 280 of the Ottoman Code of Civil Procedure, as he did not consider that a proper application under Rule 3 of the Foreign Judgments Rules 1928 had been made. In this connection, of course, the position was not actually as the learned President conceived it to be because the law applicable was Section 3 of Cap. 73. Be that as it may, there was before the District Court neither a proper application under Section 3 of Cap. 73, nor was there a proper application for confirmation of the provisional seizure nor had case been filed within the usual eight days. We consider, therefore,
Land Court in its judgment of the 23rd October, 1941, came
t conclusion when it held that on the 28th June and on the
r, 1937, there was no valid attachment upon the land in
we agree with it in thinking that it is impossible to say
r of the President of the District Court of 25th June,
ng. It follows, therefore, that the Land Court was correct
e Plaintiff bound by the order of the President of 25th
and we also think that the decision of the Land Court on
t is, whether the validity of the removal of the said attach-
be questioned in these proceedings, was also correct. The
t Appellant was therefore clearly not entitled to succeed on any one of issues 2, 3 and 4. As to issues Nos. 1, 5, 6 and 7, it seems that the Land Court did not allow the Plaintiff to lead evidence. Now, it is clear from Rule 189(1) of the Civil Procedure Rules, 1938, that the Plaintiff is entitled not only to state his case but to produce his evidence. It might well be that if the Land Court were able to answer issue 1 in a particular way it might be able to dispose of the case at once ; but, as has been held by this Court in a recent appeal, (Civil Appeal No. 28 of 1941, P. L. R. Vol. 8, pages 127 and 129), the Civil Procedure Rules give a District Court no power to decide a case on one issue only. The only time when this can be done is before the hearing, either under Rule 20 or Rule 21 and possibly under certain other provisions of the law which do not occur to us at the moment. But, it is clear that, once issues have been framed and the case set down for hearing, and the case actually comes on for hearing, the procedure envisaged by Rules 188 and 189 must be followed. We accordingly set aside the judgment of the Land Court and remit the case to it with directions to follow the procedure laid down by Rule 189 and to hear evidence adduced by all parties and to give a decision on each of issues 1, 5, 6 and 7.

We are informed by Dr. Weinshall that he would not have resisted an application by the present Appellant to hear evidence led by him in the Land Court. This being the case and as it was the Land Court of its own motion which held that it was unnecessary to hear evidence, we think that there should be no costs of this appeal, that is to say, each party will pay its own costs of this appeal.

Delivered this 17th day of February, 1942.

British Puisne Judge.

CIVIL APPEAL No. 243/41.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Zeev (Wilhelm) Faust. APPELLANT.

v.

1. Amos, son of Reizla Reiber-Breitbart, through his guardians *ad litem* Reizla Reiber-Breitbart & Dr. Shimon Lustig,
2. Mordechai Breitbart. RESPONDENTS.

Affiliation — Action by married woman for maintenance of infant son against alleged father — Action by "husband" for declaration that no marriage took place and that he is not the father — Passport describing persons as husband and wife — "Husband" appearing as father in birth certificate — Amendment of statement of claim — Admissibility of evidence proving non-access during marriage, Russell v. Russell — Impossibility of obtaining evidence from Poland — False affidavit — Estoppel.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 7th day of November, 1941, in Civil Cases Nos. 159/38 and 22/40 dismissed.

The second Respondent and Reizla (Shoshana) Reiber-Breitbart came to Palestine in 1933 on a passport describing them as husband and wife. In 1935 Reizla (Shoshana) Reiber-Breitbart gave birth to the first Respondent.

In 1938 the first Respondent, through his guardians *ad litem*, sued the Appellant for maintenance. The statement of claim and an affidavit sworn at the same time by Reizla (Shoshana) averred that the second Respondent and Reizla (Shoshana) had been married in Poland, but that the marriage had never been consummated. In 1940, after various hearings had taken place, the second Respondent filed an action asking for a declaration that he had never been married to Reizla

(Shoshana) and that the first Respondent was not his child. The two actions were then consolidated.

Leave was granted, in 1941, to amend the statement of claim in the original action and the amended statement of claim averred that Reizla (Shoshana) had not been married to the second Respondent and that the latter's name had been inserted by mistake in the birth certificate as the first Respondent's father.

On behalf of the Appellant it was submitted, *inter alia*, that Austrian Law, which was the national law of the parties at the time of the first Respondent's birth, did not allow of an action for maintenance against a third person until the marriage had been legally dissolved and, secondly, that, according to Russell *v.* Russell (1924, A. C. 687), parents could not give evidence of non-access during marriage.

The District Court found as follows :

1. There was no evidence that Reizla (Shoshana) and the second Respondent had ever been married.

2. Such marriage could not be inferred from the passport describing them as husband and wife, there being evidence that the name of Reizla (Shoshana) was inserted in the passport only in order to enable her to come to Palestine.

3. Reizla (Shoshana) could not be held to be bound by the original statement of claim, the reasons for the falsity of which had been sufficiently explained.

4. The Appellant was the father of the first Respondent and should pay a sum of LP. 1.250 *per mensem* as maintenance.

HELD : 1. There was sufficient evidence to justify the District Court's finding that the Appellant was the father of the first Respondent.

2. In view of the explanations given at the trial Reizla (Shoshana) could not be held to be bound by the original statement of claim and by the affidavit sworn to by her to the effect that she had been married to the second Respondent.

3. The fact that the statement of claim had only been amended in 1941 whereby the Appellant was deprived of an opportunity to obtain evidence from Poland was not a sufficient reason to allow the appeal.

4. Apart from the passport, which could not, of itself, establish that a marriage had taken place, there was no evidence to show that the second Respondent had been married to Reizla (Shoshana).

ANNOTATIONS :

1. On proof of marriage *vide* Halsbury, Vol. 16, *pp.* 598 *seq.*, *Sec.* 7 ; Digest, Vol. 27, *pp.* 71 *seq.*, *Sec.* 12.

2. On amendment of the statement of claim *cf.* C. A. 61/41 (1941, S. C. J. 176) and note.

FOR APPELLANT : Wiesel.

FOR RESPONDENTS : No. 1 — Iszajewitcz.
No. 2 — Scharf (by delegation from Barkai).

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv. The matter covers the paternity of an infant born in March, 1935, and as regards the paternity issue, evidence was called before the Judge which, if admissible and if believed, was, in our opinion, clearly sufficient to justify him in coming to the conclusion that the Appellant was the father of the child. There was the evidence of the wife Shoshana ; there was the evidence of the woman who shared a room with her at the relevant time — Sara Sotkin ; and there was the very significant fact that after the girl had announced her pregnancy to the Appellant he gave her a cheque for LP. 20. From those facts it is, in my opinion, idle to ask a Court of Appeal to say that there was no sufficient evidence upon which the Trial Court could, if it wished, come to the conclusion that the Appellant was the father.

But the matter is complicated by the fact that the Appellant contends that the woman was, in fact, married already to the second Respondent. The matter that has caused me difficulty is the fact that the woman herself made a sworn declaration on the 8th March, 1938, in which she states that she married the second Respondent in the year 1933 and that she came to Palestine with him as his wife. She says that there was no consummation of the marriage. She also says that after the birth of the child she registered the fact that the father of the child was what she described as her "legal husband", the second Respondent. Also in her original pleading, which was drafted on her behalf by an advocate, she sets out substantially the same allegations, namely, that she was married to this man, that the marriage was only formal and there was no consummation of it ; and it was not until 1941 that her pleadings were amended and she alleged, which is her present case, that she was never, in fact, married to the second Respondent, although an endorsement to that effect was made on his passport and she came to this country as his wife in 1933.

The question is whether subsequent evidence of the parties can dispose of that difficulty. We think that the Judge below was right in coming to the conclusion that it could. This woman Shoshana went into the witness-box and explained why she swore this false affidavit and made false statements of fact in her original statement of claim and the learned President says on page 3 :—

> "According to the evidence the reason for the wording of the original statement of claim appears to me to have arisen from the fact that Mordechai Breitbart and Reizla Reiber came to Palestine on a passport as husband and wife and Reizla Reiber feared lest the autho-

> rities should discover that they were not in fact husband and wife, and the consequences which might follow."

He then says :—

> "I am satisfied that I cannot hold Reizla Reiber bound by the original statement of claim."

That seems to me to be sufficient reasoning. It must be a matter of evidence and credibility for the Court below and the Court came to the conclusion that this woman and the second Respondent were telling substantially the truth on this issue.

Now, the Appellant says, and we have a certain sympathy with him on this point, that by this late amendment of the pleading in 1941, he was deprived of an opportunity of obtaining evidence from Poland to prove that a form of marriage had, in fact, been gone through, Poland having been invaded at the end of 1939. That is true, but it seems to me that, although the Appellant may have a slight grievance, the matter is not of such importance as to justify allowing the appeal on that point.

Leaving aside this question of the affidavit and the statement of claim which the Court below found was adequately explained, there was in fact, apart from the passport (which clearly would not be sufficient of itself to establish that a marriage had taken place), no evidence at all that this marriage ever took place in Poland.

For these reasons the appeal must be dismissed with costs on the lower scale to include in respect of each Respondent the sum of LP. 10 for advocate's attendance fee.

Delivered this 19th day of February, 1942.

British Puisne Judge.

CIVIL APPEAL No. 133/41.
CIVIL APPEAL No. 136/41.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEALS OF :—

C. A. 133/41.

Zaki Bey Ricabi, in his capacity as beneficiary and as Mutawalli of the Waqf of Qutb ed-Din el Khudeiri. APPELLANT.

v.

The Keren Kayemeth Leisrael Ltd. RESPONDENT.

C. A. 136/41.

The Keren Kayemeth Leisrael Ltd. APPELLANT.

v.

Zaki Bey Ricabi, in his capacity as beneficiary and as Mutawalli of the Waqf of Qutb ed-Din el Khudeiri. RESPONDENT.

Waqfs — Whether waqf sahih or ghair sahih — Right of mashad el maska — Whether mashad el maska possible in miri land only — Tahsisat Waqf — Annual rent to Treasury — Registrability of mashad el maska — Owners of waqf lands as administrators thereof — Additional evidence on appeal, C. P. R., Rule 344(1)(*b*) *— Test to establish whether waqf true or untrue — No evidence of dedication, C. A.* 107 & 108/41 *— Conclusions of Turkish Government enquiry, Ottoman Land Code, Art.* 78, *Regulations as to Title Deeds, Art.* 8 *— Payment of werko — Use of word "mequfe" — No dedication of the tessaruf — Hearsay evidence as to dedication — Age of waqf — Purchaser without knowledge that land is waqf, or true waqf, L. A.* 173/26, *C. A.* 84/38 *— Absence of waqfieh, C. A.* 70/39 *— Inalienability of true waqf — No jurisdiction of Settlement Officer to enquire into nature of rent.*

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated the 25th May, 1941, in Case No. 1/Khiyam-el-Walid dismissed. Cross-appeal allowed.

The facts as found by the Settlement Officer in paragraphs 4 and 5 of his decision were as follows :—

"4. The Defendant purchased his right to be the holder of the *mashad el maska* in the land in suit by a transfer registered in the Land Registry at Safad on the 14th of February, 1939, from some of the descendants of a former registered owner, one 'Ali Bey Mahmud Buzu who was registered as owner by virtue of a *Daimi* registration dated the 21st *Shawal*, 1307. After the death of 'Ali Bey some members of his family purporting to be the sole heirs of the *mashad el maska* completed a transaction of succession in 1921 and it is these persons who sold their interest to the Defendant. Other members of the family of the late 'Ali claim they were improperly excluded from the succession and as they have had no opportunity to prove their claim in these proceedings this decision is given without prejudice to any claim they may establish in further proceedings to be set for hearing at a later date.

5. The registration in favour of 'Ali Bey was made in 1307 or 27 years before the judgment of the *Sharia* Court and as the registration is referred to by the Court it is of interest to examine the events leading to this registration, particularly as this examination discloses the true interest that 'Ali Bey acquired and which the Defendant now holds.

The entry records the transfer (*feragh*) of the lands in suit from certain members of the Rikabi family for the sum of 10,000 Turkish piastres and the authority for this transfer is shewn by documents filed by the *Mutawalli* though not specifically

referred to during the trial of the claims. His document (D/1) is a copy of a power of attorney dated 1298 *A. H.*, by which the attorney was authorized to transfer to 'Ali Bey Mahmud Buzu the right of *tessaruf* in accordance with the *tabu* deeds in the *mashad el maska* of the lands in suit. The second document (D/2) is the report of the *Majlis Idara* dated 29th *Sefer*, 1304, recording the transfer of the rights and interests mentioned in the power of attorney and with instructions to issue a provisional *kushan* pending receipt of the final *kushan* from the *Daftar Khani* in accordance with Article 11 of the Law as to Title Deeds for *Waqfs*, 1293 *A. H.* The third document (D/3) is a copy of the provisional *kushan* and the fourth (D/4) is a copy of the final *kushan* and is the *kushan* of the *Daimi* registration of 21st *Shawal*, 1307, of which a true photostatic copy has been filed by the Defendant".

The Settlement Officer's "conclusions as set out at the end of paragraph 7 of his decision" which are referred to in the judgment of the Court of Appeal were as follows :—

"I find that the four connected documents of the Plaintiff and true photostatic copy of the registration of 1307 and the judgment of the *Sharia* Court of Damascus contain sufficient evidence for me to give a decision on the point whether the Defendant has a registrable interest in the land".

HELD : 1. By virtue of the provisions of Rule 344(1)(b) of the Civil Procedure Rules the Respondent would be allowed to produce additional documents.

2. The evidence showed that the predecessors in title of Respondent's vendors were the owners of the land in suit and the Respondent, therefore, had acquired a registrable interest in the land.

3. The *waqf* in question was an untrue *waqf*, particularly in view of the following reasons :

a) (Distinguishing C. A. 107 & 108/41) : There was no evidence of creation or of dedication ;

b) The Turkish Commission of Enquiry had come to the conclusion that the land was owned by the predecessors in title of Respondent's vendors ;

c) The predecessors in title of Respondent's vendors had paid *werko* ;

d) The word *"mequfe"* appeared in the Budget of the Imperial *Awqaf* Ministry ;

e) (Referring to L. A. 173/26, C. A. 84/38) : Respondent's possession was based upon purchase and no knowledge that the *waqf* was a true *waqf* could be imputed to the Respondent ;

f) The decision in C. A. 70/39 was no authority on the question of what *quantum* of proof is necessary, in the absence of a *waqfieh*, to determine whether a *waqf* is true as distinct from untrue *waqf* ;

g) The conclusions of the Ottoman Administrative Authorities were inconsistent with the *waqf* being true as a true *waqf* would have rendered the land inalienable.

4. The Settlement Officer had no jurisdiction to decide the nature of the rent.

REFERRED TO: L. A. 173/26 (1, P. L. R. 269, C. of J. 1843); C. A. 84/38 (1938, 2 S. C. J. 241).

DISTINGUISHED: C. A. 70/39 (1939, S. C. J. 383); C. A. 107 & 108/41 (1941, S. C. J. 400).

ANNOTATIONS:

1. *Mashad al maska* is used by ancient Moslem writers to denote a right to possess and cultivate land owned by the State or by the *Waqf* Administration. Although now practically superseded by the term *"tessaruf"*, the expression *"mashad al maska"* may still be found in Syrian title deeds.

2. On the first point *cf.* C. A. 278/40 (1941, S. C. J. 97) and note 1.

3. See, on the third point, the cases cited in the judgment, especially C. A. 107 & 108/41 (*supra*) and the notes thereto.

4. On the jurisdiction of the Settlement Officer *cf.* C. A. 206/40 (1941, S. C. J. 11) and note 5.

C. A. 133/41.

FOR APPELLANT: Sanders.

FOR RESPONDENT: Eliash & Ben Shemesh.

C. A. 136/41.

FOR APPELLANT: Eliash & Ben Shemesh.

FOR RESPONDENT: Sanders.

JUDGMENT.

Edwards, J.: These are an appeal and a cross appeal from a decision of the Land Settlement Officer, Safad Settlement Area (Mr. Kenyon), whereby he found that certain lands known as Khiyam al-Walid, which were purchased by the Respondents, the Keren Kayemeth Leisrael Ltd., on 14th February, 1939 were of the class of land known as *"Waqf Sahih"* and that the Respondents had a registrable and transferable right in *"mashad el maska"*. The facts are fully set out in paragraphs 4 and 5 of the careful and comprehensive decision of the L. S. O. and there is no need for us to repeat them in this judgment.

The Appellant, in his capacity as beneficiary and also as *Mutawalli* of the *Waqf* Qutb el-Din el Khudeiri, now appeals against the decision of the L. S. O. and there is also a cross-appeal by the Respondents. The main contention of the Appellant is that the *Waqf* is a true *Waqf* and that, accordingly, all the transactions whereby the Respondents acquired title were illegal and that, at most, the Respondents acquired only a rather vague right of *"mashad al maska"*, that is, a right which may be enforced by the *Sharia* Court but which is not registrable, not being a right known to the Land Law of Palestine. The Appellant's advocate

(Mr. Weston-Sanders) says that this right of "*mashad al maska*" is a vague sort of leasehold right and asks that Respondent's title deed as registered in the Land Registry be cancelled because of fraud and abuse of office and as being contrary to law. The contention of Dr. Eliash (advocate for the Respondents) is that the Land Settlement Officer was correct in holding that the Respondents had a valid registrable title but that he was wrong in holding that the *Waqf* was a true *Waqf* (*waqf sahih*) and that he should have held that the *Waqf* in question was of the *Waqf Ghair Sahih* category, *i. e.* a *Tahsisat Waqf* (see Messrs. Goadby and Doukhan's "Land Law of Palestine" pages 75 and 76). Dr. Eliash also contends that the archaic tenure of *mashad el maska,* which (he argues) is entirely unknown in Palestine, is not only fully consonant with a *Tahsisat Waqf* of *Miri* land but is made to apply by the *Hanbali* School of Moslem Law to *Miri* land only. He also contends that there was evidence before the Settlement Officer that a *Hanbali Qadi* had dealt with this tenure, this being a further indication that the land is *Tahsisat Waqf.* The argument proceeds that, in the absence of a *wakfieh* or any other written evidence to show that the land was *Waqf Sahiha,* the S. O. should have resolved the doubt to which he refers in paragraph 9 of his decision in favour of the majority class of *waqf* land in Palestine, namely, a *Tahsisat Waqf* of *Miri* land. Dr. Eliash further complains that the L. S. O. erred in holding that the so-called rent, which was payable to the Syrian Treasury was anything other than a fixed annual payment in accordance with the usual *waqf* practice and that he also erred in construing the introduction of an overbidder in the *waqf* lease as anything more than the ordinary legal fiction in *Sharia Waqf* procedure which requires the introduction of an element of withdrawal into a *waqf* deed to be refuted by the *Qadi* for the purpose of further strengthening the value of the deed. Dr. Eliash, therefore, asks this Court to vary the decision of the L. S. O. to the extent of holding that the land in question is an untrue *Waqf* and that the rent therein is a fixed annual rent, or, alternatively, that the question of the rent was not within the jurisdiction of the L. S. O. This Court sat for two whole days hearing exhaustive and learned arguments by both Mr. Weston-Sanders and Dr. Eliash in support of those main contentions which I have just set out. Nevertheless, I feel that the points falling for decision are capable of being set out very briefly. The main point is whether the L. S. O. was correct in holding that the Respondents had acquired a registrable title. If he was wrong, then the matter would at once seem to be concluded in favour of the present Appellant. I, however, consider that he was correct for the following reasons, *viz* : — all the evidence goes to show that the family of Rikabia, *i. e.*

the predecessors in title of the person from whom the Respondents purchased the land, were the owners of *Mequfa* land which they sold to the Buzu family. The Rikabis, in addition to being the owners of the land as individuals, were also administrators of charitable funds which they received from the Treasury. The mere fact that this family were administrators of those charitable funds did not alter the fact that they, as individuals, owned the land. In support of this statement I quote from Messrs. Goadby and Doukhan's book at page 76 :—

> "It (*i.e.* an untrue *waqf* or *ghair sahiha waqf*) is merely a dedication of the interests which the State has in the produce of the land and in the fees arising therefrom".

At the hearing of this appeal we allowed Dr. Eliash to produce an original copy of the Minutes (Record) of proceedings of a Turkish Commission of Enquiry into the registration of the land in question together with the conclusions of the Commission and also a copy of the official budget of the Imperial *Awqaf* Ministry for the year 1327 (Fiscal Year) which contains entries concerning the land in question. This we allowed by virtue of the provisions of Rule 344(1)(b) Civil Procedure Rules, 1938. A perusal of the former clearly reveals that the Rikabi family were the original owners and used annually to pay to the Finance Office tithe and *werko* amounting to 188 piastres and that then these lands were transferred to Mahmoud Bey Buzu who later transferred them to his son, Ali Bey. The subsequent history of the transaction, so far as the Respondents' title is concerned, is fully set out in paragraphs 4 and 5 of the L. S. O.'s decision. From the whole history of this land and from a perusal of all the documents produced I am satisfied that the L. S. O. was correct in holding that the Respondents had a registrable interest in the land and I generally agree with his conclusions as set out at the end of paragraph 7 of his decision. I am, however, of opinion that he erred in concluding that the *Waqf* was of the *Waqf Sahiha* category. As he himself pointed out in the first sentence of para 8 of his decision, the Appellant had no documentary proof that the land was *Waqf Sahiha*. According to Messrs. Goadby and Doukhan (see page 75 of their "Land Law of Palestine") — "The only true *waqf* (*Waqf Sahiha*) is that of land which, at the time of dedication, was the *mulk* of the dedicator". Now, there is no evidence at all as to the dedication, and it follows, therefore, none as to the time of dedication.

The main argument advanced on behalf of the Appellant at the hearing of the appeal was that the four members of the Rikabi family were *Mutawallis* of the *Waqf* and that they improperly disposed of the *waqf* interest. There is, however, no evidence of the establishment of a *Waqf* as a true *Waqf* and it is, therefore, impossible for us to hold

that the *Waqf* was a true *Waqf* — still less to hold that anything that the Rikabi family did was unlawful.

The main grounds (beyond those which I have already stated) on which I incline to the view that the *Waqf* is not *Waqf Sahiha* are the following, namely :

(i) There is no evidence of creation or of dedication. In this connection I agree with the L. S. O.'s reasoning as set out in para 8 of his decision. I do not ignore the effect of the decision of this Court in C. A. 107 and 108 of 1941, P. L. R. Vol. 8, August and September 1941, page 402. In that case this Court found present all the incidents of a *Waqf Sahih* extending over a very long period. The facts in this case, however, are different.

(ii) The conclusions reached on 15th August, 1303, by the Acting *Kaimakam* of Kuneitra, the *Mudir el Mahl*, the Chief Secretary and the *Tabu* Registrar, as a result of the enquiry held by them on 17th August, 1302, and subsequent days (Financial Year 1302) which conclusions were that the "said lands were owned and cultivated by the Rikabi family without any dispute from olden times and they used to pay the yearly taxes in the amount of 188 piastres and also the tithes. And during the last 15 years Ali Bey, the son of Mahmoud Bey, pays *werko* and *tahmiss* and the tithe every year to the Finance Office and it is in his ownership without any dispute. This was established. It follows, therefore, that according to Section 78 of the Royal Land Law (Land Code) and the instructions as to the issue of *Tabu* Deeds Section 8 ownership under *"Haq Karar"* was proved in the most satisfactory manner and the *Tabu* Deed issued to the said owner will remain valid". All this is consistent with the *Waqf* being *Tahsisat* when one remembers that the word *"Mequfe"* appears in the excerpt of the Budget of the Imperial *Awqaf* Ministry for the year 1327 (see the citation from the law of 6 *Rejeb*, 1292, at p. 79 of Messrs. Goadby & Doukhan's book).

(iii) The fact that the Rikabi family used from olden times to pay 188 piastres every year as *werko* (see report of 13 *Tamuz*, 1303, from the head of the Finance Office, Kuneitra Sub-district).

(iv) All the facts, coupled with the mention of the word *"Mequfe"*, tend to show that the land was an untrue *Waqf* such as is described in the last eight lines of page 8 of Messrs. Goadby & Doukhan's "Land Law of Palestine", and the first eight lines of page 9.

(v) It seems clear that there was never a dedication of the *"Tessaruf"* itself (see line 9 of page 9 of Messrs. Goadby & Doukhan). The exhibit D/1 gave authority for the *Tessaruf* to be transferred to Ali Bey Mahmoud Buzu.

(vi) In Omer Hilmi's "Law of *Evqaf*" (translation of Messrs. Tyser & Demetriades, 2nd Edition, Cyprus 1922, p. 115) we find in the example to Article 468, "If the ownership of the possessor is based on a ground regarded in law as a means of acquiring ownership, such as purchase, gift and inheritance, then hearsay evidence about the original dedication is not admissible, but the proof of the judicial sanction (*tesjil vaqf*) is required, and, in respect of that, hearsay evidence is not admissible". The ownership of the possessor in the present case is clearly based on purchase. Now it was advanced on behalf of the Respondent (*sic*) that it was common knowledge that the *Waqf* was of great antiquity. This seems scarcely sufficient to prove that it was a true *Waqf*.

(vii) In Civil Appeal 84/38 (Palestine Law Reports 1938, p. 356) this Court held that there was no evidence that the Appellant, a registered owner, knew that the property in question was *Waqf* and this Court consequently held, following Land Appeal 173/26 (Vol. I, P. L. R., p. 269) in favour of the Appellant. That case, although not on all fours with the present case, has one similar feature in that, in the present case, no knowledge that the *Waqf* was a true *Waqf* could be imputed to the present Appellants (*sic*).

(viii) Mr. Weston-Sanders says that the category of the land is set out in exhibits D/3 and D/4. An examination of exhibit D/4, however, merely shows that the category is "*Waqf* Sidna Qutb Eddin el Khudeiri", *i. e. Waqf* in favour of one Qutb Eddin el Khudeiri ; but does not mention what kind of *Waqf*.

(ix) Mr. Weston-Sanders cited Civil Appeal 70/39 (P. L. R. Vol. 6, July 1939, p. 397) as being in his favour. That case, however, is no authority on the question of what amount of proof is necessary, in the absence of a *waqfieh*, to determine whether a *Waqf* is true as distinct from untrue *Waqf*.

(x) Had it been a true *Waqf*, the Administrative Authorities would never have reached the conclusions set out in their decision of 15th August, 1303, because the effect of a true *Waqf* or dedication is to render the land inalienable (Goadby & Doukhan, p. 71).

For all the foregoing reasons I am of the opinion that the contention of Dr. Eliash that the land is of the category known as *Tahsisat Waqf* is sound. As regards the question of the nature of the rent, I hold that this was not within the jurisdiction of the Land Settlement Officer.

The appeal will, therefore, be dismissed and the cross-appeal allowed to the extent that the decision of the Land Settlement Officer be varied by declaring that the land is of the category known as "*Tahsisat*

Waqf" and by declaring also that the question of the nature of the rent is not within the jurisdiction of the Land Settlement Officer.

The Appellant will pay to the Respondents the costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee of LP. 15 ; no costs of the cross-appeal.

Delivered this 24th day of February, 1942.

British Puisne Judge.

Rose, J. : I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 20/42.

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

BEFORE : Rose, Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Sa'id Abdul Kader Shukeir. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Attempted murder — Appeal against sentence — Sworn statement by Police Officer after conviction that Appellant was a rebel leader during the disturbances — Relevancy of such fact.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 5th day of February, 1942, whereby the Appellant was convicted of attempted murder contrary to section 222(a) of the Criminal Code Ordinance, 1936, and of being in possession of a firearm and ammunition without licence contrary to section 36(2)(a) and (b) of the Firearms Ordinance, and sentenced to fifteen years' imprisonment :—

HELD : 1. In the circumstances of the case a sentence of fifteen years' imprisonment was not excessive.

2. The fact that the Appellant had been a rebel leader during the disturbances was properly taken into consideration in deciding on the sentence to be imposed.

ANNOTATIONS :

1. *Cf.* CR. A. 14/42 (*ante*, p. 109) on the inadmissibility of such evidence when tendered not as to sentence, but to prove the case against the Accused.

2. On matters to be taken into consideration in assessing the sentence see CR. A. 106/41 (1941, S. C. J. 374) and note and CR. A. 60/41 (*ibid.*, p. 540).

FOR APPELLANT : Ankar.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem. The appeal is only against sentence and it is urged first, that the sentence is excessive on the facts of the case itself, and secondly that the Court, in coming to its conclusion as to sentence, took into consideration a statement made after conviction by a Police Officer which, the Appellant urges, should not have been considered.

As to the facts of the case, they are, in our opinion, practically as serious as they could be. It appears, and there is a finding to that effect in the judgment, that a party of Police Officers were going to arrest the Accused at his house when a Mills bomb was thrown at them from a verandah at the top of the stairs. The bomb exploded but, as the Court says, by some miracle they, that is the party of Police, escaped injury or death. Then, the Court goes on to say, the Accused fired at them several times as they sought cover at the foot of the stairs. Subsequently A. S. P. Briance was wounded in the shoulder, but there is no express finding by the Court that it was the Accused who inflicted that particular wound.

In those circumstances, a sentence of fifteen years' imprisonment does not seem to us to be excessive.

With regard to the second point, the Police Officer A. S. P. Briance was sworn after conviction and deposed that the Accused led a gang of rebels during the disturbances. That does not seem to have been directly challenged by the defence, because Mr. Salah, when addressing the Court in mitigation, says that the Accused was of good character up to the time of the disturbances and adds that his doings during the disturbances should not be taken into consideration.

We do not think that that can be right. In our opinion, if a person is found as a fact to have thrown a bomb and fired a rifle, illegally, the circumstance that he was a leader of rebels is a relevant consideration in deciding what sentence should be imposed.

In any event, this point is academic as regards this case, because on the facts alone we consider that the sentence of 15 years is by no means too much.

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

Delivered this 17th day of March, 1942.

British Puisne Judge.

HIGH COURT No. 10/42.

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

BEFORE : Gordon Smith, C. J. and Frumkin, J.

IN THE APPLICATION OF :—

Nissan Katz. PETITIONER.

v.

1. His Worship Ali Eff. Zein el 'Abdin in his capacity as one of the Chief Execution Officers, Jerusalem,
2. Izhak Arie Shpak and Gershon Gurvitz. RESPONDENTS.

Eviction — Compromise after judgment for eviction — Extension of time not creating a fresh lease — Execution rightly continued after expiration of extended period.

In refusing an application for an order to issue directed to the first Respondent calling upon him to show cause why he should not refrain from executing the judgment, dated 12.3.41, in Magistrate's Court Jerusalem File No. 503/41, as it became obsolete, and why his order of eviction against Petitioner, given in Execution File No. 1067/41, should not be set aside :—

HELD : Although the extension of one year granted by the second Respondents was of an unusual length of time it did not amount to a new lease but only to a suspension of execution and once the extended period had expired the execution proceedings had to continue.

ANNOTATIONS :

1. See, on an extension of time not amounting to a new contract, C. A. 174/38 (1938, 2 S. C. J. 59).

2. On landlords and tenants generally *cf.* annotations to H. C. 18/42 (*ante*, p. 103).

FOR PETITIONER : Krongold.

FOR RESPONDENTS : No. 1 — Absent — served.
No. 2 — Goitein and Geichman.

ORDER.

Gordon Smith, C. J. : The rule *nisi* must be discharged. It is perfectly clear that there was a compromise entered into between the Landlord-Respondent and the Petitioner, on the strength of which the Respondent agreed that he, the Petitioner, should continue to occupy the premises till the end of the past *Hajara* year, and that in

consideration thereof there should be the withdrawal of the appeal filed by the Petitioner in the District Court of Jerusalem against the eviction judgment. The Respondent acted upon that compromise but the Petitioner has failed to do so. And therefore the Respondent applied to the Chief Execution Officer to execute the original judgment which execution was delayed till the end of the year.

The rule will be discharged and the Respondents will have their costs to include LP. 5 as advocate's fees.

Delivered this 17th day of February, 1942.

Chief Justice.

Frumkin, J. : I concur, but I would like to add that at first sight it appeared to me that there was some substance in the argument put forward on behalf of the Petitioner that there was a fresh lease entered into in view of the unusual length of time granted as an extension of the original lease, which was the subject matter of the Magistrate's judgment, but on further consideration I came to the conclusion that all what the arrangement amounted to was the suspension of the execution of the judgment and once the extended period has expired the execution proceedings have to continue.

Puisne Judge.

CRIMINAL APPEAL No. 23/42.

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

BEFORE : Rose, Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Jum'a Ali Khalil Abu Ajineh. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Uttering and possession of forged bank notes, C. C. O., Sec. 349 — Guilty knowledge — Sentence.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 10th day of February, 1942, in Criminal Case No. 8/42, whereby the Appellant was convicted of uttering a note purporting to be a bank note knowing the same to be forged, contrary to section 349(1) of the Criminal Code Ordinance, and having without lawful authority or excuse in his possession forged notes purporting to be bank notes knowing the same to be forged, contrary to section 349(2) of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment, and in reducing the sentence :—

HELD : 1. There was sufficient evidence before the Court to support the conviction.

2. In spite of the seriousness of the offence and in consideration of the Appellant having no previous convictions and not having been concerned with the manufacture of the notes, the sentence would be reduced from two years to 15 months.

ANNOTATIONS : See CR. A. 133/41 (1941, S. C. J. 501) and note 3 on sentences in case of first offenders.

FOR APPELLANT : Abcarius.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, convicting the Accused of an offence under Section 349 of the Criminal Code Ordinance. The question as to whether or not guilty knowledge is present is, of course, eminently one for the consideration of the Trial Court and all we have to consider is whether there is sufficient material from which the Court could reasonably infer guilty knowledge. We think that, both on the evidence as contained in the Record and on the facts cited in the judgment, there is sufficient material on which the Court could properly come to that conclusion.

As to sentence, the Accused has no previous conviction. There is no suggestion that he was engaged in the manufacture of these notes and the particular amount involved, as far as he was concerned, was only LP. 20. While we have no desire to minimize the seriousness of this class of offence, we think that a sentence of two years is perhaps a little on the high side and we reduce it to one of 15 months' imprisonment. Subject to that the conviction is affirmed.

Sentence to run from the date of the judgment.

Delivered this 17th day of March, 1942.

British Puisne Judge.

CIVIL APPEAL No. 238/41.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Messrs. Kunzler & Co. APPELLANTS.

v.

1. Dr. Hyman Bernard Raises,
2. Kolnoa Rama Ltd.,
3. H. H. Nethanel. RESPONDENTS.

Claim for return of machinery let on hire-purchase — Building mortgaged prior to hire-purchase agreement — Part of the machinery becoming fixtures — Whether fixtures included in mortgage, Ellis v. Glover & Hobson, Ltd., Ottoman Mortgage Law, Art. 5, Mejelle, Arts. 711 and 232 — Difference between English and Palestinian mortgage, Mortgage Law (Am.) Ord., Sec. 8 — Mortgage extending only to fixtures owned by mortgagor — Ownership in goods let under hire-purchase agreement — Point taken by Court of its own motion — Time to return machinery — Lien on machinery for spare parts supplied.

Appeal from the judgment of the District Court of Tel-Aviv, dated the third day of November, 1941, in Civil Case No. 152/40 allowed.

The District Court (following Sheffield and South Yorkshire Permanent Benefit Building Society *v.* Harrison, 1884, 15 Q. B. D. 358) had made a distinction between that part of the apparatus which they considered as chattels and that part which they held to be fixtures. As regards the chattels, the Court below ordered their return to the Appellants to be suspended as long as the first Respondent continued to pay certain monthly instalments agreed to by the Appellants in 1939.

As to the fixtures, the District Court held that they were included in the mortgage and (referring to Gough *v.* Word & Co., 1894, 1 Q. B. D. 713) as there had been no implied consent by the mortgagee to remove them, the Court dismissed the Appellants' claim for their return.

The second Respondent had claimed a lien on the apparatus to the extent of LP. 45.— which he had spent on spare parts. As to this, the District Court held that there was no lien and that if the second Respondent was entitled to be paid for his repairs to the machinery, this should be the subject of a separate claim.

HELD: 1. The law to be applied was the Ottoman Mortgage Law, in particular Art. 5 thereof, and not English law, the essential difference between a mortgage in England and a mortgage in Palestine being that in the case of an English mortgage the legal ownership passes to the mortgagee.

2. Articles 711 and 232 of the *Mejelle* applied only to such fixtures as are the property of an owner who sells the property.

3. The fixtures in question having been let on a hire-purchase agreement were the property of the Appellants and remained their property until the first Respondent had paid all instalments and exercised his option to purchase.

4. Certain parts of the apparatus were in fact fixtures and might be regarded as fixtures also by Ottoman Law.

5. On the view which the Court of Civil Appeal took it was irrelevant that the Court below had introduced the question of fixtures on their own motion.

6. The Appellants were entitled to the return of the whole apparatus, whether fixtures or chattels.

7. The decision of the District Court to the effect that the second Respondents had no lien on the apparatus for the sum expended by them on spare parts was correct.

REFERRED TO : Ellis *v.* Glover and Hobson, Ltd., 1908, 1 K. B. 388.

ANNOTATIONS :

1. See, on the question of what is included in a mortgage, H. C. 93/36 (C. of J. 1934—6, 412 ; P. P. 4.xii.36), H. C. 34/38 (1938, 1 S. C. J. 306), Motion D. C. Jm. 2/39 (P. P. 31.i.39) and C. D. C. Ja. 92/38 (P. P. 31.iii.39).

2. For the rules of English Law referred to *vide* Halsbury, Vol. 23, *pp.* 281—2, *No.* 413 ; Digest, Vol. 35, *pp.* 302 *seq.*, *Sub-sec.* 3.

3. On hire-purchase agreements generally see C. A. 24/39 (1939, S. C. J. 378) and notes ; *cf.* C. A. 71/40 (1940, S. C. J. 462) and C. A. 212/40 (*ibid.*, p. 519).

4. On a point being taken by the Court of its own motion *cf.* C. A. 1/39 (1939, S. C. J. 58) and C. A. 26/39 (*ibid.*, p. 187).

FOR APPELLANTS : Spindel and Barbasch.

FOR RESPONDENTS : Nos. 1 & 2 — Wittkowski.
No. 3 — Olshan.

JUDGMENT.

This is an appeal from a judgment of the learned Relieving President of the District Court of Tel-Aviv (Judge Hubbard), whereby he dismissed a claim by the present Appellant for the return to him of certain cinema apparatus which had been let on a hire purchase agreement by the Appellants to the first Respondent, then first Defendant. The main reason for the learned Relieving President's judgment was that these parts of the machinery which he held to be fixtures had been mortgaged by the first Defendant to the present third Respondent on the 24th August, 1937, whereas the hire purchase agreement was not entered into between the Appellants and the first Respondent until the 29th June, 1938. The Court below held that English law governed this mortgage, and applying the principles laid down in the case of Ellis *v.* Glover and Hobson Ltd., (1908) 1 K. B. page 388, held that the mortgagee was entitled to the fixtures. This Court was engaged for two full days hearing able and exhaustive arguments by advocates on behalf of the respective parties. We were invited to scrutinize carefully the correspondence and to have regard to the dates of the

various transactions, with a view to deciding whether or not the present Appellants were aware of the mortgage when they entered into the hire purchase agreement and generally with regard to whom knowledge should be imputed with a view to ascertaining who took the risk.

Now, because of the view which we take of the law, we consider that most of this is irrelevant and unnecessary to a decision of this appeal. The implied consent or otherwise of the mortgagee is also irrelevant. We consider that the Ottoman Law of Mortgages applies and in particular Article 5 of the Provisional Law of Mortgages ; but we are, of course, not unmindful of the provisions of articles 711 and 232 of the *Mejelle*. We consider, however, that those articles of the *Mejelle* apply only to such fixtures as are the property of an owner who sells the property.

Now, the essential difference between an English mortgage and a mortgage in Palestine is that in an English mortgage the legal ownership passes to the mortgagee. The incidents of a Palestine mortgage are clearly set out in the last paragraph of page 168 of Messrs. Goadby and Doukhan's "Land Law of Palestine" ; and, in this connection, we think that a scrutiny of section 8, Mortgage Law Amendment Ordinance, is interesting. What we mean is this, namely, that even although the Relieving President was correct in holding that certain parts of this cinema apparatus were fixtures, what has to be remembered is that those fixtures were the property of the present Appellants, and until the last instalment was paid and the first Respondent had decided to exercise his option to purchase, the property never passed from the present Appellants. Now, it is complained on behalf of the mortgagee (that is the third Respondent) that the present Appellants took a risk in bringing these fixtures into this building long after the mortgage and when they (the Appellants) must have been well aware that these fixtures had already been included in the special conditions and in the schedule to the mortgage.

Now, of course, the short answer of the Appellants to such a plea is this namely, "we took no risk ; we knew the law ; we knew that the property in this apparatus was still in us ; we knew that, under the Ottoman Mortgage Law, a mortgagor could not purport to mortgage anything other than his own property. If anyone took a risk it was the mortgagee who lent money on the security of something which did not belong to the borrower and which was not yet on the land at the time of the mortgage."

We are not prepared to hold that the Court below erred in deciding that certain parts of the cinema apparatus were in fact fixtures. We

would also say that these parts might be regarded as fixtures also by Ottoman Law. As regards the complaint that the learned Relieving President introduced this question of fixtures of his own motion, we do not think that this point is of much moment, especially having regard to the view which we take of the legal effect of this mortgage.

We do not think that we need say any more except to point out that we are glad to be able to come to this conclusion because in the Ellis and Glover case it was only with great reluctance that Lord Justice Fletcher Moulton (as he then was) came to the conclusion which he reached in that case (see page 397 of the Report).

The judgment of the Court below must, therefore, be set aside on this point and an order made that the parts of the machinery which were held to be fixtures be returned to the Appellants. We also consider that the judgment of the Court below in so far as it extended the time for the payment by instalments, of the price of the chattels, over an extended period, must be set aside. We do not, however, propose to order that the machinery, whether fixtures or chattels, be returned at once to the present Appellants. As to this we shall hear further argument by parties' advocates and we shall also hear further arguments before we make any order as to costs. We would merely at this stage add that we consider that the learned Relieving President came to a correct conclusion with regard to the claim of the second Defendant, that is the Cinema Rama Ltd., and we consider that their appeal must be dismissed.

Delivered this 26th day of February, 1942.

British Puisne Judge.

ORDER.

Having heard parties' advocates as to costs, we order that the Appellants have their costs here and below to be taxed on the lower scale with advocate's attendance fee in this Court of LP. 15. These costs will be paid by the three Respondents in equal shares.

Having heard parties' advocates on the question of the return of the fixtures, we make the following consent order.

"By consent, we order stay of the delivery of the fixtures to the Appellants till the first of October, 1942, provided that Respondent No. 1 pays the sum of LP. 570 plus interest at 6% *per annum* as from the date of filing the action, in monthly instalments of LP. 100, the first instalment to be paid on the 1st of March, 1942 and thereafter on the first of each succeeding month and the total balance (which

should include all instalments and balance of interest and costs) to be paid by the first of October, 1942. In default of prompt payment on due date of any one instalment, the whole amount will become immediately due and payable and the cinema apparatus will be returned to the Appellants."

Given this 26th day of February, 1942.

British Puisne Judge.

HIGH COURT No. 16/42.

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

BEFORE : Gordon Smith, C. J. and Frumkin, J.

IN THE APPLICATION OF :—

Efteem Dahbourah. PETITIONER.

v.

1. Director of Medical Services,
2. Chief Secretary to the Government of Palestine. RESPONDENTS.

Grant of leave to Government Officers — Government Service — Grant of leave a matter of privilege and not a right — Discretion not interfered with.

In refusing an application for an order to issue directed to the Respondents calling upon them to show cause why Petitioner was not given all kinds of leave for which he is eligible under General Regulations for the Government of Palestine, before it was decided that he be retired from Government Service on medical grounds, and why he should not be restored to Government Service as a Government Officer :—

HELD : The service of Government Officers was at pleasure and according to the regulations and the grant of leave to officers was a matter of privilege and not a right. As it had not been shown that Government had exercised arbitrarily or had failed to exercise its discretion the High Court could not interfere.

ANNOTATIONS : On non interference with the exercise of a discretion compare H. C. 78/39 (1940, S. C. J. 25), H. C. 75/41 (1941, S. C. J. 369) and notes and H. C. 3/42 (*ante*, p. 71) and note 1.

FOR PETITIONER : Nakleh.

ORDER.

We are agreed that this petition should be refused. It has not been shown to us that Government arbitrarily has exercised or has refused to exercise its discretion. The service of Government officers is at pleasure and according to the regulations ; grant of leave to officers is a matter of privilege and not a right of the officer. We are unable to interfere with the discretion of the Government.

The rule *nisi* will, therefore, be refused.

Given this 17th day of February, 1942.

Chief Justice.

CRIMINAL APPEAL No. 25/42.

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

BEFORE : Gordon Smith, C. J., Rose and Frumkin, JJ.

IN THE APPLICATION OF :—

Abdel Hadi Muhammad Abdel Hadi. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Appeal against sentence — Uttering a false document — Sentence reduced.

In allowing an application for leave to appeal from the judgment of the District Court of Jerusalem, dated the 17th day of February, 1942, in Criminal Case No. 350/41, whereby the Appellant was convicted of knowingly and fraudulently uttering a false official document contrary to sections 338 and 340 of the Criminal Code Ordinance, 1936, and sentenced to one year's imprisonment, and in reducing the sentence :—

HELD : The sentence of twelve months' imprisonment was too severe and would be reduced to one of three months.

ANNOTATIONS : *Cf.* CR. A. 23/42 (*ante*, p. 133).

FOR APPELLANT : Haddad.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

We agree that the sentence of 12 months can hardly be supported in this case but at the same time it is forgery or uttering a false document and of course if this offence persists and continues then there would

possibly be a serious loss of revenue to Government but, as I said, we think the sentence is too severe and we reduce it to three months to date from the date of conviction.

Delivered this 18th day of March, 1942.

Chief Justice.

CIVIL APPEAL No. 257/41.

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

BEFORE : Gordon Smith, C. J. and Frumkin, J.

IN THE APPEAL OF :—

Jacob Menahem Mesha. APPELLANT.

v.

1. Meir Kravzov, as heir of the estate of Dov Ber Kravzov,
2. Ashrai Bank, Ltd. RESPONDENTS.

Mortgages — Action for declaration that amount due is less than claimed in execution — Mortgage transferred — Jurisdiction, whether action one for discharge of mortgage — Action by heir in name of estate, Mejelle, Art. 1642 — Position of transferee of mortgage — Estoppel — Interest not to exceed the capital, Ottoman Law of Interest, Art. 4, Loans (Recovery of Interest) Ordinance — No right to include expenses in mortgage account — Transferor of mortgage not a proper party.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 30th of November, 1941, in Civil Case No. 19/41 dismissed.

The following is a (private) translation of the District Court judgment :—

The facts in this case are as follows :—

On 25.10.1925 a mortgage for an amount of LE. 300 (LP. 307.692) was registered on the property of Dov Ber Kravzov in favour of the second Defendant, principal and interest of the mortgage to be repaid in 156 equal monthly instalments of principal and interest, beginning on 25.11.1926 and ending on 25.10.1939, in total LE. 475.80.

Payments were made by the Plaintiff to the second Defendant at various times, beginning on 17.12.1926 and ending on 26.3.1940, amounting in all to LP. 368.511.

On 25.6.1940 the second Defendant transferred the mortgage to the first Defendant under a deed of transfer of mortgage which states that the second

Defendant transfers to the first Defendant the amount of the mortgage in the sum of LP. 307.692 together with interest up to 6.6.1940 in the amount of LP. 151.118, together LP. 458.810.

The first Defendant applied to the President of the District Court for sale of the mortgaged property by auction in order to recover the whole amount of the mortgage together with interest, namely LP. 458.810.

The Plaintiff as heir of the estate of the mortgagor was summoned by the first Defendant to appear before H. H. the President of the District Court and pleaded : a) that an amount of LP. 368.511 had already been paid on account of the mortgage ; b) that according to the Ottoman Law of Interest of April 9th, 1887, interest cannot exceed the capital, *i. e.* that the amount due under this mortgage is twice LP. 307.692, *i. e.* LP. 615.384, and that after deducting the amount of LP. 368.511 which has already been paid the amount due under the mortgage is only LP. 246.873 and not more ; c) that the second Defendant could not transfer to the first Defendant greater rights than he had and that the first Defendant was, therefore, entitled to demand execution of the mortgage in respect of the amount of LP. 246.873 only.

In view of the foregoing Plaintiff prays the Court to give an order declaring (declaratory judgment) as follows :—

a) that an amount of LP. 368.511 has already been paid on account of the said mortgage ; b) that according to Article 4 of the Ottoman Law of Interest interest on the amount of the mortgage cannot exceed the capital and that, therefore, the amount due under the mortgage is LP. 615.384 ; c) that the second Defendant cannot transfer to the first Defendant greater rights than he himself had and that, therefore, the first Defendant can claim execution of the mortgage only for the amount of LP. 246.873 and not more.

The new mortgagee, Jacob Menahem Mesha, and the original mortgagee, Ashrai Bank Ltd., were summoned as Defendants in this action.

The Defendants pleaded as follows :—

a) The first Defendant denied the Plaintiff's allegations and stated that the full amount of the said mortgage, namely LP. 307.692, had been transferred to him by the second Defendant together with interest up to 6.6.1940 in the amount of LP. 151.118, and that the accounts between the Plaintiff and the second Defendant are not known to him (as set out in detail in his written defence submitted on 19.2.1941).

b) The second Defendant pleaded :—

1) Lack of jurisdiction on the ground that this is really a claim to obtain judgment for partial discharge of the mortgage and that, consequently, the claim falls within the exclusive jurisdiction of the Land Court.

2) That the Plaintiff "Meir Kravzov in his capacity as heir to the estate of Dov Ber Kravzov, deceased" is not the only heir to this estate and that one heir alone cannot bring an action in the name of the estate.

3) That the second Defendant is no party in this action, as he has transferred the mortgage to the first Defendant and does not claim anything from the Plaintiff.

4) That the Plaintiff is estopped from bringing this action as an order for the sale of the property in question had already been given in file No. 6674/1931, Execution Office, Jaffa, and published in the press.

5) The second Defendant denied the further claims of the Plaintiff.

As regards the issue of law concerning the jurisdiction of this Court, a preliminary decision was given on 17.10.1941, holding that this Court had jurisdiction to deal with the claim, as the Plaintiff does not dispute the validity of the mortgage but claims that he has paid to the second Defendant more money than he owed him.

As to the second Defendant's plea that the Plaintiff, Meir Kravzov in his capacity as heir to the estate of Dov Ber Kravzov deceased, cannot bring the action as there are other heirs, this is absolutely unfounded as under Article 1641 (*sic*) of the *Mejelle* each heir can sue and be sued in the name of the estate. We would point out that there is no administrator of the estate in the present case.

The principal question in this case is whether the first Defendant, to whom the mortgage has been transferred by the second Defendant, can be considered as a holder in due course and, therefore, not be concerned with the claims of the Plaintiff against the second Defendant.

The Court is of opinion that the term "holder in due course", with all the rights which it confers on the holder of a bill of exchange, does not apply to transferees of a mortgage. Such persons are to be considered as assignees of a debt and it is a well-known principle that the debtor can set up against the assignee any claim which he has against the assignor.

Regarding the first Defendant's allegation that Plaintiff is estopped from making any claims because in Execution file Jaffa No. 6674/31 an order for sale had already been given in respect of the said property and Plaintiff did not set up his claims then, the Court does not find any estoppel here as at that time the Plaintiff was not in a position to set up such claims.

There remains the question whether the Ottoman Law under which interest may not exceed the capital applies in the present case. The Court is of opinion that it does since the Ashrai Bank is not an Approved Company within the meaning of the law and cannot claim more interest than is permitted by law.

There remains only one minor point, namely the first Defendant's claim that the Plaintiff's account includes not only interest but also expenses and advocates' fees.

On perusal of the mortgage deed the Court finds that the Bank was not entitled to include expenses in the mortgage.

Therefore, as the original amount of the debt and the payments made by Plaintiff are not disputed, we find that on account of the deed of mortgage, Ex. S. K. 3, only the amount of LP. 246.873 is due. The first Defendant will pay the Plaintiff's costs and LP. 10.— advocate's fee (inclusive).

As to the second Defendant, Ashrai Bank, we find that they are not a party in this action since they have transferred the mortgage to the first Defendant. It is, therefore, decided to dismiss the action against them with costs and LP. 10.— (incl.) advocate's fees.

Delivered in presence of advocates for the parties this 30th day of December, 1941.

HELD : The District Court was right in holding :

1. The case fell within the jurisdiction of the District Court as the Plaintiff did not dispute the validity of the mortgage, but alleged

only that the amount claimed from him was more than he owed.

2. The action was correctly brought by one heir in the name of the estate.

3. The mortgagor could set up against the transferee of the mortgage all defences which he had against the original mortgagee.

4. Plaintiff's silence when the mortgage was sought to be executed in 1931 by the original mortgagee did not, in the circumstances, create an estoppel.

5. Interest on the mortgage could not exceed the capital amount.

6. The deed of mortgage did not authorise the inclusion of expenses, *etc.* in the mortgage.

7. As the second Defendant had transferred the mortgage and did not claim anything from the mortgagor he was not a proper party to the action.

ANNOTATIONS :

1. See, on the first point, C. A. 75/41 (1941, S. C. J. 202) and note.

2. As to the second point note that the correct article is Art. 1642 (*not* 1641) of the *Mejelle*. *Cf.* C. D. C. Ja. 434/29 (C. of J. 881), C. D. C. Jm. 317/33 (C. of J. 1794), P. C. 47/32 (1, L. R. P. 831, at p. 842 ; C. of J. 406, at p. 416) and L. C. T. A. 80/34 (P. P. 4.i.38).

3. See, on the third point, H. C. 35/39 (1939, S. C. J. 375) and note.

4. On the fifth point *vide* Art. 4 of the Ottoman Law of Interest and see the Loans (Recovery of Interest) Ordinance, 1938.

FOR APPELLANT : Zakheim.

FOR RESPONDENTS : No. 1 — Kadoury.

No. 2 — No appearance — served.

JUDGMENT.

We see no grounds in this appeal necessitating the setting aside of the judgment of the Court below. We find that the reasons given by the Court below in its judgment are sound in the matters of law, especially on the question of the discharge of mortgage, and we adopt that judgment entirely.

The appeal is, therefore, dismissed, with costs, and we certify LP. 10 as advocate's hearing fees to the first Respondent.

Delivered this 12th day of February, 1942.

Chief Justice.

HIGH COURT No. 13/42.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPLICATION OF :—

Solomon Horowitz. PETITIONER.

v.

The Assessing Officer, Jerusalem District. RESPONDENT.

Income Tax — Petitioner refusing to furnish return and particulars in respect of income from profession which Petitioner ceased to exercise — Proper remedies under Income Tax Ordinance, Part IX — Mandamus an extraordinary remedy and not granted where other remedies available, Halsbury, Vol. 9.

In refusing an application for an order to issue directed to the Respondent calling upon him to show cause why he should not refrain from demanding the Return required in his letter of 31.12.41 (Exhibit "B") or any Return of Petitioner's professional income for 1941, or any other year :—

HELD : The writ of mandamus was an extraordinary remedy and as the Income Tax Ordinance provided for other and sufficient remedies the intervention of the High Court was not necessary for the administration of justice.

ANNOTATIONS :

1. On the High Court only acting where necessary for the administration of justice *vide* H. C. 104/41 (1941, S. C. J. 601) and note 3.

2. See, on the High Court refusing to interfere where there is another remedy available, H. C. 78/39 (1940, S. C. J. 25) and cases cited on top of p. 30 ; *cf.* H. C. 88/41 (1941, S. C. J. 449) and note 3 and H. C. 99/41 (*ibid.*, p. 513).

PETITIONER : In person.

FOR RESPONDENT : Crown Counsel — (Hogan).

ORDER.

This is an application by way of petition and on which a Rule *Nisi* was issued calling upon the Assessing Officer to refrain from demanding a return under the Income Tax Ordinance, or any return, of the Petitioner's professional income for the year 1941, or any other year, and it is claimed that the Respondent, the Assessing Officer, has acted without jurisdiction, or alternatively, in excess of his jurisdiction, in demanding this return, inasmuch as the income in respect of which the return is required is not income chargeable under the Ordinance.

Putting it very briefly, the complaint is that the Petitioner having ceased to carry on a profession, the Assessing Officer is attempting to charge him with income tax, or will attempt to charge him with income tax, on receipts which may be received by him arising out of that profession, but subsequently to his retirement. If I understand the Petitioner correctly that is his complaint.

Now, we have recently had an Income Tax Ordinance and the imposition of income tax, under which income may be chargeable with income tax under the Ordinance. In order to enable the Assessing Officer to make an assessment, returns have to be made in accordance with notice, and on receiving those returns the Assessing Officer can by notice require further particulars. In this case a return was made and the Assessing Officer has required further particulars.

It is claimed that he is not entitled to those further particulars because, in the submission of the Petitioner, the income which might be taxable in the opinion of the Assessing Officer is not taxable in his opinion, that is in the Petitioner's opinion. Under the Ordinance he can give notice to the Assessing Officer requiring him to revise an assessment, and the Assessing Officer can do so if he thinks fit, or he can do otherwise and refuse to revise his assessment, in which case the Petitioner, or anybody else aggrieved by an assessment, can appeal against such assessment to the Supreme Court, in accordance with Part 9 of the Ordinance, which provides for such appeals. If an Assessing Officer can be restrained from obtaining the necessary details of income on which he can make an assessment and from saying whether all or any part of such income is chargeable or not, it strikes at the whole framework and foundation of the Income Tax Ordinance.

As has been pointed out by Crown Counsel for the Respondent, there are alternative methods in which this matter can be brought before the Court and where such a remedy is provided, an intervention is not necessary for the administration of justice. Ample provision is made in the Ordinance, and in our opinion such intervention is not necessary. It is clear from Hailsham that at home remedies by way of mandamus, prohibition, petition of right, and *certiorari,* are extraordinary remedies, and will not lie where other appropriate remedies are available. In this case it may be argued whether certain income becomes chargeable or not. That is a matter for the Assessing Officer in the first instance, and it is for the Petitioner to object, on which the Assessing Officer can revise the assessment, and there is a further remedy that if he does not revise his opinion then the Petitioner can come to Court and have it thrashed out *in camera* before the Supreme

Court. In our opinion that is ample and sufficient remedy. It is in the hands of the Petitioner, and for that reason we have come to the conclusion that this rule must be discharged with LP. 10 inclusive costs.

Given this 24th day of February, 1942.

Chief Justice.

CRIMINAL APPEAL No. 22/42.

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

BEFORE : Gordon Smith, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Joshua Zetler. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Bank robbery — Attempted murder — Conviction on two counts out of three for attempted murder quashed — Sentence — Special treatment.

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 5th day of February, 1942, in Criminal Case No. 11/42, whereby the Appellant was convicted of robbery contrary to section 283(1) and section 23 of the Criminal Code Ordinance, 1936, and of attempted murder contrary to section 222(a) of the Criminal Code Ordinance, 1936, and sentenced to fifteen years' imprisonment :—

HELD : 1. There was not sufficient evidence to show that the Appellant had got into the car and fired and the convictions in that respect had, therefore, to be quashed.

2. The Appellant had been properly convicted of armed robbery and of one count of attempted murder and the Court of Criminal Appeal was, therefore, entitled to revise the sentence imposed by the District Court and to impose sentence on the basis of the charges actually proved ; the sentence of fifteen years' imprisonment was appropriate to these two offences.

3. There was no reason to grant special treatment.

ANNOTATIONS :

1. On sentence in case of attempted murder compare CR. A. 118/41 (1941, S. C. J. 419) and CR. A. 20/42 (*ante*, p. 130).

2. See, on bank robbery, CR. A. 58/39 (1939, S. C. J. 512), CR. A. 24/41 (1941, S. C. J. 95) and CR. A. 148/41 (*ante*, p. 4).

3. On the last point see Misc. Appl. 2/42 (*ante*, p. 99) and note ; *cf.* especially CR. A. 148/41 (*supra*).

FOR APPELLANT : Goitein and Ficheleff.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

In this case the Accused was convicted by the Court below of armed robbery on the first count and attempted murder of three different individuals in the second, third and fourth counts. It is unnecessary really to go into all facts of the case which have been very carefully referred to by Mr. Goitein and we have had a long judgment by the Court below which perhaps, if it had been framed differently, would not have given Mr. Goitein all the grounds for the arguments he put forward. But it is quite clear that in this judgment the Court below found as a fact that the Accused was one of those who entered the bank on the 16th September, and was armed, and there was all the necessary evidence to be inferred from those facts that he was guilty of the offence of armed robbery and we see no reason to disturb the verdict in that respect. As regards the charges of attempted murders, taking the third and fourth counts first, that judgment found that this Accused escaped with other members of the gang in the stolen Mercedes car from which the eight or ten shots were fired. Counsel for the prosecution admits that there is a missing link in that charge in that there is no evidence to show that the Accused got into the car ; there is no evidence how he left the bank, whether he got into the car or not and as to his subsequent movements. There was evidence of the finding of a pair of trousers in the house of the Accused but we are unable to find that that is sufficient evidence on which a proper inference can be made that he was, without any reasonable doubt, in that car when those shots were fired. We, therefore, find it necessary to quash the convictions on those third and fourth counts.

As regards the other count of attempted murder — that of Goldberg, the cashier, who was in the bank during this armed robbery, he seized his revolver which apparently was unloaded, pointed it at them (he must have seen them pointing their revolvers at him) and probably immediately ducked, and shots were fired. These shots hit the glass of the partition where he was standing. It is quite clear that the Court below drew inferences from these facts that the armed robbers shot at the cashier Goldberg. It seems to us that it is unnecessary to decide whether it was a question of a split second or not in Goldberg dropping to the floor — whether he escaped actually being shot or not. There is, we think, ample evidence on which this conviction for the attempted murder is shown to be correct, and we, therefore, uphold the conviction in that respect.

As regards the sentence, we find ourselves somewhat in a difficulty because we are unable to say exactly what the Court below would have passed as an appropriate sentence if the Accused had been convicted only of the armed robbery and the one attempt to commit murder. Without creating any precedent, because we would like to consider things further before laying down any rule about sentences, we feel that we can revise this sentence in this instance and put ourselves in the position of the District Court in passing a sentence on these two counts alone. We, therefore, have to consider what would be an appropriate sentence in the case of a bank robbery of this nature coupled with an attempt to commit murder. And in those circumstances we think that the sentence of 15 years passed by the District Court is not at all an excessive sentence.

The sentence in this case will, therefore, be the same, *i. e.* 15 years' imprisonment without special treatment. We see no reason whatsoever to grant special treatment in this case.

Delivered this 18th day of March, 1942.

Chief Justice.

HIGH COURT No. 14/42.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Henri Beigel. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. The Attorney General. RESPONDENT.

Enforcement of bail bond — Notice to produce certain person before Court of Criminal Appeal, Criminal Procedure (Release on Bail) Ord., Sec. 4(3) as amended — Case adjourned for delivery of judgment and person guaranteed not appearing — Bond declared forfeited, Release on Bail Ord., Sec. 8(1) — Petitioner's movables attached — Meaning of "order" and "notice" in Sec. 8(1) of the Ordinance — Possibility to apply for remission of part of the amount of the bond, Release on Bail Ord., Sec. 8(3) — Meaning of "Court" in the subsection — Alternative remedy available — English practice.

In refusing an application for an order to issue directed to the first Respondent calling upon him to show cause why the orders of the Assistant Chief Execution Officer, dated 8.12.41 and 12.1.42, in Execution File No. 1358/41, Tel-Aviv, should not be set aside and why the said execution proceedings against the Petitioner should not be cancelled :—

HELD : 1. There was no necessity for the certificate on the bail bond to set out what conditions of the bond had not been performed as Section 8(1) of the Ordinance required only a setting forth of the fact that the condition of the bond had not been complied with.

2. *Quaere* whether a notice to the surety as contemplated by Section 4(3) of the Ordinance was necessary.

3. Although the property attached was alleged to be that of Petitioner's mother the application was not premature since the Petitioner was subjected to execution proceedings and liable to imprisonment.

4. *Quaere* whether the words "order" and "notice" in Section 8(1) of the Ordinance contemplated an order by the Court of Criminal Appeal and another document, namely a notice.

5. The Petitioner had another remedy available in that he could apply to "the Court", *i. e.* the Supreme Court sitting as a Court of Criminal Appeal for remission of part of the amount of the bond.

ANNOTATIONS :

1. The criminal proceedings in respect of which the bail bond had been given are CR. A. 27/41 (1941, S. C. J. 146). *Cf.* also CR. A. 27/41 (*post*, p. 154).

2. See, on release on bail, Misc. Appl. 1/40 (1940, S. C. J. 37). *Cf.* C. A. 241/41 (*ante*, p. 46) and notes.

3. On the last point *vide* H. C. 13/42 (*ante*, p. 145) and note 2.

FOR PETITIONER : Lande.

FOR RESPONDENTS : No. 1 — absent — served.
No. 2 — Crown Counsel — (Rigby).

ORDER.

This is a petition for an order calling upon the Chief Execution Officer, Tel-Aviv, to show cause why an order made by him on 12th January, 1942, directing certain execution proceedings to continue, should not be set aside. The Petitioner was guarantor under a bail bond, dated 12th March, 1941, whereby he bound himself to forfeit LP. 100 in the event of a certain Kalman Friedenberg failing to attend, when called upon, the hearing of an appeal before the Supreme Court sitting as a Court of Criminal Appeal.

It seems that the Petitioner was served with a notice such as is contemplated by Section 4(3) of the Criminal Procedure (Release on Bail) Ordinance, Cap. 35, as amended by Criminal Procedure

(Release on Bail)(Amendment) Ordinance, 1936, to produce Friedenberg in the Supreme Court on the date of hearing of the appeal, namely 27th March, 1941. The present Petitioner did produce Friedenberg on that date, and on that date the Supreme Court reserved judgment till the 10th April, 1941. There is no complaint that the surety, that is, the present Petitioner, did not know of this. It seems, however, that the Supreme Court was not ready to deliver judgment on the 10th April, 1941, and on 8th April, 1941, Mr. Goitein, Appellant's advocate, informed the Appellant that judgment would not be delivered until the 24th April, 1941.

On the 24th April, 1941, the Appellant was absent, and the Supreme Court, sitting as a Court of Criminal Appeal, thereupon endorsed its certificate on the bail bond that the condition had not been performed. This certificate was endorsed in accordance with the provisions of Section 8(1) of Cap. 35.

One of the complaints of the present Petitioner is that he was never informed that judgment would not be delivered on 10th April, or at any rate he was never informed that he had to produce the Appellant on the 24th April, 1941. For reasons which we shall give later, we do not intend to rule as to whether the present Petitioner has got good grounds of complaint on this score.

He also complains that the certificate on the bail bond signed by the then Chief Justice, Sir Harry Trusted, and Mr. Justice Rose and Mr. Justice Khayat, did not set out what conditions had not been performed. We think that there is nothing in this point, because all that is required by Section 8(1) is a setting forth of the fact that the condition of the bond has not been performed.

We do not intend to decide whether a notice to the surety as contemplated by Section 4(3) was really necessary, because the bond which the present Petitioner himself signed obliged him to see to it that Friedenberg attended the Supreme Court, Jerusalem, not only on the date fixed for the hearing of the above appeal, but also that he should continue so to attend until otherwise directed by the Court. Because of the certificate issued under Section 8(1) the Execution Officer, Tel-Aviv, was requested to attach the movable property of the Petitioner, and it is against this execution by the Execution Officer that the present Petitioner now complains.

On the return day Mr. Rigby, Crown Counsel, argued that the application was premature because the property attached was in fact alleged by the Petitioner's mother to be hers and not that of the Petitioner. We however feel that it would not be right to discharge

the Order *Nisi* on this ground, because as the Petitioner's advocate, Dr. Lande, pointed out, his client is being subjected to execution proceedings and is liable to imprisonment under Section 8(2). Dr. Lande has also complained, as an alternative, that no order as required by line 6 of Section 8(1) was made by the Court of Criminal Appeal. He contends that such an order must be an order made by the Court of Criminal Appeal, and he also complains that there must be two documents, namely, (1) an order made by the Court of Criminal Appeal, and (2) a notice calling upon him to pay within six days. It is not disputed that a notice, dated 26th November, 1941, was issued by the Execution Office and served upon the Petitioner's mother at the place of residence of the Petitioner, calling upon him to pay within seven days.

We do not consider that we ought to give a ruling on the question as to whether the words 'order' and 'notice' in line 6 of Section 8(1) contemplate an order by the Court of Criminal Appeal itself and another document, namely a notice, because we think that this matter can be decided on a very simple ground, namely that the Petitioner has an alternative remedy. To begin with, we would say that we seriously doubt whether the Chief Execution Officer can question the certificate of the Court of Criminal Appeal given under Section 8(1). If that is so, it is difficult to see in what respect the Execution Officer has improperly acted. We think, however, that the Petitioner's remedy lies in making an application to the Court of Criminal Appeal itself.

Dr. Lande not unnaturally complained that it was strange that his client should not have an opportunity of appearing before the Court of Criminal Appeal to show cause why an order of forfeiture of the bond should not be made. The answer to this would appear to be found in the wording of Section 8(1) itself. But we would direct the Petitioner's attention to the provisions of Section 8(3). Dr. Lande says that he is in some difficulty, as Sir Harry Trusted is now no longer in Palestine. But, surely, the Court contemplated by line 1 of Section 8(3), Cap. 35, is the Supreme Court properly constituted for sitting as a Court of Criminal Appeal. It may be that there are no rules of Court laying down procedure whereby incidental applications to that Court can be made ; but we cannot believe that the Chief Registrar of the Supreme Court will put insuperable obstacles in the way, that is, in the event of Dr. Lande submitting a motion and asking that that motion be listed for hearing before the Supreme Court, on the next convenient occasion when it sits as a Court of

Criminal Appeal, with due notice of course to Crown Counsel. If that course is followed one would imagine that the present Petitioner could then apply to the Court of Criminal Appeal for a remission under Section 8(3). At such a hearing he can, no doubt, advance most of the arguments which he has advanced before us. It seems true that the Court cannot remit the whole of the amount; but there is no apparent limit (short of the whole) which can be remitted.

Now, it seems clear to us that the Petitioner must be allowed a chance of applying to the Supreme Court sitting as a Court of Criminal Appeal, otherwise the whole of Section 8(3) would be meaningless. As Mr. Rigby correctly pointed out, the whole of Section 8 is very badly drafted, in particular the word 'thereupon' in line 4 of Section 8(1) seems meaningless. It seems that, once the certificate has been endorsed, nothing can happen until the expiry of six days. This being so, what possible meaning can be attached to the word 'thereupon' in line 4? Furthermore, the words 'order' and 'notice' are by no means clear. Do they mean two documents or one document? Does the word 'order' mean a special order made by the Supreme Court sitting as a Court of Criminal Appeal, or does it merely mean an order from the Execution Officer? We are not prepared to say; but it seems quite clear that the Court contemplated by Section 8(3) cannot very well refuse to listen to a person who has given a bond, or to a person who was a surety, if either of such persons wishes to apply under Section 8(3). We accordingly think that the present Petitioner has that alternative remedy, and there seems to be no period prescribed within which he must make such application for remission.

In this connection it is interesting to see what is the procedure in England as found on page 100 of the 72nd (1940) Edition of Stone's "Justices' Manual", at any rate, in so far as Courts of summary jurisdiction are concerned.

In the result, as we consider that the Chief Execution Officer has not acted improperly or in excess of his powers, and as we think that the present Petitioner has an alternative remedy under Section 8(3) of Cap. 35, the Order *Nisi* must be discharged.

Delivered this 20th day of March, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 27/41.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPLICATION OF :—

1. Kalman (Karl) Friedenberg,
2. Henry Beigel. APPLICANTS.

v.

The Attorney General. RESPONDENT.

Application for remission of bail bond — Applicant not appearing in Court although informed of the date — No reasons for remission.

In refusing an application for remission of the forfeited bond under section 8(3) of the Criminal Procedure (Release on Bail) Ordinance, in Criminal Appeal No. 27/41 :—

HELD : The Applicant had been informed of the date on which the reserved judgment would be given and there was, therefore, no justification to cancel the bond or to remit part of the sum.

ANNOTATIONS : See H. C. 14/42 (*ante*, p. 149) and notes.

FOR APPLICANTS : No. 1 — S. Fogel.
No. 2 — Absent.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an application for remission of the forfeiture of a bail bond made by the Appellant to appear in this Court. The facts of the case are that the Appellant had been convicted apparently of arson, in the District Court and appealed to this Court. The appeal was heard and judgment reserved. One of the learned Judges of the Court was in the fortunate position of departing shortly upon leave and Mr. Goitein who was appearing for the Appellant, was asked whether he preferred the judgment to be given by the two remaining members of the Court, one of whom was the then Chief Justice of Palestine, or whether he would prefer his client to remain on bail until the Judge on leave returned. Not perhaps unnaturally, the Appellant who was consulted by his advocate Mr. Goitein, replied that he certainly preferred to remain on bail for a further period. When

that further period terminated, the Appellant was absent at Tiberias. Now, it is the duty, of course, of persons on bail and their sureties to keep in touch with the Courts and to inform themselves as to what the position is with regard to this question of bail, whether the dates were fixed or not. In this case it is stated definitely on affidavit that Mr. Goitein informed his client of the date on which the reserved judgment would be given. That being so we are afraid that this application has no merits whatsoever and we consider that there is no reason therefore for cancelling the forfeiture. We have considered the question as to whether we should remit a part of the bail bond but the sum was only LP. 100 and we do not feel that there would, therefore, be any justification, in the circumstances, in remitting part of this sum.

The application is dismissed.

Delivered this 24th day of March, 1942.

British Puisne Judge.

CIVIL APPEAL No. 248/41.

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

BEFORE : Rose, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Hassan Mustafa Abdalla Hussein el Marridi,
2. Muhammad Mohammad Mustafa Abdalla el Marridi,
3. Mahmud Muhammad Mustafa Abdalla el Marridi. APPELLANTS.

v.

Waqf of Hudayatallah and Taji el Din Sheikh Abu el Huda, through its Mutawalli Ibrahim Adham Abu el Huda el Faruqi & 11 ors. RESPONDENTS.

Claims to land — Land entered into Schedule of Rights as mevqufe and claimed as true waqf by virtue of waqfieh — Settlement Officer

adjudging land on account of possessory title — Possession never relied upon during settlement proceedings.

In allowing an appeal from the decision of the Settlement Officer, Ramleh Settlement Area, dated the 18th day of October, 1941, in Case No. 63/Lydda :—

HELD : 1. The Settlement Officer, having found that the land was entered in the Schedule of Rights as *miri mevqufe* should have dismissed the first Respondent's claim because the latter claimed the land to be *waqf sahih* by virtue of a *waqfieh*.

2. As the first Respondent had never relied on possession the Settlement Officer was wrong in ordering the registration of the land in dispute in the name of the first Respondent as having acquired title by possession.

ANNOTATIONS : On a point being taken by the Court of its own motion see C. A. 238/41 (*ante*, p. 134) and note 4.

FOR APPELLANTS : Malak.

FOR RESPONDENTS : No. 1 — Abcarius.
No. 2 — Absent.
Others — *ex parte*.

JUDGMENT.

Khayat, J. : This is an appeal from the decision of the Settlement Officer, Ramleh Settlement Area, dated the 14th October, 1941, whereby he decided in favour of the first Respondent (Second Plaintiff) and dismissed the claim of Appellants and Respondents 3 to 12.

The first Respondent, in his capacity as *Mutawalli* of *Waqf* of Hudayatallah and Taji el Din Sheikh Abu el Huda, claimed the land in dispute as true *waqf* (*waqf sahih*) by virtue of a *waqfieh* and produced the *waqfieh* in support of his claim. The Settlement Officer held that, the land in question having been entered in the Schedule of Rights as *miri mawqufi* (*Waqf* Khaski Sultan), he was bound by that entry as no appeal had been brought to test the correctness of that entry in the Schedule of Rights and he could not go beyond it. He further held that on the evidence before him the *waqf* acquired a title to the land in dispute by possession. The Appellants, on the hearing of the appeal, urged two points of law, firstly, that the *waqf* could not acquire title by possession in *miri mawqufi* lands, and, secondly, that the *waqf* cannot acquire such land by possession if the *mutawalli* of that *waqf* did not rely on possession ; the first point was never raised before the Settlement Officer nor was it a ground of appeal.

We are of opinion that the Settlement Officer, having found that

the land was entered in the Schedule of Rights as *miri mawqufi* (*Waqf* Khaski Sultan), should have dismissed the first Respondent's claim because he claimed the land to be *waqf sahih* by virtue of the *waqfieh*. We further think that the Settlement Officer was also wrong in ordering the registration of the land in dispute in the name of the *waqf* since the first Respondent never relied on possession.

In the result the appeal must be allowed ; the decision of the Settlement Officer must be set aside and the first Respondent's claim dismissed with costs on the lower scale to include the sum of LP. 15 advocate's attendance fee to be paid by the first Respondent.

Delivered this 25th day of March, 1942.

Puisne Judge.

CRIMINAL APPEAL No. 34/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Haj Hafiz el Luh. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Concealment of foodstuffs — Charge under Concealment and Destruction of Controlled Articles (Prohibition) Order, 1941, Rule 2 — No evidence of concealment — Concealing not the same as hoarding.

In allowing an appeal from the judgment of the District Court of Jaffa, sitting as a Court of Appeal, dated the 13th of February, 1942, in Criminal Appeal No. 71/41, whereby it confirmed the judgment of the Assistant District Commissioner, Gaza, acting in his capacity as a Magistrate, dated the 20th of November, 1941, who convicted the Appellant of concealing controlled articles, contrary to Section 2 of the Concealment and Destruction of Controlled Articles (Prohibition) Order, 1941, and sentenced him to three months' imprisonment, and in quashing the conviction :—

HELD : There was no allegation or evidence of concealment, but only of hoarding which was not an offence under the Concealment and Destruction of Controlled Articles (Prohibition) Order.

FOR APPELLANT : Goitein and Eisenberg.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal by leave from the District Court of Jaffa dismissing an appeal from the Assistant District Commissioner of Gaza, sitting as a Magistrate. The Appellant was convicted of an offence against an order passed under the Food and Essential Commodities Ordinance, 1939, the relevant rule being Rule 2 of an order appearing on page 266 of the 2nd Supplement of 1941, which reads :—

> "No person shall, in Palestine, conceal or destroy any of (certain) articles set out in the Schedule."

There is no doubt that the Accused had in his house certain controlled articles as set out in the schedule to the Order. He had not destroyed them, and we may, therefore, assume that he was charged with concealing them. The point, as the learned President of the District Court appreciated when granting leave to appeal, is whether there is sufficient evidence of concealment.

The relevant and only admissible evidence called on behalf of the prosecution was as follows :—

> "I searched a room in the Accused's house. I found 560 rottles of wheat, 1040 rottles of barley, and 280 rottles of dura."

There is no allegation that these articles were concealed, and the witness himself does not say so.

That is sufficient, in our opinion, to dispose of the matter. We would add that it would seem that both the Assistant District Commissioner and the Prosecution were under the impression that concealing is the same thing as hoarding, the latter, of course, not being an offence under the Order.

For these reasons the appeal must be allowed and the conviction and sentence quashed.

Delivered this 26th day of March, 1942.

British Puisne Judge.

CIVIL APPEAL No. 256/41.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Mustafa Rida el-Khairi. APPELLANT.

v.

Nicolas Schmidt. RESPONDENT.

Claims to land — Prescriptive title, Land Code, Art. 20, Land (Settlement of Title) Ord., Sec. 51 — Mazbata as evidence — Letters signed by Respondent's agent not evidence against the Appellant — "Ancient documents" — Settlement Officer failing to make findings on oral evidence — Position of holder of kushan, C. A. 92/39.

In allowing an appeal from the decision of the Settlement Officer, Ramleh Settlement Area, in Case No. 2/Kunaiyisa, dated 29th November, 1941, and in remitting the case to the Settlement Officer :—

HELD : 1. The letters signed by a deceased agent of the Respondent were not evidence against the Appellant, nor could ordinary letters be regarded as "ancient documents" which term applied only to such documents as title deeds, public records, certified copies of public records, *etc.*

2. As the Settlement Officer had failed to say whether he believed or disbelieved the oral evidence, the case had to go back to him to decide whether, on that evidence, the Appellant had made out the defence of prescriptive possession.

3. The Settlement Officer should bear in mind the decision in Civil Appeal 92/39 (to the effect that the holder of a *kushan* need not plead or prove possession).

REFERRED TO : C. A. 92/39 (1939, S. C. J. 442).

ANNOTATIONS :

1. On "ancient documents" *vide* Halsbury, Vol. 13, *pp.* 642 *seq.*, *Sub-sec.* 3 ; Digest, Vol. 22, *pp.* 351 *seq.*, *Sub-sec.* 1.

2. On the third point see, in addition to C. A. 92/39 (*supra*), C. A. 85/39 (1939, S. C. J. 438).

FOR APPELLANT : Abcarius.

FOR RESPONDENT : Atallah.

JUDGMENT.

This is an appeal from a judgment of the Land Settlement Officer, Ramleh Settlement Area, in his case No. 22/Kunaiyisa, whereby he found in favour of the present Respondent, then Plaintiff, and ordered registration of certain parcels of land in his favour. Respondent was the holder of a *kushan*, while the present Appellant relied on prescription under Article 20 of the Land Code, he having purchased by private sale. The Land Settlement Officer heard oral evidence, and in paragraph 9 of his judgment he said :—

> "In general, however, the oral evidence heard by me, even that of the witnesses for the Plaintiff, is to the effect that the Defendant was in possession of the lands since about the time when the Great War began in 1914, and that the Plaintiff was never in possession of any of it."

It is to be noted that he does not say whether he believed or disbelieved the oral evidence. The difficulty in this case has arisen from the fact that the Land Settlement Officer went on to consider

the effect of certain documents, that is to say, the effect which these documents might or should have on the question of the Defendant's possession. Abcarius Bey, the Appellant's advocate, has argued that there was no proper documentary evidence before the Land Settlement Officer which he should have considered. It seems that the first document which the Land Settlement Officer had before him was a *mazbata*, namely exhibit P. 17. In paragraph 13 of his judgment he said that he did not attach much value to this certificate as evidence. This being the case, we think that he should have entirely disregarded it. He next went on to consider three letters signed by one, Salih Hassan, now deceased, who was apparently the agent of the Respondent, exhibits P/18, P/19 and P/20. Now, Abcarius Bey has argued with force that what is contained in those letters is not proof of their contents and cannot bind his client, nor can they be held up against him. We agree with this submission.

Respondent's advocate, Mr. H. Atallah, suggested that they should be regarded as "ancient documents" as referred to in Best on Evidence, 12th Ed., by Phipson, page 422, para. 499, but we are not prepared to hold that ordinary letters can be regarded as "ancient documents", which term we consider is meant to refer to such documents as title deeds, public records, or certified copies of public records, *etc.* We consider that the Land Settlement Officer should have excluded these three documents from consideration. It seems, therefore, that the sole material before the Land Settlement Officer proper for him to consider, was the oral evidence as to possession, plus such official receipts for tithe and *werko* as were produced by the present Appellant. It will be noted that, as we have said, the Land Settlement Officer made no definite finding on the oral evidence.

The case must accordingly be remitted for him to give a fresh judgment on that oral evidence, and for him to decide whether on that evidence the present Appellant has made out a defence under Article 20 of the Land Code and Section 51 of the Land (Settlement of Title) Ordinance. We would call the attention of the Land Settlement Officer to Civil Appeal 92/39 of this Court, reported in Vol. 6, P. L. R., at page 511.

We, accordingly, set aside the judgment of the Land Settlement Officer and remit the case for him to give a fresh judgment in the sense which we have intimated. Costs to abide the event ; we certify LP. 15 for advocate's attendance fee at the hearing of this appeal.

Delivered this 16th day of March, 1942.

British Puisne Judge.

HIGH COURT No. 5/42.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Israel Rokach, Tel Aviv, Chairman of Committee of Jewish Community, Tel Aviv. PETITIONER.

v.

1. District Commissioner, Lydda District, Jaffa,
2. David Potash,
3. Shraga Steinberg. RESPONDENTS.

AND

Israel Rokach, Tel Aviv, Chairman of Committee of Jewish Community, Tel Aviv. PETITIONER.

v.

1. District Commissioner, Lydda District, Jaffa,
2. David Potash,
3. Shraga Steinberg,
4. Central Agudath Israel. RESPONDENTS.

(By order of the High Court dated 30.1.1942).

Religious Communities — Application to restrain District Commissioner from issuing Forms of Marriage and Divorce Registration Certificates to Rabbis of "Jewish Orthodox Congregation" — Chairman of Jewish Community entitled to apply to High Court to test measures allegedly detrimental to the Community — Whether a legal duty on District Commissioner in absence of statutory provisions — Issue of registration forms part of machinery of registration — Link in the operation of the law — Meaning of "rabbi" in Marriage and Divorce (Registration) Ord., Sec. 2 — "Rabbi" both a title and an office — Designation of "registering authorities" — Organisation of Jewish Community, P. O. in C., Art. 83 as amended, Religious Communities (Organisation) Ord., Sec. 2, Jewish Community Rules, Rules 2, 3, 4(1), 6, 8, 13, 14 and 17 as amended — Provisions regarding Jews who have opted out of the Jewish Community, Jewish Community Rules 26 and 27 — Possibility of special legislation for marriages and divorces of persons not members of a religious Community, P. O. in C., Art. 65A

as enacted in P. (Am.) O. in C., 1939, Art. 13 — Hardship — Scope of the law — Dissenting Order.

In allowing an application for an order to issue directed to the first Respondent, calling upon him to refrain from issuing Forms of Marriage Registration Certificates and Divorce Registration Certificates, for celebration of Jewish Marriages and issue of Jewish Divorces, to the second and/or third Respondents and/or to any other persons who do not have a Rabbinical Warrant of Appointment and are not Religious Officers of the Community :

HELD : 1. If the Committee of the Jewish Community felt that the District Commissioner in issuing Marriage and Divorce Registration Forms to the second and third Respondents showed a latitude not warranted by law and detrimental to the public interest of the Jewish Community at large, there was no reason why the Chairman of the Jewish Community should not be given the opportunity of testing the validity of the practice.

2. The High Court was competent to issue the order prayed for although there were no statutory provisions for the issue of registration forms as the issue of these forms was, if not in law, at least in practice, a part of the machinery of registration and thus a necessary link in the operation of the law.

3. The term "the rabbi" in Section 2 of the Marriage and Divorce (Registration) Ordinance did not mean any qualified rabbi, but meant the rabbis designated by the competent religious authority of the Jewish Community (*per* Khayat, J., or by a Jewish independent congregation) to celebrate marriages of Jews.

4. The law recognised for the Jews of Palestine one religious community, with one set of Courts, one religious representative body, one national or general representative body and one power of taxation.

5. (Khayat, J., *dissentiente*) : Persons who are not members of the Jewish Community, whether organised as a congregation or not, had no statutory right to have their own rabbis officiating as registering authorities so long as Government had not availed itself of the powers vested in it by Article 65A of the Palestine Order-in-Council, as enacted by Article 13 of the Palestine (Am.) Order-in-Council, 1939.

ANNOTATIONS :

1. On the determination of membership in the Jewish Community *cf.* C. A. 246/40 (1941, S. C. J. 17).

2. See, on the constitutionality of the "Great Rabbinical Court of the Ashkenasi Community", H. C. 63/38 (1938, 2 S. C. J. 108). *Cf.* H. C. 104/41 (1941, S. C. J. 601) and note 4.

3. On the second point *vide* H. C. 75/41 (1941, S. C. J. 369) and note 1.

FOR PETITIONER : Eliash and Katznelson.

FOR RESPONDENTS : No. 1 — Solicitor General — (Griffin).
Nos. 2, 3 and 4 — Seligman, Wittkowsky and Frank.

ORDER.

Frumkin, J.: This is an application for an order against the first Respondent, the District Commissioner, Lydda District, directing him to refrain from issuing Forms of Marriage Registration Certificates and Divorce Registration Certificates for the celebration of Jewish Marriages and the issue of Jewish Divorces to the second and third Respondents.

Originally the Petitioner asked for the order to extend also to "any other persons who do not hold a Rabbinical Warrant of Appointment and are not Religious Officers of the Community."

A body known as the Central Agudath Israel, whose Rabbis, although not Religious Officers of the Community, have hitherto been supplied with Books of Certificates referred to above, then applied to this Court to be issued with a summons to appear as third party and having been granted leave, they, in fact, did appear.

The Petitioner, however, has in Court declared that he does not intend to interfere with the rights of such Rabbis of the Agudath Israel who have hitherto been supplied with Books of Certificates and restricted his application to the 2nd and 3rd Respondents. The Central Agudath Israel then withdrew from these proceedings and although our order might in the result affect persons in a similar position to the 2nd and 3rd Respondents, we now are directly concerned with them only.

The Petitioner, who is the Mayor of Tel Aviv, applies in his capacity as Chairman of the Committee of the Jewish Community of Tel Aviv — Jaffa, pursuant to a resolution passed by this committee to that effect. The 2nd and 3rd Respondents are Rabbis of a so-called "Jewish Orthodox Congregation" founded as a Society under the Ottoman Law of Societies.

The immediate cause for the petition was a letter written by the Assistant District Commissioner, Tel Aviv, dated 2nd December, 1941, and addressed to the Petitioner, (Ex. 4) which reads as follows:

"District Offices
Tel-Aviv
2nd December, 1941.

I have the honour to refer to your letter No. L/2/2—16484 of 8.10.41 and to inform you that the District Commissioner is not prepared to refuse the issue of Marriage Registration Certificates to Rabbis Potash and Steinberg for the reason that he is unable to state in the High Court that:—

(a) they are not qualified Rabbis; and

(b) they are "unfitted" to receive books of Registration Certificates.

Being incompetent to express an opinion in such matters such a statement cannot be made by the District Commissioner and in his opinion it should be made by the Head of the *Vaad Hakehillah* or any person competent to testify to the High Court on the above two points. It is proposed, therefore, to continue to issue marriage certificates to these Rabbis.

A demand from these rabbis or any other rabbi for divorce certificates must similarly be granted by the District Commissioner.

I have the honour to be,
Sir,
Your obedient servant,

(Sgd.) *T. V. Scrivenor*
ASSISTANT DISTRICT COMMISSIONER,
TEL-AVIV.

Chairman,
Local Jewish Community,
Tel-Aviv—Jaffa."

Before coming to the merits I wish to dispose of two formal objections taken on behalf of the 2nd and 3rd Respondents, the first of which relates to the competence of the Petitioner, as the Chairman of the Jewish Community of Tel Aviv—Jaffa, to make the petition. The answer to this objection is this, namely, that if the Committee of the Jewish Community feels that the District Commissioner in issuing Forms to the 2nd and 3rd Respondents is showing a latitude which is not warranted by law and is detrimental to the public interest of the Jewish Community at large, there is no reason why he should not be given the opportunity of testing the validity or otherwise of the showing of such latitude.

Another objection was taken to the effect that there is no statutory provision for the issue of Books of Certificates, nor is the form of the Certificates provided for in any legislation. That being so, it is argued, a public officer should not be asked to do or to refrain from doing a thing which in law he is not bound to do. But we have been told by the learned Solicitor General that it has been the practice since 1928 that no Marriage or Divorce is registered otherwise than upon the contents of a formal certificate issued to competent persons by the District Commissioner, and it follows that the issue of the forms in question is, if not in law, at least in practice, a part of the machinery of registration and thus a necessary link in the operation of the law.

I turn now to the merits of the petition. But before doing so, I might as well, at this stage, note that the Solicitor General, who appeared on behalf of the District Commissioner, stated that the District Commissioner holds no strong view one way or another in the matter,

although he thought that the District Commissioner acted in accordance with law.

The case for both sides rests largely on the meaning to be given to the words "the Rabbi", in the Marriage and Divorce (Registration) Ordinance. This Ordinance introduces for the first time a system of compulsory registration of marriages and divorces making non-compliance with the provisions a punishable offence. The novelty of the Ordinance is only in the matter of Registration. The celebration of marriages, however, was already at the time the Ordinance was promulgated controlled by law, and the Ottoman Penal Code provided for penalties for people celebrating marriages without a licence from the competent Courts.

The Ordinance provides for a "registering authority" and in Section 2 defines the "registering authority" as meaning :

> "In the case of a civil marriage, the official who celebrates the marriage and, in the case of a Moslem marriage, the *Imam*, a Christian marriage, the Priest, a Jewish marriage, the Rabbi, and a Druze marriage the Sheikh of the tribe."

It seems that in 1919 the Legislature visualized the introduction in Palestine of a Civil Marriage, but up to date the only marriages recognised by law as regards Palestinians are religious marriages celebrated in accordance with religious law and subject to the control and supervision of the religious authorities of the respective communities.

Now, it has been argued on behalf of the 2nd and 3rd Respondents, and this view has been accepted by the first Respondent, that "the Rabbi" means "a qualified Rabbi". And since the District Commissioner was not in a position to say that the 2nd and 3rd Respondents were not qualified Rabbis or otherwise "unfit" to receive Books of Registration Certificates, he felt that he could not refuse to furnish them with such Books, thereby constituting them "registering authorities".

That cannot be a correct view of the law.

A "Rabi" is both a title or degree and an office. It is not necessary in this case to go at great length into the question of how the title of "Rabbi" can be obtained. It suffices to say that it is granted by high religious dignitaries to candidates who have successfully devoted themselves to the study and learning of Jewish law and have also, by religious devotion, proved themselves worthy of the title. I am prepared to accept, for the purposes of this case, that the second and third Respondents are well qualified to bear the title of Rabbi.

The office of Rabbi is connected with some communal function entrusted to a Rabbi which function might be judicial as in the case of

a Judge of a Rabbinical Court, or spiritual as in the case of a religious head, commonly known simply as "the Rabbi of a Community", or otherwise, such as is required for the supervision of ritual matters. Now the office of a Rabbi would not as a rule be vested in a person who did not have the necessary qualifications or the title of Rabbi, but the title of Rabbi does not necessarily confer on the holder thereof the office of Rabbi. In fact, there are hundreds of people qualified to be Rabbis as a result of their studies who are waiting for a vacancy in an office to occur. Furthermore, there are at present in this country hundreds of Rabbis who not only have the qualifications and title of a Rabbi but who also had at one time held offices as Rabbis in communities abroad. It cannot be a proper interpretation of the law that all these Rabbis, however highly qualified they might be, are to be considered "registering authorities" just as it could not be said that "the Official" in the definition can mean any of the hundreds of officials of the Government of Palestine ; or the Priest, any Priest ; or the *Imam,* any *Imam.* And just as in the case of Civil Marriages, if and when introduced, the "Official" would obviously be the Registrar of Civil Marriages appointed for this office, and none else, so in Religious Marriages, it must be the Religious Officer designated for that purpose.

And the question we are called upon to answer is who, with regard to Jews, is the proper authority to designate the Rabbi or Rabbis who can exercise, either as a principal or an additional function, the office of registering authority of Marriages and Divorces of Jews ?

There is no difficulty whatsoever in connection with the recognised Jewish Community. The Rabbinical Council or the local Rabbi recognised under the Jewish Community Rules would notify the respective District Commissioners as to who are the Rabbis designated by them to celebrate Marriages of Jews, and it would be to such Rabbis and to such Rabbis only that the District Commissioner should issue Books of Certificates. No doubt this is also the case as regards Moslems, Books of Certificates being issued to the *Imams* nominated by the Moslem Supreme Council, and as regards Christians, when Books of Certificates would be issued to Priests designated for that purpose by the heads of their respective communities.

The matter becomes somewhat complicated with regard to Jews who have elected to opt out of the Jewish Religious Community. Before dealing with them, it would be opportune at this stage to review the legislation enacted in this country relating to Jews as a public body.

Article 83, Palestine Order-in-Council, 1939, provides :

"All persons in Palestine shall enjoy full liberty of conscience, and

> the free exercise of their forms of worship subject only to the maintenance of public order and morals. Each religious community shall enjoy autonomy for the internal affairs of the community subject to the provisions of any Ordinance or Order issued by the High Commissioner."

Based on this article, the Religious Communities Ordinance was promulgated in 1926. Section 2(1) of it provides that

> "If any religious community in Palestine makes application under this Ordinance, the High Commissioner in Council may, with the approval of a Secretary of State, make rules for its organisation as a *religious community* and its recognition as such by the Government of Palestine ;"

and Section 2(2) that

> "Separate rules shall be made in each case and shall be suited to the special circumstances and organisation of the community concerned."

Under this Ordinance, the Jewish Community Rules were promulgated in 1928. Rule 3 reads as follows :—

> "There shall be a recognised Community of the Jews in Palestine and local Communities constituted in the manner hereinafter provided and the organs of the Community shall include :—
>
> (a) A Rabbinical Council ;
>
> (b) Local Rabbinical Offices, *etc.*

Rule 4(1) provides :—

> "A Rabbinical Council, constituted as hereinafter described, shall exercise general supervision over the local Rabbinical Offices and the Rabbis of local Communities."

And Rule 8 is :—

> "The Rabbinical Council shall be the recognised religious representative of the Community in relation to the Government of Palestine ; and the local Rabbi or Rabbinical Office shall be the recognised religious representative of the local Community in relation to the district administration."

It is obvious that the law thus recognises for the Jews of Palestine one religious community, with one set of Courts (Rule 6), one religious representative body (Rule 8), one national or general representative body, (Rule 14) and one power of taxation (Rule 13).

The same rules visualise also the possibility of Jews not wishing to remain under the authority of the recognised community. In Rule 2 "community" is defined thus :—

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

Rule 17 provides for a Register which automatically includes all Jews who have been resident in Palestine for a certain period, but

provides in paragraph 3 of that rule (as amended in 1937) that

> "Any person who desires his name to be struck off the register shall, within one month of the publication of the relevant portion thereof or within the month of *Iyar* of each year, give notice either personally, or by an agent duly authorized in writing to the General Council (*Vaad Leumi*) which shall acknowledge the receipt of the notice and strike his name off accordingly. He may send a copy of such notice to the office of the District Commissioner."

Now, what right or status do Jews who have thus opted out of the community acquire ? Rule 26 and 27 foresee the possibility of persons not registered in the community organising themselves as a congregation and give such congregation a right to be represented on the Board to control the affairs of ritual killing (Rule 26(3)) and a right to make its own arrangement for burial (Rule 27).

These are the only two instances in which the rules confer certain rights on congregations consisting of persons who are not members of the Jewish Community. We were not referred to any legislation, either in these Rules or elsewhere, conferring upon such congregations a right to have their own machinery for the celebration and registration of marriages.

The vast majority of the Jews who are not registered as members of the Jewish Community are organised in an organisation or congregation known as the "Central Agudath Israel" who, it is common knowledge, have for the last 20 years or more tried hard to obtain recognition as an independent Jewish Community with rights similar to those accorded to the recognised Jewish Community, and it is also common knowledge that all these efforts have thus far been unsuccessful. See the letter of the Chief Secretary to the Central Agudath Israel of the 4th February, 1932 (Ex. 3), of which I would quote the following paragraph :—

> "I am directed by the High Commissioner to refer to your letter of the 14th January, 1932, regarding the separate organisation of the Central Agudath Israel congregation as a community under the Religious Communities Organisation Ordinance, 1926, and to inform you that His Excellency sees no grounds for reviewing the decision taken by his predecessor with the approval of the Secretary of State that the Central Agudath Israel should not be recognised as a separate community under that Ordinance, with powers of taxation over their members and compulsory power of jurisdiction in matters of personal status" *etc.*

As regards registration of marriages, however, the Rabbis of the Agudath Israel at present enjoy an administrative privilege by having their Rabbis supplied with Books of Certificates, and such Rabbis are thus recognised as registering authorities. See the letter of the Deputy

District Commissioner dated the 23rd August, 1928, (Ex. 1) which includes the following paragraph :—

> "I enclose, therefore, one specimen Register of Marriages and one of Divorces for use by the Registering Marriage Officer under your jurisdiction, and shall be grateful if you will inform me of the number of books you will require."

As stated earlier in this judgment, the Petitioner does not wish to interfere with this practice.

There is now also the Palestine (Amendment) Order-in-Council, 1939, Section 65A of which lays down that provision may be made by Ordinance for the Celebration of Marriages of persons neither of whom are members of a religious community.

In scrutinizing all this legislation one can come to only one conclusion, namely, that as regards Jews the Rabbi entitled to be recognized by the District Commissioner as registering authority is the Rabbi designated by the competent religious authority of the Jewish Community ; and that persons who are not members of he Jewish Community, whether organised as a congregation or not, have no statutory right to have their own Rabbis officiating as registering authorities so long as Government has not availed itself of the power vested in it by the Palestine (Amendment) Order-in-Council, 1939, 65A(a).

To an outsider the law as stated may appear to be hard on these persons who for one reason or another have elected to opt out of the Jewish Community.

The answer to that objection is that, good or bad, that is the law. But one must also bear in mind that so far as the vast majority of persons who are not registered as members of the community are concerned, this hardship does not exist, since, as shown before, the Rabbis of the Central Agudath Israel are in practice recognised as registering authorities. And even as regards the congregation represented by the 2nd and 3rd Respondents no such hardship exists, as it is admitted that until recently that congregation was attached to the Central Agudath Israel.

On the other hand one cannot overlook the danger of upholding the contention of the Respondents, both from the point of view of public policy as well as of the preservation of the traditional purity of Jewish Family Life, a danger to which the Respondents themselves must be alive no less than anyone else, if it is held that any group of persons can organise themselves into a congregation for religious purposes, (and then they could also do so for anti-religious purposes), register themselves as an Ottoman Society, appoint Rabbis and thus become registering authorities. The main object of the Ordinance would then

be defeated and the purpose of keeping the celebration of marriages and divorces within the framework of law and good order, undermined.

The order should, therefore, be made absolute and should take the following form : That the first Respondent refrain from issuing forms of Marriage Registration Certificates and Divorce Registration Certificates for the celebration of Jewish marriages and the issue of Jewish divorces to the second and third Respondents.

Given this 24th day of March, 1942.

Puisne Judge.

Edwards, J. : I concur in the judgment of my brother Frumkin. The only matters as to which, during the hearing of the application, I entertained doubts were, firstly, as to whether we could issue an order to a District Commissioner not to issue books of forms of certificates, in view of the fact that in the Ordinance no mention is made of such certificates, and, secondly, whether we might not be unduly fettering the discretion of the District Commissioner by stating who, in our view, should be regarded as "the Rabbi", and indeed whether we might not even be legislating instead of interpreting the law by stating our views as to who should be regarded as "the Rabbi". As regards the first point, I think that it would be highly artificial were we to discharge the order *nisi* on this ground. As regards the other point, in view of the history of the legislation as set out in the judgment of my brother Frumkin, I am now satisfied that we are not only entitled but indeed compelled to interpret the term "the Rabbi" in the manner which he has indicated. The serious practical difficulty for the second and third Respondents is the lack of any Rabbi recognised by the District Commissioner as authorized to celebrate marriages and to sanction divorces of members of their congregation who have seen fit to opt out of the "Jewish Community" and who are not members of the Central Agudath Israel.

What is their remedy, if any ? It would seem to be to try to persuade the Authorities to enact legislation under Art. 65A(a) as amended by Art. 13 Palestine (Amendment) Order-in-Council, 1939.

I accordingly concur in my brother Frumkin's judgment. The order will, therefore, be made absolute and will take the following form, namely : That the first Respondent refrain from issuing forms of Marriage Registration Certificates and Divorce Registration Certificates for the celebration of Jewish marriages and the issue of Jewish divorces by the second and third Respondents. The Applicant will have a sum of LP. 10 as fixed or inclusive costs to be borne by each of 2nd and 3rd

Respondents in equal shares, that is, LP. 5.— to be paid by each of them.

British Puisne Judge.

Khayat, J.: I am of opinion that the term "Rabbi" described in section 2 of the Marriage and Divorce (Registration) Ordinance (Cap. 88) as "registering authority" must be a special Rabbi designated by the Jewish Community or by a Jewish independent congregation in the terms of section 2 of the Jewish Community Rules made under the Religious Communities (Organisation) Ordinance (Cap. 126).

The special rights of these independent congregations are mentioned in section 26(11) and 27(6) of the Jewish Community Rules for ritual killing and burials.

Article 13 of the Palestine (Amendment) Order-in-Council, 1939. provides for a special legislation for the celebration or dissolution of marriages of persons not members of a religious community.

All that law contemplates the existence of independent congregations as a fact and the "Agudath Israel" as an independent body is a confirmation of that fact.

It is not necessary to make a special legislation for the constitution of independent congregations, but it is for the executive authority to inquire about and recognise such a body as it is stated in paragraph 2 (Ex. 3) of the letter of the Chief Secretary, dated the 4th February, 1932, to the Agudath Israel.

I am of the opinion that the order *nisi* should be discharged.

Puisne Judge.

CRIMINAL APPEAL No. 18/42

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

BEFORE: Gordon Smith, C. J., Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

1. Safieh Abed Omar,
2. Fatmeh Ahmad el Haj. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Dying statements — Three statements made by deceased — Trial Court

rejecting first statement for lack of proof that it had been made shortly after offence — Statement made during transportation of deceased to hospital admitted in evidence, CR. A. 14/38 — Last declaration of deceased admitted by majority of Court — Possibility of majority rulings — Admissibility of dying statements, Evidence Ord., Sec. 8 — Meaning of word "mistwi" — Impossibility of fixing actual time of offence — Inconsistencies in several statements of deceased — No necessity for corroboration of dying statement — Circumstantial evidence — Motive — Sentence.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 6th of February, 1942, in Crime No. 206/41, whereby the Appellants were convicted of manslaughter, contrary to Sections 212 and 213 of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonment :—

HELD : 1. A ruling given by a two-third majority was a ruling of the Court and there was nothing illogical in a member of the Court considering the contents of a document or a statement and founding a verdict thereon, when his opinion as to the admissibility thereof had been overruled by a majority.

2. The last declaration of the deceased had been made when the deceased was dying and believed himself to be dying ; there was no proof of anything in the nature of cross-examination although the deceased had of necessity been asked questions and there was nothing objectionable in that the actual questions asked had not been recorded. The statement was, therefore, rightly admitted in evidence.

3. (Referring to CR. A. 14/38) : The statement made by the deceased during his transportation to hospital was also properly admitted as having been made "shortly after the act of violence was committed, or so soon after as he had an opportunity of complaining of it — —".

4. The first statement made by the deceased had been wrongly rejected by the District Court as it had also been made shortly after the offence had been committed.

5. The several statements made by the deceased were not inconsistent with each other.

6. There was no rule of law or of practice requiring the details of a dying statement to be corroborated.

7. As the deceased had been killed in a brutal manner the sentence of 10 years' imprisonment was not too severe.

REFERRED TO : CR. A. 14/38 (1938, 1 S. C. J. 121).

ANNOTATIONS :

1. On the first point *cf.* CR. A. 54/41 (1941, S. C. J. 183).

2. See, on early complaints, CR. A. 14/38 (*supra*) and notes, CR. A. 71/38 (1938, 2 S. C. J. 45) and note 1, CR. A. 29/40 (1940, S. C. J. 123), CR. A. 104/40 (*ibid.*, p. 395) and CR. A. 138/40 (*ante*, p. 48).

3. On dying statements *vide* CR. A. 7/42 (*ante*, p. 41) and note.

FOR APPELLANTS : No. 1 — Goitein.
No. 2 — Mogannam.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

As this appeal raised several questions as to admissibility of statements made by a deceased, and also the weight to be attached to such statements, if admissible, we reserved judgment in the matter.

The two Accused were charged jointly with and convicted of the manslaughter of Mohammad Hassan Hamad by stabbing him with a dagger and striking him with stones. The date and place of the offence was given as being the 6th May, 1941, at Givat Sha'ul locality, and although the actual time of day is somewhat uncertain, it is clear that the deceased received these injuries sometime between 3 *p. m.* and 6 *p. m.*, and he died the following morning in hospital. The cause of death was shock and internal poisoning due to ruptures of stomach and *rectum* whereby the contents of stomach and *rectum* were spilled into the abdominal cavity. He had also received a stab wound on the lower right side of the chest penetrating to the cover of the lung and upper surface of the liver. There were, in addition, eleven small skin wounds on the head and scratches on the hands and knees. There was no external injury on the surface of the abdomen. Neither the head injuries nor the stab wound were the cause of death.

The facts very briefly are as follows :—

The deceased and his wife were, that afternoon, sitting by a Biscuit Factory when the two Accused passed and greetings were exchanged. Shortly afterwards the wife went home and the deceased followed or went off in the same direction as the second Accused, which was towards some waste and rocky ground.

A witness, Sallah, who worked at the Diskin Orphanage and lived at Ain Karim, left his work as usual at 5 *p. m.*, proceeded home to his village and then, presumably taking a short cut amongst this rocky ground, saw two women, one standing on a rock and the other near the corner of a shed. He did not identify them as the two Accused but said they had ordinary peasant dress on, and he saw no one else there and was not accustomed to see women amongst these rocks.

Another witness Niman Mohammad who knew deceased, was also going home accompanied by Mohammad Ahmad, the son of the elder Accused when they met the two Accused by the Diskin Orphanage walking down the hill where it was all rocky land, called Givat Sha'ul

Quarter ; one or other, or both the Accused, spoke to Mohammad Ahmad and told him, "Go back, your uncle Jamil has fallen", and for some reason or other they cursed him. Anyhow, Mohammad Ahmad returned with the second Accused towards the main road. This witness then went towards the main road and seeing a small boy running spoke to him, as a result of which he went back to Givat Sha'ul and found a number of people gathered round the deceased who was wounded. He stated that when he met the two Accused they were at a spot about one kilometre from the place where deceased lay.

Apart from subsequent statements made by the deceased this is practically all the evidence against the two Accused, but it is significant that both the Accused made statements to the Police, each denying that they were in that neighbourhood at all that day, did not see the deceased at all that day but were at home, and gave the names of witnesses who could substantiate their statements. Neither of the Accused gave evidence nor were any witnesses called for the defence.

The first witness called in the Court below was P. C. Deeb Rashid. He was the first policeman on the scene, having been summoned, and he stated that he reached the injured man about 5.35 *p. m.*, and he spoke to him. The Court ruled by a majority that the deceased's reply was inadmissible, as there was nothing at that stage of the proceedings to show that the statement had been made *shortly* after the act of violence had taken place and within Section 8 of the Evidence Ordinance.

Subsequently, deceased was removed to hospital in a taxi and on the way he made a statement to P. C. Spiegelstein, who recorded it at the time and obtained deceased's thumbprint to it on arrival at the hospital.

According to the doctor the deceased arrived at the hospital at 6.20 *p. m.* unconscious, but it is in evidence that a statement was obtained from the deceased at 7.30 *p. m.* by P. C. Jamil. I will refer to this last statement as the Dying Declaration.

Now, as I have stated, that first statement made to the first witness, P. C. Deeb Rashid, was rejected at that stage by a majority of the Court below, nor was it admitted at any subsequent stage, and we do not know the contents.

The Dying Declaration was, after an adjournment, admitted by a majority of the Court, and similarly the statement to P. C. Spiegelstein was admitted, but unanimously, in view of a ruling in Criminal Appeal 14/1938, Vol. 5, P. L. R. p. 129, and in view of the facts, as being "*shortly after*" the injuries were received.

Although it was argued before us that a ruling by a two-third

majority was not a ruling by the Court, we had no hesitation in rejecting this submission, and there is nothing illogical in a member of the Court, although dissenting on a point of admissibility of a document or statement, considering the contents of such document or statement and founding a verdict thereon, when his opinion as to its admissibility has been over-ruled by a majority.

Every conceivable argument was put before us most strenuously as to why this Dying Declaration was inadmissible both because of the recorded details and words used, and as to the manner and circumstances in which it was obtained and recorded. It was argued that the witness who recorded it was unreliable — that there had been cross examination of the deceased and that the interpretation was also unreliable, and that the deceased had not that settled hopeless conviction of death sufficient to render the statement admissible. I would observe hat Section 8 of the Evidence Ordinance reads, "..... or made when the person was, or believed himself to be, dying as a direct consequence of the act of violence.....". The doctor stated that he told the deceased, "Your condition is very dangerous — you may die any time, and here is a Policeman coming to take your statement." As recorded, the deceased replied, "I see that I am in danger and I am —" and deceased used the words "*Ana mistwi*". Considerable discussion took place before us as to the colloquial and literal meaning of "*mistwi*", and whether it meant "exhausted", "finished", "ripe" or "ready", as in cooking or whether there are other words in Arabic that can be used for "death" or "dying". We are quite satisfied, as was the Court below, that in fact the deceased was not only dying but believed himself to be dying. We are also satisfied that there was nothing in the nature of cross examination, although questions must have been asked the deceased, as is clearly indicated by the statement itself in regard to the dagger and to Jamil Kafieh, but we see nothing objectionable in not having recorded the actual questions asked, in this instance. We are satisfied that the statement was properly admitted as a dying declaration.

As regards the statement made to P. C. Spiegelstein, we also agree that the Court below properly admitted this statement and for the reasons then given. Such statement is, under Section 8 (*supra*), admissible "if made at the time or shortly after the act of violence was committed or so soon after as he had an opportunity of *complaining of* it...". In my opinion the earlier statement to P. C. Deeb Rashid was also admissible, but there was no subsequent attempt to bring this one in at a later stage. It is quite impossible to fix definitely the actual minute of the act of violence, particularly in view of the complete

absence of any eye witness, but it is reasonable to suppose that it was not earlier than 4.30 *p. m.* and not later than 5.30 *p. m.*, and this statement was made by the deceased when being taken to hospital by the Police, about 6.10 *p. m.* In my view that comes within the expression shortly after, having regard to all the circumstances.

Then, so it was argued, the statements are themselves inconsistent with each other and with other evidence, for example that in the one statement he stated he was stabbed in the belly, in the Dying Declaration he said in the abdomen — whereas according to the medical evidence, although seriously injured in the abdomen or belly, the actual stab wound was in the lower right side of the chest. Taking into consideration the nature of the injuries, it is not surprising that the deceased did not describe in anatomical terms the exact spots or the exact manner in which he was injured.

Similarly, in the statement he refers to both Accused and Jamil as having stabbed him, whereas in the Dying Declaration he gives clearer details and even goes so far as to say that he did not know whether Jamil struck him or not. And, moreover, it is more than likely that in the car the Police Constable asked him who stabbed him, as there were no visible and external signs of the injuries to the abdomen, and it was the chest wound that was bleeding. In reply he probably meant to convey that it was all three who had assaulted him. But it is significant that Jamil must have been there, as disclosed by the women themselves to the witness Niman, on whom the Court below placed great reliance.

Further, it was submitted that there was no corroboration of these statements and that it would be wholly unsafe to convict on such evidence. I know of no rule of law or of practice that requires the details of a dying declaration to be corroborated. In the absence of eye witnesses, evidence must necessarily be circumstantial, and the presence at least of these two women at this rocky place is amply substantiated, in spite of their denials, and there is a motive certainly suggested by the widow of the deceased and by other circumstances of the actual injuries. All these facts were very closely considered by the Court below and there was justification for the Court drawing attention to the fact that all these statements were uncontradicted on oath by the very persons best qualified to do so, if their statements to the Police were true. The Court below found that there was no reasonable doubt about the guilt of the Accused, and we are quite unable to say that the Court has erred in this respect.

There is nothing to distinguish between the guilt of the two Accused, and the appeal is dismissed.

As regards the sentence, although we feel that the whole story as to the relations between the younger Accused and the deceased has not been brought before the Court for obvious reasons, and that by reason thereof the Accused may have given some just cause for feelings of resentment and ill-will, the deceased was killed by these women in a brutal manner and we are unable to say that the sentence is too severe, to run from date of hearing of appeal, *i. e.* 25th February, 1942.

Delivered this 18th day of March, 1942.

Chief Justice.

CIVIL APPEAL No. 223/41.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Yacub Abdel Rahim el Hirbawi,
2. Muhammad Rashid el Hirbawi,
3. Hafiz, son of the late Ahmad el Hirbawi, on behalf of the estate of the late Ahmad el Hirbawi. APPELLANTS.

V.

1. Amin Ahmad Diab, on behalf of all the heirs of Ahmad Diab,
2. Mamduh Ibn Muhammad Sharif el Nuss, on behalf of all the heirs of Muhammad Sharif el Nuss who died during the proceedings. RESPONDENTS.

AND

1. Muhammad Rashid el Hirbawi,
2. Hafiz, son of the late Ahmad el Hirbawi, on behalf of the estate of the late Ahmad el Hirbawi. APPELLANTS.

V.

Amin Ahmad Diab, on behalf of all the heirs of Ahmad Diab & 10 ors. RESPONDENTS.

(By order of the Supreme Court dated 14th January, 1942).

Partnerships — Action filed when one partner already dead — Second partner deceased during proceedings — Action improperly brought in partnership name — Allegation that action brought in name of Syrian partnership — Foreign partnership through forming a partnership in Palestine is carrying on business in Palestine — No right of foreign partnership to sue in Palestine, Partnership Ord., Secs. 70 and 74, C. A. 83/27, C. A. 194/33 — Point not taken at trial.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 17th of October, 1941, in Civil Case No. 129/36 :—

HELD : 1. The partnership had been dissolved by the death of one of the partners and the action could not be brought in the partnership name.

2. (Referring to C. A. 83/27, C. A. 194/33) : The Syrian partnership, by forming a partnership in Palestine was carrying on business in Palestine and, as it was not registered, constituted an illegal body and could not sue in Palestine.

3. As the action could never have been brought the judgment of the District Court could not stand, regardless of whether these points had been taken at the trial or not.

REFERRED TO : C. A. 83/27 (1, P. L. R. 206, C. of J. 1427) ; C. A. 194/33 (2, P. L. R. 289, C. of J. 1443).

ANNOTATIONS :

1. See, on the first point, Partnership Ordinance, Sec. 39(1).

2. On the meaning of "carrying on business" see note 1 to C. A. 58/41 (1941, S. C. J. 216).

3. On the right of foreign companies and partnerships to sue in Palestine *vide* C. A. 140/26 (1, P. L. R. 99, C. of J. 342), C. A. 194/33 (*supra*) and C. D. C. T. A. 55/39 (Tel-Aviv Judgments, 1940, p. 3, on p. 6). *Cf.* C. A. D. C. T. A. 232/37 (*ibid.*, 1937, p. 40).

4. See, on the last point, C. A. 179/41 (1941, S. C. J. 629) and note 2.

FOR APPELLANTS : No. 1 — Abcarius.
No. 2 — Eisenberg.

FOR RESPONDENTS : Nos. 1—10 — Eliash & Kehaty.
No. 11 — In person.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, whereby the Appellants as heirs of one Ahmad el Hirbawi, deceased, were ordered to pay LP. 423 on the basis of certain promissory notes to the Respondents on behalf of the estate of one Mohammad Sharif el Nuss and Ahmad Diab. The action was originally filed in the name of a partnership called "Ahmad Diab and Mohammad Sharif el Nuss".

Before the action was filed, one of the partners had already died and during the course of the action the other partner died. Now, it is clear that the partnership was dissolved by the death of one of the partners and it is quite impossible to understand how the action could have been brought in the partnership name. Mr. Kehaty, Respondents' advocate, at the hearing before us, suggested that the heirs of the deceased partners stepped into the shoes of the deceased as far as the partnership was concerned. There is, however, no evidence that the surviving partner ever assumed the heirs as partners nor is there evidence of any agreement between the original partners that, in the event of the death of one of them, the partnership should continue with the surviving heirs of the deceased. A certain trade circular was produced ; but that document proves nothing. It is apparent, therefore, that at the time when the action was brought, there was no proper partnership in existence, and it is difficult to understand how any proper action could have been instituted.

Now, Mr. Kehaty at the hearing before us, said that the action was brought by a Syrian partnership. He says that the Syrian partnership was entitled to sue on bills for debts owing to it by a guarantor. He says that the action was brought on behalf of the Syrian partnership and not on behalf of the Palestine partnership. His argument is that the partnership in Syria entered into a partnership in Palestine composed of the Syrian partnership as one partner and one Yacob Hirbawi of Hebron, Palestine, as the other partner. He says that it was the Syrian partnership which were Plaintiffs and he contends that the Syrian partnership was entitled to bring an action in Palestine without being registered in Palestine, and in support thereof he cited C. A. 194/33, P. L. R. Vol. 2, p. 289. He denies that Hirbawi was an agent for the Syrian Partnership. He says that Hirbawi was not a member of the Syrian Partnership. Reference was also made to Civil Appeal 83 of 1927, P. L. R. Vol. 1, p. 206.

Now, it seems clear to us that the Syrian partnership, by forming a partnership in Palestine, must be regarded as carrying on business in Palestine. It was not registered in Palestine and therefore it was an illegal body under Section 70 of the Partnership Ordinance, and it could not sue in Palestine. We refer also to Section 74 of the Partnership Ordinance. Evidence was taken on commission in Syria and it is clear from that evidence that the Plaintiff firm was carrying on business in Palestine with Hirbawi. Mr. Kehaty argues that, because certain matters were not argued in the Court below and because of the fact that certain matters were not contested in the Court below, the Appellant cannot take those points now. If, however, the action could never

have been brought it seems clear to us that the judgment cannot stand. Certain other matters were argued ; but it is unnecessary to deal with them. The appeal should be allowed on one point alone, namely, that at the time when the action was brought one of the partners was dead and the partnership therefore no longer existed. It is equally clear, however, that the appeal should be allowed on the ground that the partnership was carrying on business in Palestine and was not registered and was consequently illegal and therefore could not sue. We accordingly allow the appeal and set aside the judgment of the District Court and the action of the Respondents is dismissed with costs here and below, that is, against Respondents 1 to 10 inclusive, costs of this appeal to be taxed on the lower scale and to include an advocate's attendance fee of LP. 10 to each advocate.

Delivered this 18th day of March, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 37/42.

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

BEFORE : Gordon Smith, C. J., Copland and Frumkin, JJ.

IN THE APPEAL OF :—

1. Nissim Reuven,
2. Yehoshua Becker. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Robbery and murder — Jurisdiction of Court of Criminal Assize to convict of robbery, Palestine O. in C., Art. 40 and 41, Courts Ord., Sec. 11, Criminal Procedure (T. U. I.) Ord., Sec. 52 — Proof of robbery in the case condition precedent for conviction on murder charge — Identity of Appellants — Killing in order to secure escape statutory murder by Palestinian Law, C. C. O., Sec. 214(d) — Sentence — Recommendation for mercy.

In dismissing an appeal from the judgment of the Criminal Assize Court sitting at Jerusalem, dated the 6th of March, 1942, in Criminal Assize Case No. 2/42, whereby the first Appellant was convicted of robbery, contrary to Section 288(1) of the Criminal Code Ordinance, and the second Appellant was convicted of murder, contrary to Section 214(d) of the Criminal Code Ordinance, 1936, and

sentenced, the first Appellant to fourteen years' imprisonment, and the second Appellant to death :—

HELD : 1. By virtue of the provisions of Article 41 of the Palestine Order-in-Council Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance was not *ultra vires* and the Court of Criminal Assize had jurisdiction to try and convict of non-capital offences.

2. In the present case the charge of murder specifically referred to the offence of robbery and it was a condition precedent to a possible conviction for murder that the offence of robbery be proved.

3. The identity of the first Appellant was sufficiently established.

4. Whatever the provisions of the Common Law, the second Appellant had rightly been convicted of murder under Section 214(d) of the Criminal Code Ordinance as he had caused the death of a person in order to secure his escape after having committed an offence.

5. The sentence of fourteen years imposed upon the first Appellant was not excessive.

6. The Court of Criminal Appeal was not entitled to make recommendations for mercy.

ANNOTATIONS :

1. Note that the first point has already been decided in CR. A. 5/39 (1939, S. C. J. 38, at p. 40).

2. See, on the second point and, generally, on Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, CR. A. 54/38 (1938, 1 S. C. J. 340) and note 1. *Cf.* CR. A. 5/39 (*supra*) and CR. A. 59/39 (1939, S. C. J. 492).

3. On evidence as to identity *vide* CR. A. 118/41 (1941, S. C. J. 419) and note 1.

4. On the last point see CR. A. 83/41 (1941, S. C. J. 266) and note 2.

5. The sentence imposed upon the second Appellant has since been commuted.

FOR APPELLANTS : Seligman and Kritzman.

FOR RESPONDENT : Crown Counsel — (Hogan & Rigby).

JUDGMENT.

The two Accused were tried together, being charged jointly with the murder, under Section 214(d) of the Criminal Code Ordinance, 1936, of one Federman. After a long trial, followed by a reasoned and analytical judgment, the Accused Reuven was found not guilty of murder but guilty of robbery, such being the relevant offence referred to in the charge, and he was sentenced to fourteen years' imprisonment. The second Accused, Becker, was found guilty of murder, and the consequential sentence was passed. Both Accused appealed, and both appeals were dismissed without calling on Counsel for the Prosecution, and the Court intimated that as Counsel for the Accused had raised

several novel points of construction, which had not apparently been raised in previous similar cases, a short written and considered judgment was desirable.

On behalf of Reuven it was submitted that the Court had no jurisdiction to convict him of robbery, with which offence he had not been separately charged. In support of this contention it was argued that as Article 41 of the Order-in-Council conferred exclusive jurisdiction on the Court of Criminal Assize to try capital offences, and that as by Article 40 District Courts had jurisdiction to try other and lesser offences, therefore the conviction on a non-capital offence by the Court of Criminal Assize was *ultra vires*. It was also argued, in effect, that Section 11 of the Courts Ordinance confirmed this view and that as the Criminal Procedure (Trial Upon Information) Ordinance did not and could not confer such jurisdiction, therefore Section 52 of such Ordinance was also *ultra vires*.

These are novel points, and it is not surprising that Counsel could not refer us to any earlier case giving a ruling on such points.

It is to be noted that Article 41 of the Order-in-Council, after providing for the constitution of a Court of Criminal Assize and its jurisdiction, goes on to read "and such other jurisdiction with regard to other offences as may be prescribed by Ordinance."

Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance reads as follows :—

> "The Court may find an accused person guilty of an attempt to commit an offence charged, or of being an accessory after the fact, or may convict him of an offence not set out in the information and without amendment of the information notwithstanding that such offence is one within the jurisdiction of some other Court to try upon information, or one which could be tried summarily :—
> "Provided that such offence be covered by the evidence in the case and by findings of fact necessary to establish it and does not render the accused person liable to a greater punishment than does any charge in the information."

It is, therefore, abundantly clear that there is no substance in this submission nor in the alternative submission that, having been charged with murder only, he could not be convicted of robbery, as this latter offence was in a different category to that of murder. This alternative submission is ruled out by the second paragraph of Section 52 above, as the charge of murder specifically refers to the offence of robbery and it was a condition precedent to a possible conviction for murder that the Court must come to the conclusion that robbery was committed or attempted.

Further, it would be rather astonishing, at this date, to find that

a Court of Criminal Assize could not, (as must have been done hundreds of times) on a charge of murder, convict an accused of the lesser offence of manslaughter and be compelled to order that such case should then go back for trial by a District Court on the lesser charge.

On the facts of this case as against Reuven it was urged that the Court had erred in drawing the inference that this Accused was one of those participating in the robbery and that there was nothing improbable in the possibility of the crowd having lost the scent and, so to speak, found another scent, — or have "changed foxes". The Court considered this possibility and rejected it and had no reasonable doubt about the matter. In view of the evidence, which showed a continuous chase of this Accused, although not continuous all the time by the same individuals, and that he was in view of one or more of the witnesses from the moment of the robbery until he finally threw away his revolver and gave up, we are not surprised that the Court below had no reasonable doubt, and it is quite impossible for this Court to say that the Court below erred in the slightest degree in drawing the inferences it did, and which were fully justified from the evidence and circumstances of the case.

As regards Becker, who was convicted of murder, it was submitted that on the same facts and circumstances under the English Common Law, he would only have been found guilty of manslaughter. Be that as it may, and we by no means assent to such proposition, the fact remains that he was neither charged nor tried under the Common Law of England but under a specific provision of the Criminal Code. Under this provision any person, who where an offence has been committed, causes the death of any person in order to secure the escape or avoidance of punishment in connection with such offence, of himself or others, is guilty of murder. Robbery, with violence, had been committed in broad daylight, the two robbers — of whom Becker was one — chased by a crowd of people ; they separated, and Becker was run to earth in a store, where shortly afterwards a minor gun battle took place with an armed policeman in plain clothes, and during the course of which a bullet from the revolver of Becker caused the death of one, Federman. Becker then escaped from this store and was again chased by several people, in the course of which he fired other shots, and was eventually secured after his ammunition was exhausted. These facts were all conclusively proved and come exactly within the scope and meaning of the words used in the section. It is quite immaterial that Becker had no intention to kill Federman, but he fired the shot which caused his death in order to secure his escape, and in fact he did secure his escape from this refuge, but fortunately, only temporarily.

As regards the sentences, that of fourteen years in respect of Reuven is not excessive, in view of the facts of the crime and in spite of his youth. As regards Becker, also a young man, it was suggested that this Court should recommend mercy on account of his youth and other factors.

It is not the duty of this Court to make recommendations in regard to the carrying out of death sentences, nor is this Court entitled to make any such recommendations.

Delivered this 26th day of March, 1942.

Chief Justice.

HIGH COURT No. 21/42.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPLICATION OF :—

Shlomo Wolstein. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Isaac Braun. RESPONDENTS.

Sale of mortgage — Discrepancies in valuations — Description in publications incomplete — Attempt to delay proceedings — No sufficient reason to cancel sale proceedings.

In refusing an application for an order directing the first Respondent to show cause why his order, dated 5.12.41, in Execution File No. 5168/39, Tel-Aviv, ordering execution to proceed (without any valuation and without new advertisements being published) should not be set aside ; and to show cause why no order was made at the hearing of Petitioner's application on 13.12.42, dealing with irregularities in the execution proceedings in the same file ; and to show cause why all execution proceedings in the said file, save the order of sale, should not be cancelled :—

HELD : The real reason for the application was to delay the sale and the small discrepancies in the valuations and publications were insufficient ground to cancel the proceedings.

ANNOTATIONS : *Cf.* H. C. 94/40 (1940, S. C. J. 547) and note 4 ; see also H. C. 26/41 (1941, S. C. J. 196).

FOR PETITIONER : Doukhan.

RESPONDENT : *Ex parte.*

ORDER.

The main complaint in this application is that there are certain discrepancies occurring in the valuations which were made in connection with the execution proceedings for the sale of the mortgaged property. Another complaint is that the advertising of the sale was erroneous in that a small store, three trees and a flower garden, the area of which does not exceed a total of three hundred square metres, have been omitted from the notices. But the real reason for the application is quite apparent — to delay further the proceedings. The execution proceedings were commenced in 1939, and we are now well into 1942, but it is true they were postponed for one year upon payment of LP. 300 on account.

We do not think that because of these small discrepancies the execution proceedings should be delayed any longer. In any event the mortgagor can always redeem the mortgage, even within three days of the final order of sale and before the registration of the property.

We see, therefore, no reason to grant the order *nisi*, and the application will be dismissed.

Given this 24th day of February, 1942.

Chief Justice.

CRIMINAL APPEAL No. 26/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Ismail Abdullah Abdul Razik. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Manslaughter — Confession, whether free and voluntary — Sentence.

In dismissing an appeal from the judgment of the District Court of Jerusalem in Criminal Case No. 355/41, dated 9.2.42, whereby the Appellant was convicted of the charge of manslaughter contrary to section 212 of the Criminal Code Ordinance, 1936, and sentenced to twelve years' imprisonment, and ordered to pay LP. 50 by way of compensation for the loss caused by the offence, and in reducing the sentence :—

HELD : 1. Confessions which are subsequently retracted should be accepted with reserve, but in this case there had been no objection to the statement when it had been put in and there was nothing to show that the Court below had erred in accepting the confession as free and voluntary.

2. As the weapon used by the Appellant was one which normally could not be expected to cause a lethal wound the sentence would be reduced from twelve years to seven years' imprisonment.

ANNOTATIONS :

1. On confessions see CR. A. 132/41 (1941, S. C. J. 626) and note 2.

2. On reasons for reduction of sentence *cf.* CR. A. 133/41 (1941, S. C. J. 501) and note 3.

FOR APPELLANT : Nashashibi.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem convicting the Accused of manslaughter and sentencing him to twelve years' imprisonment. The Appellant urges as his main ground of appeal, that a statement in the nature of a confession which was made to the police should not have been accepted by the Court, the suggestion being that this was not free and voluntary.

The question as to whether a statement is free and voluntary depends, of course, upon the circumstances in which it is taken and is eminently one of fact for the Trial Court to decide, and this Court is most reluctant to interfere with the Trial Court's decision in that matter unless there has been some manifest mistake or a wrong test has been applied. It is quite true, as counsel for the Appellant contends, that confessions which are subsequently retracted should be accepted with reserve but in this particular case not only was there no objection to the statement at the time when it was put in, but there was no serious suggestion in the cross-examination of the relevant witness that any improper conduct had taken place and it was not apparently until the final speech of counsel for the defence that the admissibility of the statement was seriously attacked. That being so, we think that there is no doubt that the Court below were right in accepting this statement as being free and voluntary.

In addition to this confession, there was the evidence of an eye-witness which the Court accepted. There is, of course, no ground on which we can interfere with their finding in that respect. That being so, as regards the conviction, the appeal must be dismissed and the conviction confirmed.

As to sentence, the conduct of the Accused in this case was very bad. According to the evidence of the prosecution, his action forced a quarrel upon the deceased, as a result of which the unfortunate man died. There are, however, certain factors that perhaps may be said to operate favourably to the Accused and the main one is the fact that the weapon which the Court below found as the one used, was, in fact, a weapon which normally one would hardly expect to cause a lethal wound unless the man was hit in an obviously vital spot such as the throat or the heart. In this case only one blow was struck in the course of the struggle and that was in the neigbourhood of the right breast. Normally one would not have expected death to result from such an injury, and to that extent the Accused is perhaps a little unfortunate in that this wound did result in death after 19 or 20 days from the time of the struggle.

We think, therefore, in all the circumstances, that the sentence of twelve years is on the high side and we reduce it to one of seven years from the date of the appeal.

Delivered this 19th day of March, 1942.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 27/42.

IN THE SUPREME COURT OF PALESTINE.

BEFORE : Gordon Smith, C. J.

IN THE APPLICATION OF :—

Avraham Gorochov. APPLICANT.

v.

Yvette Claudine Gorochov (née Raymond). RESPONDENT.

Application to determine what Court has jurisdiction, Palestine O. in C., Art. 55 — Civil marriage between Jew and non-Jewess — Both parties Palestinians domiciled in Palestine — Adultery — Nullity of marriage according to Jewish law — Adultery as ground for divorce according to Civil law — Applicability of law as at the time of celebration of marriage.

Application under the first part of Article 55 of the Palestine Order-in-Council to determine what Court has jurisdiction.

The application, after setting out the facts referred to in the Order, continued as follows :—

6. According to the Religious Law administered by the Rabbinical Courts of the Jewish Community, a marriage celebrated between a Jew and a non Jew, whether in Palestine or abroad, is null and void.

7. According to the Civil Law administered by the Civil Courts in Palestine, a marriage between a Palestinian Jew and a foreign non-Jewess, contracted abroad, in accordance with the Marriage Laws of that Foreign Country, is to be held valid and legal also in Palestine.

8. By virtue of Art. 47 and Art. 51 of the Order in Council, 1922/1939, the Civil Courts have jurisdiction to grant a Decree of Divorce to Palestinians who are not subject to the exclusive jurisdiction of any Religious Court of the recognized Communities.

9. On ground of the above, and if jurisdiction be conferred by Your Lordship either upon a Religious Court or upon a Civil Court, in accordance with Art. 55 of the Order in Council, Applicant desires to bring an action against Respondent before the Court so appointed, and will ask either for a Decree of Nullity of Marriage, under Religious Law, or for a Decree of Divorce, under Civil Law, on ground of the adultery committed by Respondent as aforesaid.

HELD : The District Court of Tel-Aviv would be given jurisdiction to try the action and should apply French Matrimonial Law as at the time the marriage was contracted.

ANNOTATIONS :

1. For other decisions under the first part of Article 55 of the Order in Council see Misc. Appl. 60/41 (1941, S. C. J. 448) and note.

2. On the invalidity of marriages between Jews and non-Jews according to Rabbinical Law *cf.* C. A. 38/41 (1941, S. C. J. 173) and note 3. See also C. A. 11/41 (1941, S. C. J. 230).

3. On the applicability of the *lex loci celebrationis* in such cases see Khayat *v.* Khayat (C. of J. 1244) and C. A. 11/41 (*supra, per* Frumkin, J. at p. 237 and *per* Khayat, J. at p. 238).

FOR APPLICANT : Silberg.

RESPONDENT : Absent — served.

ORDER.

This is an application by the Petitioner, Avraham Gorochov, made to me under the first part of Article 55 of the Palestine Order-in-Council for an order determining which Court shall have jurisdiction to deal with and decide in an action for a decree of nullity of marriage or a decree of divorce which the Petitioner intends to bring against the Respondent, his wife. The Petitioner states that he and the Respondent were married to each other by Civil Marriage in Paris, France, on the 12th January, 1939 ; that both are Palestinian citizens and hold Palestinian passports ; that the Petitioner is a member of the Jewish Religious Community and Respondent does not belong to any Religious Community and did not at the time of the marriage

belong to any Religious Community; that both Petitioner and Respondent are domiciled in Tel-Aviv, and that since the month of February, 1942, the Respondent, as alleged by the Petitioner, has been entertaining and is still entertaining intimate relations with a lover and has committed adultery on several occasions and he, therefore, prays for the order already referred to above.

After hearing Dr. Silberg for the Petitioner, I hereby order that the District Court of Tel-Aviv do have jurisdiction to try the action and to apply the French Matrimonial Law as at the time the marriage was contracted.

Given this 24th day of April, 1942.

Chief Justice.

CRIMINAL APPEAL No. 40/42.

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

BEFORE: Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

1. Nimer Hamad Daghmash,
2. Ghali Maslah Ghali,
3. Mahmoud Mustafa Burbara. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Confessions — Conviction for attempted housebreaking, C. C. O., Secs. 297(a) and 29(d) — Common sense tests to be applied in case of uncorroborated confession, CR. A. 19/38, CR. A. 132/41.

In allowing an appeal from the judgment of the District Court of Jaffa, dated 4.3.42, in Criminal Case No. 36/42, whereby the Appellants were convicted of the offence of attempt to break and enter a building with intent to commit theft therein, contrary to section 297(a) and 29(d) of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment each :—

HELD: (Following CR. A. 19/38, CR. A. 132/41): The Court below had failed to apply the common sense tests required in case of confessions which are not supported by other evidence and the convictions would, therefore, be quashed.

FOLLOWED: CR. A. 19/38 (1938, 1 S. C. J. 199); CR. A. 132/41 (1941, S. C. J. 626).

ANNOTATIONS : See the annotations to CR. A. 132/41 (*supra*).

APPELLANT : In person.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

The three Appellants were convicted before the Jaffa District Court of attempting to break and enter a building with intent to commit theft therein, contrary to section 297(a) and 29(d) of the Criminal Code Ordinance, 1936, and were sentenced to three years' imprisonment each. The three Appellants were not defended by advocates in the Court below, neither was their appeal taken by an advocate here. Mr. Rigby, with that characteristic fairness which he always displays, admits to this Court that the only evidence against them is the evidence of alleged statements by the Appellants and he is unable to contend that the requirements laid down in Criminal Appeals 19/38 and 132/41 have been complied with. What those two judgments laid down was that certain common sense tests had to be applied to the confessions. The Court regrets to have to observe that this is the third or fourth time that we have had to lay down these rules and it is time that our remarks should be observed and acted upon. In this present appeal we cannot fail to remark that there is nothing to show that the learned Judges of the Court below applied their minds to the correct considerations, either in whole or in part.

The result is that the appeals of these three Appellants are allowed and the convictions quashed.

Delivered this 1st day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 196/41.

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

BEFORE : Gordon Smith, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Aziz Khayat & 6 ors. APPELLANTS.

v.

Magda Schantz, as guardian of Erica

Elizabeth Unger,
heir of the late Johanna and Hans Unger,
and heir of Ruth Wilhelmine Unger,

2. The Custodian of Enemy Property,
representing the interests of :—
(a) Rudolf Jacob Unger and Hans Unger,
heirs of the late Johanna and Hans
Unger, and heirs of Ruth Wilhelmine
Unger,
(b) Fritz Ernst Unger, as heir of Ruth
Wilhelmine Unger. RESPONDENTS.

AND

Aziz Khayat & 6 ors. APPELLANTS.

v.

1. Magda Schantz, as guardian of Erica
Elizabeth Unger,
heir of the late Johanna and Hans Unger,
and heir of Ruth Wilhelmine Unger,
2. The Custodian of Enemy Property,
representing the interests of :—
(a) Rudolf Jacob Unger and Hans Unger,
heirs of the late Johanna and Hans
Unger, and heirs of Ruth Wilhelmine
Unger,
(b) Fritz Ernst Unger, as heir of Ruth
Wilhelmine Unger. RESPONDENTS.

(By Order of the Supreme Court, dated 24th February, 1942).

Right to appeal — Action for partition, Magistrates' Courts Jurisdiction Ord., Sec. 3(d) — Claim that part of land in undivided ownership — Magistrate granting adjournment to enable claimant to establish his rights in a competent Court — Appeal against order for adjournment — Whether appeal possible, Magistrates' Corts Jurisdiction Ord., Sec. 11 and 26, Civil Procedure Rules, Rules 313 seq. and 334, Magistrates' Courts Procedure Rules, Rules 2 and 240 — Meaning of "judgment" and "decree" — No appeal from order for adjournment.

In allowing an appeal from the judgment of the District Court of Haifa, sitting as a Court of Appeal, dated the 27th of June, 1941, in Civil Appeal No. 27/41, and in restoring the order of the Magistrate :—

HELD : 1. No appeal lay as of right from an order of a Magistrate granting an adjournment, whatever the reasons for such adjournment.

2. The Respondents should have waited for the Magistrate to give

a preliminary decision to proceed with the partition in which case they could have asked for a decree to be drawn up and could have appealed against such decree.

ANNOTATIONS : On "judgments" and "orders", see Digest, Vol. 30, p. 122 *passim*. *Cf.* C. A. 41/40 (1940, S. C. J. 244) and note 3 and C. A. 234/41 (1941, S. C. J. 545) and note 1.

FOR APPELLANTS : No. 1 — Atalla.
Others — Weinshall.

FOR RESPONDENTS : No. 1 — J. Levy.
No. 2 — absent — served.

JUDGMENT.

This was an action before the Magistrate's Court claiming partition of certain land, for which jurisdiction is conferred by paragraph (d) of Section 3 of the Magistrates' Courts Jurisdiction Ordinance, 1939, and the matter was, therefore, properly before the Magistrate.

It transpired during the course of the proceedings that one of the owners claimed that the whole of a certain parcel which it was proposed to include in the partition, was in this owner's possession independently, and was not co-owned by him with the other owners. The value of this disputed piece of land was such that the Magistrate had no jurisdiction to adjudicate on this claim of ownership. He was, therefore, in the position that if he proceeded with the partition he would, in effect, be adjudicating upon the question of ownership, that is, whether he included the disputed parcel of land in his order for partition, or whether he excluded it. He, therefore, gave a judgment in the following terms :—

> "I decide to grant Mr. Levy, the Attorney of Defendants, a period of 15 days to apply to the competent Court regarding the sole independent ownership of this parcel by his clients, and to adjourn the hearing to 20.2.41, and both parties are informed accordingly".

This judgment was given on the 5th February, 1941, but we understand that thereafter the period of fifteen days mentioned was extended to thirty days.

Against this decision there was an appeal to the District Court, and the preliminary objection was taken at the hearing of this appeal that this order or judgment was not appealable. The District Court held otherwise and dealt with other points taken on the appeal, and sent the case back to the Magistrate for ascertainment as to various facts.

Against this decision of the District Court the Appellants bring the matter before the Supreme Court on various grounds, but if we decide

that the decision of the Magistrate was not appealable, then the whole judgment of the District Court on appeal must be set aside. It is necessary, therefore, to decide this point first.

In the first place, the Magistrates' Courts Jurisdiction Ordinance, by Section 11(5), allows an appeal, as of right, in a partition matter before a Magistrate's Court, and Section 11(10) states that any such appeal shall be heard in accordance with the Civil Procedure Rules. These Rules, however, do not deal with the point in question but detail how such an appeal shall be proceeded with, *vide* Rule 313 *et seq.* and Rule 334. The Magistrates' Courts Procedure Rules, 1940, have however been enacted and are relevant, having been made under the authority of the Order-in-Council, and Section 26 of the Magistrates' Courts Jurisdiction Ordinance, 1939. Rule 240 refers back to the Ordinance but Rule 2 defines what is a judgment and what is a decree. A judgment is defined as meaning "the statement given by a Magistrate of the grounds of a decree", and a decree is defined as meaning 'the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final.

It was submitted before us on behalf of the Respondents that the Magistrate, by reason of the concluding part of the judgment, which I have quoted above, decided the rights of the parties by giving the Respondent time to bring an action to have his rights declared therein.

No formal decree was ever drawn up or entered, and in my view the only thing the Magistrate decided was to adjourn the hearing, to enable the Respondent to take whatever action or steps he might think fit to safeguard his alleged rights.

The Magistrate does not proceed with the partition, gives no decision, exclusive or otherwise, on any matter in dispute, and merely states in effect that a claim has arisen therein which he has no jurisdiction to adjudicate upon, and, therefore, he adjourned the matter to enable such claimant to establish his alleged right before a competent Court or not, as he thought fit.

No appeal from an order by a Magistrate granting an adjournment lies as of right. The Respondent has as yet not brought such action to establish his alleged rights, but appealed against the decision granting such adjournment, and before the District Court an objection was taken to such appeal, which was overruled.

If the Respondent had waited for the adjourned hearing before the Magistrate, the Magistrate might then possibly have proceeded with

the partition, and upon the Magistrate giving a preliminary decision so to proceed with the partition, the Respondent might have asked for a decree in that respect to have been drawn up and entered, and against which the Respondent might have appealed.

The reason for the adjournment given by the Magistrate was really unnecessary, as the Respondent might at any time, and without the Magistrate specifically giving him time to do so, or authority to do so, take action in the proper Court to establish his alleged rights. If the Magistrate had proceeded with the partition and made an order thereon which prejudiced the Respondent in his alleged rights, then equally the Respondent would have had the right to appeal against such order.

In my view the District Court erred in the respect that an appeal lay from the order of the Magistrate's Court, and the order of the District Court, allowing the appeal, should be set aside. It is, therefore, unnecessary to go into the other grounds of appeal, and on which it was also urged that the District Court had gone wrong.

The order will, therefore, be that the judgment of the District Court on appeal is set aside, the effect of which will be that the order of the Magistrate's Court, granting an adjournment, remains effective.

The Respondent must pay the costs of both appeals, including attendance fee of LP. 5.— each.

Delivered this 26th day of March, 1942.

Chief Justice.

CRIMINAL APPEAL No. 38/42.

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

BEFROE : Copland, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Mustafa Abdel Rahman Hassan Ighneim. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Murder — Sufficiency of evidence — Findings of fact — Credibility of contradictory evidence — Premeditation.

In dismissing an appeal from the judgment of the Court of Criminal Assize sitting at Jerusalem, in Criminal Assize Case No. 6/42, dated the 12th March,

1942, whereby the Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. There was conclusive evidence that the Appellant had fired the shot which killed the deceased.

2. The Trial Court had made sufficient findings of fact to support the conviction.

3. It was for the Court below to sort out the evidence and to say what they believed and what they did not believe.

4. There was clear proof of premeditation.

ANNOTATIONS :

1. See, on the second point, CR. A. 54/41 (1941, S. C. J. 183) and note 2.
2. On the third point *cf.* CR. A. 5/42 (*ante*, p. 31) and note 1.
3. On premeditation *vide* CR. A. 12/42 (*ante*, p. 74) and note 4.

FOR APPELLANT : Moghannam.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

We need not trouble you, Mr. Rigby.

The Appellant was convicted of murder before the Jerusalem Assize Court of one, Hassan Ahmad Ighneim, on the 16th day of June, 1941, at Zakaria village, and was sentenced to death. There was evidence which the Court of Trial believed, which they were entitled to believe, that this Appellant came up to the courtyard where the deceased and others were sitting and without saying anything fired at the deceased with a rifle and killed him. That evidence is supported by two witnesses, Hussein and Fatmeh. Both stated that the Appellant was armed with a rifle. Hussein says he did not actually see the Accused aiming but Fatmeh says she did see him aiming. Whether those witnesses were speaking the truth is eminently a matter of credibility, which is entirely for the Assize Court, but there was further conclusive evidence that an empty cartridge case picked up on the scene of the crime had been fired from the rifle which was found in the possession of the Appellant when arrested. That evidence, of course, is absolutely conclusive that the shot was fired from that rifle, and, connected with the evidence of Fatmeh and Hussein, proves beyond a shadow of doubt that it was this Accused who killed the deceased.

Mr. Moghannam, for the Appellant, has argued that there was no finding of fact before the Trial Court. The last sentence of the judgment reads :—

"On those facts which I have briefly detailed, there is no reasonable

doubt whatsoever in our minds as to the guilt of the Accused, and we, therefore, find him guilty of murder."

Whatever more definite finding of fact is required, we must confess we fail to see. The fact that there was contradictory evidence has also been stressed on the appeal, but that is entirely for the Assize Court and it is for them to sort out the evidence and to say what they believe and what they do not believe.

Finally it is argued that premeditation has not been proved as required by the law. On the facts of this case the Court finds it difficult to see how there could be a clearer case of premeditated murder.

There are no reasons for disturbing the verdict of the Court below. The appeal is, therefore, dismissed and the conviction and sentence of death are confirmed.

Delivered this 31st day of March, 1942.

British Puisne Judge.

HIGH COURT No. 8/42 & 9/42.

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

BEFORE : Gordon Smith, C. J., Frumkin and Khayat, JJ.

IN THE APPLICATIONS OF :—

H. C. 8/42.

Registrar of Trade Marks. PETITIONER.

v.

1. Paldag Ltd.,
2. Frankenthal and Company. RESPONDENTS.

H. C. 9/42.

Registrar of Trade Marks. PETITIONER.

v.

1. Paldag Ltd.,
2. Frankenthal and Company. RESPONDENTS.

Trade Marks — Reference by Registrar of Trade Marks under Trade Marks Ord., Sec. 17(6) *— Rival applications for registration of same mark — Affidavits — Right to mark by prior user — Licence to use for certain period — Right never sold or abandoned but only suspended — Prior user entitling to registration.*

In deciding an application by the Registrar of Trade Marks for an order adjudicating as between the rival claimants as to the ownership of the trade mark forming the subject matter of the dispute :—

HELD : 1. The second Respondent had by previous user acquired and established a right to the user of the unregistered trade mark, and the use of the mark by the first Respondent during 1939 and 1940 was by licence from the second Respondent.

2. The said right of the second Respondent had not been abandoned, nor sold, but having merely been suspended during a prescribed period, it reverted to the second Respondent on the expiration of such period.

ANNOTATIONS : *Cf.* H. C. 68 & 71/41 (1941, S. C. J. 387) and note.

PETITIONER : Absent — served.

FOR RESPONDENTS : No. 1 — Seligsohn.
No. 2 — Goitein.

JUDGMENT.

This was a reference by the Registrar of Trade Marks under Section 17(6) of the Trade Marks Ordinance, No. 35 of 1938, arising out of two applications for registration of a trade mark by (a) Paldag Ltd. (hereinafter referred to as "the Company"), being application No. 5812, filed on the 16th September, 1941, and (b) Frankenthal and Company (hereinafter referred to as "the Firm"), being application No. 5814, filed on the 18th September, 1941.

The Applicants having failed to come to an agreement, the matter was brought before the Court by reference by the Registrar, dated the 21st January, 1942.

Affidavits on behalf of the Company, dated respectively the 3rd and 4th February, 1942, by Mr. Kaufmann, a director, and his wife, Mrs. O. Kaufmann, who designed some labels, were filed, and similarly an affidavit by Mr. Leo Frankenthal, dated the 16th February, 1942, was filed on behalf of the Firm, but on being served with copies of the two affidavits of the Company Mr. Frankenthal filed a further affidavit, dated the 27th February, 1942, in reply thereto, and which in itself was replied to by a further affidavit by Mr. Kaufmann dated the 3rd March, 1942.

It is on the material contained in these affidavits upon which the Court has to come to the decision as to which Applicant is entitled to registration of the trade mark in dispute.

The trade mark itself mainly consists of the use of the word "Gold"

superimposed upon some local scenery, and the label is used in connection with and advertises a brand of soup cubes.

The main points which arise are (a) whether the Firm had, some time previously, acquired a right to the user of this unregistered trade mark, and if so, (b) whether, for a certain period, the use of the same by the Company was by licence of the Firm or otherwise, and (c) whether at the expiration of that certain period, the right of user reverted to the Firm or whether such right had been so abandoned and that the Company had retained such right.

All these points are questions of fact to be ascertained from the evidence put before the Court by way of affidavits, and after hearing the arguments of Counsel thereon, and after a close scrutiny and analysis of these affidavits, we have come to the following conclusions.

(1) In 1936 or thereabouts and possibly earlier, the Firm was importing a substantial quantity of soup cubes from abroad, which it repacked and labelled and distributed amongst its customers. To identify these particular soup cubes the Firm had invented the name "Gold" in English and "Zahab" in Hebrew.

(2) Amongst the Firm's customers in 1937 was the Company, and it is stated that the Company's sales of "Gold" soup cubes amounted to about 10% of the total sold or distributed by the Firm, but that during this year the Company sold also other brands of soup cubes. In 1938 these "Gold" cubes were sold only by the Firm and were not sold by the Company. These facts were not disputed, and we take them as being conclusively proved.

(3) Early in 1939 Frankenthal Senior arrived in Palestine and he and his son both invested money in the Company, the father becoming Managing Director. The Company then commenced selling "Gold" cubes again, having apparently acquired the existing stock from the Firm, and they also supplied the Firm's previous customers with this brand. These facts also are not disputed.

(4) Frankenthal Senior died in December, 1940, and the son as his administrator sold his father's shares in the Company and also his own shares.

(5) The son alleges that upon his father becoming Managing Director of the Company he agreed not to use the label or trade mark "Gold" as long as his father remained Managing Director, and he alleges that there is a Minute in the records of the Company to the effect that the Company was entitled to use this trade mark "Gold" only so long as the father remained Managing Director of the Company. The answer

to this allegation by Mr. Kaufmann is, in our opinion, equivocal, as it reads : "There is no record of any condition as to the reversion of the trade mark "Gold" to Mr. Leo Frankenthal or his Firm" (*vide* paragraph 3 of affidavit of 2/3/42). We are satisfied that there was such an agreement as alleged.

So far, we can answer the first point by saying that the Firm had by previous user acquired and established a right to the user of the unregistered trade mark, as previously described, and we are satisfied that the use of this trade mark during 1939 and 1940 by the Company was by permission of or by agreement with the Firm — in other words, by licence of the Firm. No contract for sale of this right or agreement other than alleged by the Firm has been substantiated by the Company. Such licence permitted the Company to use the trade mark while the father Frankenthal was Managing Director, and the son undertook not to exercise his right in this respect during this period. On the death of the father in December, 1940, such right and such undertaking ceased. It follows, therefore, that the right of the Firm not having been abandoned, nor sold, but being merely suspended during a prescribed period, reverts to the Firm on the expiration of that period.

This really concludes the matter, as there was no real dispute on the law on the subject, but subsequent events are of some interest.

It appears that, owing to war conditions, the import of these soup cubes ceased, and the Firm proposed to manufacture these cubes locally, and negotiations were entered upon between the Firm and the Company in August, 1941, on the terms set out in paragraph 4 of Mrs. Kaufmann's affidavit or 4/2/42, and provisional agreement was come to. It is noteworthy that it was not then disputed that the use of the word "Gold" was vested in the Firm, and the Firm undertook to reserve these "Gold" labelled and locally manufactured soup cubes exclusively for the Company. However, final agreement did not eventuate, and both Firm and Company put on the market their own and respectively locally manufactured cubes, advertised under different trade marks, the Firm's trade mark being the original label "Gold", and that of the Company being labelled "Star", and the Company specifically disclaimed any connection with the soup cubes labelled "Gold".

It is obvious that on the final breakdown of the provisional agreement of August, 1941, the Company endeavoured to forestall any application by the Firm, and sought to obtain registration of the word "Gold" in connection with their own soup cubes, before the Firm could do so in respect of their "Gold" soup cubes. There would, therefore, appear to be every justification for the statements contained

in the final paragraph of Mr. Leo Frankenthal's affidavit of the 16th February, 1941.

The order to the Registrar of Trade Marks will, therefore, be that the rights of the Firm Frankenthal & Co. to the use of the word "Gold" in respect of labels for soup cubes entitle the Firm to registration in that respect, and to the exclusion of the Company, Paldag Ltd.

The Company will pay the costs of the reference to include LP. 5.— in respect of each reference.

Delivered this 14th day of April, 1942.

Chief Justice.

CRIMINAL APPEAL No. 15/42.

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

BEFORE : Gordon Smith, C. J., Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Jules Khattar. APPELLANT.

v.

The Attorney-General. RESPONDENT.

False pretences, C. C. O., Sec. 301 — Inducing the Government to deliver a certificate of arrival in Palestine to another person — Numerous counts charged — Elements of offence of false pretences — Possibility of bona fide mistake — No evidence of intent to defraud — No evidence of obtaining.

In allowing an appeal from the judgment of the District Court of Nablus, dated the 12th of January, 1942, in Felony No. 69/41, whereby the Appellant was convicted of inducing by false pretences the delivery to another person of something capable of being stolen, contrary to Section 301 of the Criminal Code Ordinance, 1936, and sentenced on 27th January, 1942, to three years' imprisonment :—

HELD : 1. To establish a charge of false pretences, it is incumbent upon the prosecution to prove all the elements of the offence.

2. There was no evidence to show that the particulars given by the Appellant were false to the Appellant's knowledge, it being possible that he had made a *bona fide* mistake.

3. Neither was there any evidence of an intent to defraud, nor of obtaining any money's worth.

ANNOTATIONS : See, on false pretences, CR. A. 146/41 (*ante*, p. 22, at p. 27) and note 2.

FOR APPELLANT : Goitein.

FOR RESPONDENT : Junior Government Advocate — (Akel).

JUDGMENT.

The Accused was convicted by the District Court sitting at Nablus on the 12th January last of contravening Section 301 of the Criminal Code Ordinance, 1936, in that on or about the 26th July, 1939, he, together with one Freedman, with intent to defraud, induced the Government of Palestine to deliver to Hersch Herman Schrenzel a certificate of arrival by falsely pretending that he, the said H. H. Schrenzel, had arrived in Palestine on the 27th August, 1933, and passed through the immigration control at Haifa.

On the 27th January, 1942, the Accused was sentenced to three years' imprisonment.

Against this conviction and sentence he has appealed.

At the conclusion of the arguments on this appeal we were unanimously of the opinion that the conviction could not stand and we allowed the appeal, discharging the Accused, and we stated we would give our reasons subsequently.

It is unnecessary to go into all the details of these protracted proceedings and it is sufficient to state that originally the Accused and the said Freedman were charged together but have been tried separately, and it would appear that Freedman was the principal actor in the piece, but is now behind the scenes, and that the Accused had only a minor part to play. It is, however, necessary to state that the Accused was also simultaneously charged on 28 other counts, ranging from forgery, conspiracy to commit forgery, inducing by false pretences and corruptly receiving rewards, on all of which he was either found not guilty or they were withdrawn. It is not surprising that with this multitude of charges and connecting exhibits, it was extremely difficult to sift the necessary evidence on this one remaining charge out of a mass of admittedly unreliable evidence by admitted accomplices. It is also desirable to keep in mind the necessary ingredients of the offence charged, and as they are extremely relevant I do not apologise for setting them out. (1) There must be a false pretence made by the Accused. (2) The Accused must know it to be false. (3) There must be an obtaining of money's worth by means of such false pretence. And (4) there must be an intent to defraud. If the prosecution fails to prove each and every one of these ingredients, then the Accused is entitled to be acquitted.

It was submitted to us that there was no evidence at all to support the intent to defraud, and also that there was not only no finding but no evidence at all to the obtaining.

The alleged false pretence was in respect of particulars endorsed, admittedly by the Accused, on the back of Exhibit H. S. 1 under paragraph E., which gives certain details taken from the face of the form and a number, H. A/4539, was given as referring to a registration number assigned to the particular immigrant on his arrival. This number was, admittedly, incorrect. From this fact the prosecution alleged that it must be inferred that therefore it was a false pretence made by the Accused knowingly, with intent to defraud. The basis of this is that because of the Accused submitting this form to a higher authority with this incorrect detail, a certificate of arrival was subsequently issued to the applicant which would not have otherwise been issued.

The Accused's explanation was that he might have made a mistake or that the file from which he got the number was itself wrong. No file was produced in this respect and apparently many files are missing. Moreover, since the Applicant's arrival in 1933, the system of registering and filing entry forms has been changed. It is true that the number H. A/4539 referred to another immigrant, and the Accused admitted that he must have had some supporting document from which he took this number. The fact remains that it may have been made genuinely by mistake and through carelessness, or that the supporting document in itself was wrong. Assuming however that it was made falsely and deliberately and knowingly by the Accused, this does not obviate the necessity for proving the other ingredients of the offence. There is no evidence whatsoever of the intent to defraud nor of obtaining by the Accused any money's worth and these cannot be inferred merely from the fact that a person known to the Accused has been convicted of various offences in connection with illegal immigration.

Schrenzel's evidence did not, in itself, implicate the Accused, and it is an extraordinary fact that the Immigration Authorities at Tel-Aviv enquired specifically into Schrenzel's *bona fides* as an immigrant, and on finding them satisfactory wrote Exhibit J. K. 1 to the Assistant Commissioner. Apparently they also made a *bona fide* mistake, and it is not unreasonable to think that the Accused also made a *bona fide* mistake in putting in this wrong number. It must also be remembered that at the time of this man's entry in 1933 the system of registration was different, and there were no No. 10 forms then in existence. The learned Relieving President comments on the absence of this form.

As I have said there was no evidence from which either the necessary intent to defraud or the obtaining could be properly inferred, even assuming that the entry was knowingly false, and it may well be that the entry itself was made by mistake.

For these reasons, the conviction could not stand and the Accused was discharged.

Delivered this 18th day of March, 1942.

Chief Justice.

CRIMINAL APPEAL No. 41/42.

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

BEFORE : Copland, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Attieh Taleb Miswadeh. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Premeditation — No evidence that Appellant was lying in wait for the deceased — Conviction for murder quashed and one for manslaughter substituted.

In allowing an appeal from the judgment of the Court of Criminal Assize, sitting at Jerusalem, in Criminal Assize Case No. 8/42, dated the 9th March, 1942, whereby the Appellant was convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death, and in convicting the Appellant of manslaughter and sentencing him to twelve years' imprisonment :—

HELD : The evidence on the record did not justify the finding of fact that the Appellant had been lying in wait for the deceased. There was, therefore, no evidence of premeditation and the Appellant could only be found guilty of manslaughter.

ANNOTATIONS :

1. See, on premeditation, CR. A. 38/42 (*ante*, p. 194) and note 3.
2. On preparation *cf.* CR. A. 57/40 (1940, S. C. J. 442) and note 3.

FOR APPELLANT : Salah.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

The Appellant was charged before the Jerusalem Assizes with murder committed on the 6th November, 1941, at Hebron. He was convicted and sentenced to death.

The Court of Assize based themselves on the evidence of certain prosecution witnesses, namely — Mohammad, Shamieh, Sami and Zein el Din. The evidence of these witnesses, in effect, showed that a party consisting of the deceased, his brother, his brother's wife and two children, proceeded from the brother's house to a wedding celebration some distance away, shortly after sunset. On the way, these witnesses said, they were met by the Appellant, who, without any previous conversation, fired at them with a revolver. The first two shots hit the brother of the deceased man, Mohammad, merely wounding him, whilst the third shot killed the deceased man, Ashur. That is the tale as told by the prosecution witnesses and, of course, on that evidence there was a clear case of murder with premeditation to go to the Court.

The defence put up by the Appellant was that he shot in self-defence or after provocation. The Appellant himself said that it was the deceased, his brother Mohammad, and someone else who attacked him under this archway with daggers, that in order to defend himself in this sudden attack he drew his revolver, which he said he was in the habit of carrying, and fired at them.

The appeal is that the facts of the case do not disclose a case of murder, but one of manslaughter. Self-defence has not been stressed, and in fact could not possibly have succeeded. In many ways this case looks a perfectly simple one, but when one considers it a little more deeply, all is not quite so simple as it appears on the surface.

The prosecution case rests upon the theory that the Appellant was lying in wait at this particular spot for the deceased man and his brother, because, if he had not been so lying in wait, the encounter would have been a chance one and the killing could only have been manslaughter. The point which has impressed the Court most is this, why was the Appellant in this particular spot at this particular moment. So far as the prosecution evidence goes there was nothing to lead the Appellant to suppose that the deceased and his party would be passing that way on that particular evening. Mr. Rigby, with his usual scrupulous fairness, has admitted that there is no evidence to show why this man was there. The defence, on the other hand, give a very good reason why he was there, that is, that he had been asked to go

down by the deceased, or members of the deceased's family, and the defence is to a certain extent supported by the evidence of Zein el Din with regard to a dagger, and Zein el Din's evidence as to the dagger is that it was put in a sack by Mohammad, the brother of the deceased.

Premeditation is a question entirely of fact, and the only function of this Court is to see that there was sufficient evidence to support that finding of fact and that the case is a definite one. We are not satisfied that there was sufficient evidence to support the finding of premeditation. The evidence on the record, which is the only evidence that we can go by, in our opinion does not justify the finding of fact that the Appellant was lying in wait for the deceased man and his party.

For these reasons the conviction for murder cannot stand. The Court, therefore, quashes the conviction and sentence for murder, and convicts the Appellant of manslaughter. For the offence of manslaughter the Appellant will serve a sentence of twelve years' imprisonment.

Delivered this 31st day of March, 1942.

British Puisne Judge.

HIGH COURT No. 26/42.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Kenda Leah Koltunovsky. PETITIONER.

v.

1. The Chief Execution Officer, Haifa,
2. Nachman Koltunovsky,
3. Yehuda Koltunovsky. RESPONDENTS.

Eviction — Husband and wife living apart — Husband obtaining judgment for ownership of a house built by his son and order for eviction of the son — Wife refusing to leave the house — No rights of wife to husband's property and no necessity to obtain separate judgment for eviction — Failure to invoke Execution Law, Art. 43, *H. C.* 48/41, *H. C.* 59/41.

In refusing an application for an order to issue directed to the first Respondent calling upon him to show cause why his order dated 21st March, 1942, in Haifa

Execution Office File No. 11/42, should not be set aside and why he should not refrain from evicting the Petitioner from the premises occupied by her at 37, Hechalutz Street, Haifa :—

HELD : 1. Under the Civil Law of Palestine a wife had no rights in her husband's property apart from those which her husband might allow her to exercise.

2. (Following H. C. 48/41, H. C. 59/41) : As the Petitioner (the wife) had failed to invoke the provisions of Article 43 of the Execution Law the order *nisi* granted had to be discharged.

3. The High Court could not interfere with the execution and the request for giving time would equally be refused.

FOLLOWED : H. C. 48/41 (1941, S. C. J. 509) ; H. C. 59/41 (*ibid.*, p. 305).
ANNOTATIONS : See, in addition to the cases cited, C. A. 91/41 (1941, S. C. J. 534).

FOR PETITIONER : J. Shapiro.

FOR RESPONDENTS : No. 1 — Absent — served.
No. 2 — Levitsky.
No. 3 — In person.

ORDER.

This is a return to an order *nisi* granted to a woman asking for an order that her eviction from her husband's house should not be carried out. Apparently for some 16 years the husband and wife most unfortunately had not been living together. There is proof in the case before the District Court that the husband had sent money to his son in Haifa for the erection of a house for his (father's) benefit, and that the son had registered this house as his own property in his (son's) name. In an action in the District Court the present second Respondent, the husband, got a judgment in his favour cancelling registration in the son's name and ordering registration in his own name, and he also got an order of eviction of his son, the third Respondent in this case. When the Execution Officer went to execute, he found that the second Respondent's wife was living in these premises and she declined to go. The Chief Execution Officer refused to stay execution and the wife has now come to this Court.

Now, it is difficult to see under the Civil Law of Palestine (because I understand Jewish Religious Law is different) what rights a wife has in her husband's property apart from those which her husband may allow her to exercise. I do not think that it is possible for a wife to go and say "I am going to reside in such and such a house belonging to my husband", and that if he does not want it he must ask for an

eviction action to dispossess her. That would make domestic relations even more complicated than they already are in many instances.

In our opinion, this case depends upon article 43 of the Execution Law. Article 43 has last year been subject to two interpretations, both the same, namely, in High Court Cases Nos. 48/41, 8 P. L. R. 298 and 59/41, 8 P. L. R. 353. In the second one of these cases the Court decided that the third sentence in article 43 is entirely independent of the first two sentences, *i. e.* if persons are residing in a place which is to be vacated they must apply to the Court to obtain an order of stay of execution. The first High Court case, No. 48/41, laid down that on the proper interpretation of article 43 it was upon the other parties to invoke the provisions of this article if they wished.

The provisions of article 43 have not been invoked by the Petitioner, and for these reasons the rule *nisi* must be discharged.

With regard to the request that we should give time, we do not think that we should do so. If we cannot interfere with the execution, it is not for us to give time to parties to adopt whatever other lines of procedure they may think fit.

The rule *nisi* is, therefore, discharged. The second Petitioner (*sic*) will have his costs fixed at an inclusive sum of LP. 5.

Given this 13th day of April, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 46/42.

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

BEFORE : Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Abdul Rahim Mahmoud. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Evidence — Case remitted to District Court to explain differentiation between several accused on identical evidence — Explanations given unsatisfactory.

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 27th day of February, 1942, in Criminal Case No. 27/41, whereby the Appellant was convicted of manslaughter, contrary to section 212 of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment :—

HELD : As the District Court did not believe the evidence of the prosecution witnesses it was unfair to convict the Appellant on the strength of his own evidence, which, if believed, was entirely exculpatory.

ANNOTATIONS : See the previous proceedings in this case, CR. A. 142/41 (1941, S. C. J. 591) and note 1 thereto.

FOR APPELLANT : Abcarius.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is the second time that this case has been before this Court. On the first occasion, the trial Court having acquitted three of the accused of the offence of manslaughter and convicted the fourth, the present Appellant, this Court remitted the case to give the trial Court an opportunity of explaining why it came to a different conclusion with regard to him, the evidence against all four accused appearing to have been identical.

The case for the prosecution depended substantially upon the evidence of three women eye witnesses, who deposed that the present Appellant as well as the other accused who were acquitted struck the deceased on the head with an iron fork in the course of a village brawl. The other three accused went into the witness box and denied that they were present at the material place at the material time, while the Appellant admitted that he was on the scene at the time but said that he took no part in the fracas except in a passive way. In the event the trial Court held that the denials of the other three accused raised a doubt in their mind as to their guilt but the partial admission of the Appellant resolved that doubt as far as he was concerned.

With all respect to the District Court we find difficulty in following their reasoning. For the prosecution to succeed in this case it was essential that the women eye witnesses, or at least one of them, should have been believed. If the Court was not prepared to believe their evidence, or that of any of them, we are of opinion that it is unfair to the Appellant to convict him on the strength of his own evidence, which so far from constituting an admission of guilt was, if believed, entirely exculpatory.

The appeal will, therefore, be allowed and the conviction quashed. It follows that the order for the payment of compensation must be set aside.

Delivered this 2nd day of April, 1942.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 19/42.

IN THE SUPREME COURT OF PALESTINE.

BEFORE : Gordon Smith, C. J.

IN THE APPLICATION OF :—

Alice Shubeita. APPLICANT.

v.

Elia Shubeita. RESPONDENT.

Application to determine which Religious Court has jurisdiction, Palestine O. in C., Art. 55 — Parties being of different religious communities, H. C. 100/41, Religious Community (Change) Ord., Sec. 2 — Applicability of law of religious community of defendant or of that under which marriage solemnized — Divorce not recognized by law governing marriage — Jurisdiction given to Court of community within which the marriage was solemnized, C. A. 178/34, C. A. 119/39, C. A. 11/41, C. A. 38/41, Khayat v. Khayat, Religious Community (Change) Ord., Sec. 4(2) — Costs.

In deciding an application under the first part of Article 55 of the Palestine Order-in-Council to determine which Religious Court has jurisdiction :—

HELD : (Referring to C. A. 178/34, C. A. 119/39, C. A. 11/41, C. A. 38/41 ; Following Khayat *v.* Khayat) : The Respondent could not, by changing his religion, oblige the Petitioner to follow him to the Court of another Community which did not administer the law of the marriage contract and there was nothing in the authorities cited which precluded the making of an order giving jurisdiction to the Religious Court of the Community in which the marriage was solemnized. That Court would, therefore, be given jurisdiction.

REFERRED TO : H. C. 100/41 (*ante*, p. 85) ; C. A. 178/34 (2, P. L. R. 282, C. of J. 1934—6, 582) ; C. A. 119/39 (1940, S. C. J. 38) ; C. A. 11/41 (1941, S. C. J. 230) ; C. A. 38/41 (*ibid.*, p. 173).

FOLLOWED : Khayat *v.* Khayat (C. of J. 1244).

ANNOTATIONS :

1. See the previous proceedings (H. C. 100/41 — *supra*) and the notes thereto.

2. For other applications of this nature *vide* Misc. Appl. 27/42 (*ante*, p. 187) and note 1.

3. On the applicability of the personal law of the defendant see, in addition to C. A. 119/39 (*supra*), C. A. 11/41 (*supra*) and cases cited on p. 233 of the judgment.

4. *Cf.* C. A. 38/41 (*supra*) and note 3.

FOR APPLICANT : Abcarius.

FOR RESPONDENT : Goitein.

ORDER.

This was an application to me under the first part of Article 55 of the Order-in-Council, 1922, whereby I am required to decide which Court shall have jurisdiction in an action of personal status involving persons of different religious communities.

My task is somewhat simplified by reason of the fact that both Applicant and Respondent were before the Court in High Court 100/41, and certain facts as to the different religious communities of the parties can be ascertained from the judgment in that case. Taking the Applicant first, it was there found that she remained a member of the Latin Catholic Community until her marriage with the Respondent, and that if she ever became a member of the Greek (*Melkite*) Catholic Community, it was only coincidentally with her marriage, and that as she had not given the notice required by Section 2 of the Religious Community (Change) Ordinance, Cap. 127, such coincidental change (if any) had no legal effect. Prior to such marriage, however, the Respondent had properly and legally changed his community from the Greek Orthodox Community to that of the Greek (*Melkite*) Catholic Community. For the reason therefore that the two parties were of different communities the order of the Greek (*Melkite*) Catholic Court of Appeal was, in that case, set aside. Subsequently to the marriage, the Respondent properly and legally changed back to the Greek Orthodox Community, and subsequently to the decision in High Court Case No. 100/41 the Applicant has properly and legally become a member of the Greek Catholic Community as evidenced by the Certificate of Registration produced to me.

The position, therefore, now is that the Applicant is a member of the Greek Catholic Community, whereas the Respondent is a member of the Greek Orthodox Community. For the Applicant Abcarius Bey submitted that I should decide in favour of the Greek Catholic Court, as being the Court of the Community within which the marriage was solemnized. For the Respondent Mr. Goitein submitted that the Court of the Community of the Defendant, namely the Greek Orthodox Court should be clothed with jurisdiction, but he suggested and was prepared to agree to the District Court as an alternative. Before referring to the authorities quoted by Mr. Goitein in support of his contention, I think it is desirable to make certain observations.

The Applicant in the previous proceedings had applied for and been awarded maintenance, the order for which, owing to a technical omission on the part of the Applicant, had to be set aside.

It is not disputed that she intends to obtain in further proceedings a proper and valid order for separation and maintenance.

Neither the Latin Catholic Community (to which the Applicant previously belonged) nor the Greek Catholic Community (to which she now technically and legally belongs) recognize divorce, and a marriage solemnized within either Community is recognized as being indissoluble. On the other hand the Greek Orthodox Community recognizes and grants divorce. In these respects there is a very great distinction to be drawn between these two communitites, far less (*sic*) so than between the Latin Catholic and the Greek Catholic or *Melkite* Communities.

In order to marry the Applicant the Respondent forsook his religion and entered a community which did not recognize divorce and which regarded such marriage as indissoluble, and of which fact he must have been well aware and accepted it, and now that the marriage has not turned out a success, he changes his religion back again to that which would enable him to seek a divorce !

My own views agree with those of Abcarius Bey, namely that the community within which the marriage was solemnized should be the community which should exercise jurisdiction over such a marriage. I have, therefore, to ascertain whether there is anything in the authorities quoted which precludes me from giving effect to those views.

Mr. Goitein referred to the following cases : (a) C. A. 178/1934, P. L. R. Vol. 2, p. 282 ; (b) C. A. 119/1939, P. L. R. Vol. 7, p. 20 ; (c) C. A. 11/1941, P. L. R Vol 8, p. 241 ; and (d) C. A. 38/41, S. C. Judgments 1941, p. 173. I have examined all these cases with interest, and although the personal law of a defendant may have been applied, *e. g.* in (b), there is nothing in any of them that precludes me from ordering that the Religious Court of the Community in which the marriage was solemnized should not be clothed with jurisdiction.

I would also refer to Khayat *v.* Khayat, reported in Rotenberg, Vol. IV, p. 1244, which was a similar application under Article 55 of the Order-in-Council, with practically similar facts, but made by an applicant for the purpose of seeking a divorce, and I would quote the following from the judgment :—

> "In this case I have to decide whether the Respondent, who was married to the Petitioner in the *Melkite* Church and who has always remained a member of that Community, may sue him for alimony before a *Melkite* Religious Court, or whether she must follow him to a Court of the Orthodox Church which he has joined since the marriage. To put it in other words, may the Petitioner by changing his religion and joining another Community oblige his wife to follow him to the Court of that Community, a Court which does

not administer the law of the marriage contract, but a law to which she is a stranger ? The answer in my opinion is this — the Petitioner, when he married in the *Melkite* Church submitted to the *Melkite* law of marriage with its attendant consequences. It was his own law and the law of the woman he married, and the obligations it entailed were known to him as matters of common knowledge in the Community. Were I to hold that he could avoid these obligations voluntarily contracted by joining another Community, such a decision would not be in accordance with the duty put upon me by the Order-in-Council of doing justice between persons of different religious communities."

These are exactly my sentiments, which are also confirmed by Section 4(2) of the Religious Community (Change) Ordinance, Cap. 127, and I, therefore, direct that the Religious Court of the Greek (*Melkite*) Catholic Community shall have jurisdiction as prayed for by the Applicant.

There will be no order as to the costs of this application.

Delivered this 24th day of April, 1942.

Chief Justice.

CRIMINAL APPEAL No. 17/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

1. Darwish Abdul Razzak el Dajani,
2. Abdul Rahman Abdullah. APPLICANTS.

v.

The Attorney General. RESPONDENT.

Forgery and false pretences — Application for leave to appeal treated as the appeal itself — Onus of proof in criminal cases — Unhappily worded phrase in judgment — Document not necessarily a forgery because it contains untrue statements — Conspiracy — False pretences — Whether attempt or only preparatory act — Sentence.

In allowing an application for leave to appeal from the judgment of the District Court of Jerusalem, in Criminal Case No. 300/41, dated 6.2.42, whereby both Applicants were convicted on the charges of conspiracy contrary to section 34 of the C. C. O. 1936, attempt to obtain money by false prentences contrary to sections 301 and 29 of the C. C. O. 1936, forgery of official documents contrary

to section 338 of the Criminal Code Ordinance, 1936, and the 2nd Applicant also of the charge of forgery of another official document contrary to section 338 of the C. C. O. 1936, and sentenced, each of the Applicants, to one year's imprisonment and the 1st Applicant ordered to pay LP.100 towards the costs of the prosecution, and in partly allowing the appeal :—

HELD : 1. In accordance with the usual practice the applications for leave to appeal would be treated as the appeals themselves.

2. The passage in the judgment objected to was mere surplusage as the Court below had applied its mind to the relevant considerations and had not placed the onus of proof upon the Appellants.

3. There was no evidence of forgery as the circumstance that a document, which in other respects was what it purported to be, contained untrue or fraudulent statements of fact did not of itself make that document a forgery.

4. There was sufficient evidence that the two motor cars in question were not burnt on the 28th April or on any date round about that time.

5. The facts proved amounted to an attempt at false pretences and were not merely preparatory acts.

6. A sentence of one year for an attempt to obtain LP. 1000.— by false pretences was not excessive, while the sentence on the second Appellant who, in the result, had only been convicted of aiding and abetting the first Appellant would be reduced to one of three months.

ANNOTATIONS :

1. On the first point see, *e. g.*, CR. A. 146/41 (*ante*, p. 22, on top of p. 24) and CR. A. 25/42 (*ante*, p. 140).

2. *Cf.*, on the onus of proving the whole case being always on the prosecution, CR. A. 82/41 (1941, S. C. J. 284) and note 2 ; see also CR. A. 126/41 (*ibid.*, p. 492).

3. On the third point see Odgers, On the Common Law of England, 3rd ed., Vol. 1, p. 405 : "It is not enough that the document tells a lie, it must tell a lie about itself".

4. On attempt and the difference between preparatory acts and attempts, *vide* CR. A. 1/41 (1941, S. C. J. 238) and note 3. *Cf.* CR. A. 124/41 (*ibid.*, p. 451).

5. See, on false pretences generally, CR. A. 146/41 (*ante*, p. 22) and note 2. Compare CR. A. 15/42 (*ante*, p. 200).

6. On sentence in case of part of the convictions being quashed, *vide* CR. A. 22/42 (*ante*, p. 147).

FOR APPLICANTS : No. 1 — B. Joseph & Caspi.
No. 2 — Elia.

FOR RESPONDENT : Junior Government Advocate — (Beham).

JUDGMENT.

These are applications for leave to appeal from a judgment of the District Court of Jerusalem convicting the two Accused on four counts, one of conspiracy, one of attempting to obtain money by false pretences and two of forgery. In accordance with the usual practice, we are treating these applications as the appeals themselves. The facts are adequately set out in the judgment of the trial Court and need not be referred to here in any detail.

The first point taken by the Appellants was that there is a passage in the judgment of the trial Court which should of itself be regarded as being fatal to the conviction. That is the passage on page 7 of the judgment which reads as follows :—

> "Having regard to the obvious object and purpose of the documents we considered the onus must shift in the circumstances and there is a duty upon both Accused to explain their said acts and intentions."

It is urged by Dr. Joseph, on behalf of the first Appellant, that that goes contrary to the rule that the onus in a criminal case always remains on the prosecution. If, however, one reads the next sentence in the judgment, the difficulty seems to be resolved because the learned President goes on to say :—

> "At the end of the case for the prosecution, therefore, we felt little difficulty as regards the facts which had emerged and were satisfied that there was a case to answer by the Accused respectively on all counts as laid."

We think, therefore, that the passage objected to was at the worst mere surplusage and does not indicate that the Court wrongly applied its mind to the relevant considerations.

We must, then, consider whether there was sufficient evidence to justify the convictions on these four counts. We are of opinion that as regards the two counts for forgery there was clearly insufficient evidence to justify the convictions. The mere circumstance that a document, which in other respects is what it purports to be, contains untrue or fraudulent statements of fact does not of itself make that document a forgery. The convictions on counts 3 and 4, therefore, cannot stand.

The evidence as regards conspiracy is also very slender, and we are of opinion that the conviction on the first count cannot be supported.

There remains the second count, that of attempting to obtain by false pretences the sum of LP. 1000 from the Government of Palestine. This depends mainly on three documents (Exhibits 1, 2 and 3) and the evidence of two police officers, namely, Sgt. Cressy and Yahya

Langer. In order to establish the false pretence, the prosecution, of course, has to show that the two motorcars in question were not burnt on the material dates. While the evidence of the two police officers may not perhaps read as clearly as it might do, we are satisfied that Sgt. Cressy's evidence and particularly that of Yahya Langer, who was the officer in charge of the Measheārim Police Station at the material time, is sufficient to justify the Court in drawing the inference that the cars were not burnt on the 28th of April or on any date round about that time.

Proving a negative is, of course, always a difficult thing to do, but this was eminently a question of fact for the trial Court and we cannot say that it was not justified in drawing the inference that the prosecution had satisfied the onus which was upon it. Still less can we say that the trial Court was not justified in rejecting the evidence called on behalf of the Accused.

A further point was raised that, even assuming that the findings of the trial Court could be supported, nevertheless no criminal offence had been committed because these claims had to go before a tribunal. It is said that what was done in this case by the Accused was indistinguishable from a litigant making untrue or fraudulent statements in his statement of claim. We cannot see any substance in this point for the reason, amongst others, that the documents which were produced in this case might well have resulted in payment of the claim being ordered by the officer appointed to assess and examine such claims without any further enquiry at all.

We now come to the question of sentence and it is urged as regards the first Appellant by Dr. Joseph that, as the forgery and conspiracy counts have gone, he should be granted a substantial reduction of sentence. As regards the first Appellant we cannot see the force of that argument. It is clear, we think, from the circumstances of the case as far as it affects him, that the main count was that of attempting to obtain money by false pretences. What we have to consider is what is a reasonable sentence to pass for that offence. We cannot say that a sentence of one year is excessive for a person who attempts to obtain the sum of LP. 1000 by false pretences. As regards the first Appellant, therefore, the convictions on the 1st, 3rd and 4th counts are set aside and the conviction on the second count and the sentence of one year's imprisonment are confirmed.

With regard to the second Appellant, we think that the matter is somewhat different. If the forgery and conspiracy counts go out, the position is that he has been convicted only of aiding and abetting the

1st Accused in attempting to obtain money by false pretences. Further, he has already lost his employment as a result of this matter. We think, therefore, that his sentence should be substantially reduced and that justice will be done if he goes to prison for three months. In his case also, therefore, the convictions on the 1st, 3rd and 4th counts are set aside and that on the 2nd count confirmed. The sentence will be varied as stated.

Delivered this 20th day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 15/42.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Israel Smoly. APPELLANT.

v.

1. Eliezer Weingarten,
2. Menachem Horovitz,
3. Avigdor Ginzburg. RESPONDENTS.

Arbitration — Oral evidence to prove partnership, Ottoman C. P. C., Art. 80, C. A. 87/37 — Presumption that goods bought by partner and brought into the partnership business are partnership property — Contention that not all points dealt with by arbitrator — Courts always inclined to support validity of award, Russell on Arbitration.

Appeal from the judgment of the District Court of Tel-Aviv in Civil Case No. 167/41, dated 30.11.41, whereby Respondents' application to confirm the award made by the arbitrator Mr. Ben Ari, Advocate, on 10.6.41 was granted, and Appellant's application to set aside the said award was dismissed.

In 1940 the Respondents lodged an action in the District Court of Tel-Aviv against the Appellant, claiming dissolution of an alleged partnership and liquidation of the partnership property. The action was later on discontinued and the case brought before an arbitrator.

The Appellant contended that there was no partnership at all ; and, alternatively, that if there was a partnership, the scaffolding belonged to him personally. The arbitrator found against the Appellant on both these points.

On application to the District Court to confirm and a cross application to set aside the award, the Appellant contended, firstly, that even if there was in fact a partnership in respect of the execution of the work, there was no partnership as regards the ownership of the scaffolding and the arbitrator was not entitled to

make a finding to that effect on oral evidence alone as Article 80 of the Ottoman Code of Civil Procedure contained special provisions for the necessity of documentary proof in case of partnerships. The Appellant's second argument was that the arbitrator had committed legal misconduct by admitting oral evidence as against the two contracts of sale since the said contracts had been made between the vendors and the Appellant personally and did not contain any mention of the partnership or of the Respondents. He also contended that the evidence of the Respondents was not evidence of "the parties" as the Respondents, though parties to the action, were not parties to the above contracts. Reference was made to Russell on Arbitration and Awards, 13th ed., *pp.* 350 and 357. The District Court held against the Appellant and decided that the evidence was admissible as referring only to the circumstances surrounding the purchase.

HELD : 1. (Referring to C. A. 87/37) : If a partner buys goods and brings these goods on to the partnership premises or into the partnership business, the presumption is that he bought them for the partnership and with partnership funds. The Appellant had produced no documentary evidence clearly rebutting this presumption.

2. Courts were inclined to support the validity of an award and in the present case the arbitrator was not guilty of misconduct and had dealt fully with all the contentions put forward.

REFERRED TO : C. A. 87/37 (1937, 2 S. C. J. 15, P. P. 2,3.viii.37, 2 Ct. L. R. 19).

ANNOTATIONS :

1. On the admissibility of oral evidence against documents see C. A. 168/41 (1941, S. C. J. 643) and note 2.

2. On the question how far an arbitrator is bound by the rules of evidence, *cf.* the passages in Russell referred to by the Appellant (*supra*) and Halsbury, Vol. 1, *p.* 681, and footnotes (*k*) and (*m*).

FOR APPELLANT : Harari.

FOR RESPONDENTS : Nos. 1 & 2 — Rotenstreich.
No. 3 — Caspi.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Tel-Aviv, whereby the present Appellant's application to set aside the award of an arbitrator was dismissed.

The Appellant's main ground of appeal is that oral evidence was admitted by the arbitrator to prove a partnership and it is said that this was contrary to article 80 of the Ottoman Code of Civil Procedure. At the hearing before us reference was made to Civil Appeal 87/37. It seems, however, that at the hearing before the arbitrator the Appellant did at the beginning allege that there was no partnership. It seems, however, that later on the facts and circumstances proved were too much for him and it became obvious that there was in fact a partnership, of which the present Appellant was one of the members. The

partnership business was that of doing scaffolding work. The substantial complaint of the Appellant is that the arbitrator held that certain scaffolding was part of the partnership property. The Appellant contended that certain of the scaffolding, not only that scaffolding in his possession but also the scaffolding in the possession of other partners, was his own property and not that of the partnership. It was admitted that scaffolding had been purchased during the currency of the partnership. A certain document of sale was produced but that proved nothing beyond the fact that the Appellant had purchased the scaffolding. Any reference, therefore, to article 80 is on this point irrelevant because it is not denied that the Appellant may have purchased the scaffolding but it is said that he purchased it as a partner and for the partnership business and with partnership funds. This document, therefore, is not conclusive, because if a partner buys goods and brings these goods on to the partnership premises or into the partnership business, the presumption is that he bought them for the partnership and with partnership funds. Had he wished to rebut this he should have been careful to produce documentary evidence which would have left no doubt that the scaffolding was his own personal property, purchased with funds other than partnership funds. This he failed to do. In the result, the arbitrator found that the property was held in equal shares by four persons who were partners, one of them being the present Appellant. It is impossible to see what misconduct the arbitrator committed. It is also argued that he did not give sufficient reasons and that he did not deal with every point but it is laid down in Russell on Arbitration and Awards, 13th Edition, pages 203 and 204 :—

> "The Courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favour of its being a final, certain, and sufficient termination of the matters in dispute. The award will be sustained although the arbitrator has omitted in his award to notice some claim put forward by a party if, according to the fair interpretation of the award, it is to be presumed that the arbitrator has taken the claim into his consideration in making his award."

The arbitrator dealt fully in his award with all the various contentions of the parties' advocates. We, therefore, think that the District Court came to a right conclusion. The appeal is, therefore, dismissed with costs, to be taxed on the lower scale, and we certify LP. 7.500 mils for the first and second Respondents and LP. 7.500 for the third Respondent as advocate's attendance fees.

Delivered this 11th day of March, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 24/42.

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

BEFORE : Gordon Smith, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Zeinab bint Najib el Kasem. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Entering a dwelling house with intent to commit theft — Sufficiency of evidence — Sentence.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 10th day of February, 1942, in Criminal Case No. 6/42, whereby the Appellant was convicted of entering a human dwelling with intent to commit theft therein, contrary to section 296 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment, and in reducing the sentence :—

HELD : 1. There was sufficient evidence to support the conviction.
2. The sentence would be reduced from two years to twelve months.

ANNOTATIONS : On sentence in case of previous convictions *cf.* CR. A. 122/41 (1941, S. C. J. 447) and CR. A. 5/42 (*ante*, p. 31).

FOR APPELLANT : Habayeb.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

There was clear evidence in this case that the Accused was originally inside the house coming out of the bedroom. The first witness, I suppose the owner of the house or a responsible person in the house, said she saw Accused coming out of the bedroom. Another girl had been seen sitting at the hall entrance and the witness who saw this girl also saw Accused coming out of the bedroom and asked her what she was doing there and she said looking for work and she seized her. The second witness who saw the girl sitting on the stairs outside told her mistress that she had seen the Accused coming out of the children's bedroom. The Accused herself said that she knocked at the door, the servant opened the door, (that is not borne out by the servant) and that she asked for work and she saw the jar and went for a drink. It is obvious that she had no business there at all and the inference is extremely strong that she was there in order to commit theft. There is evidence that a whole lot of children's clothing were found on the

floor in this room where a number of children slept and that the cupboard doors where the clothing is kept were opened and the clothes were on the floor. It is not likely that the children themselves had done that. The Accused has already had two previous convictions. We do not take notice of one. She was convicted in 1941 and was bound over and that was a charge of theft. We reduce the sentence to 12 months.

Delivered this 18th day of March, 1942.

Chief Justice.

CIVIL APPEAL No. 6/42.

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

BEFORE : Gordon Smith, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Salem Sam'an Ziyadeh. — APPELLANT.

v.

Yusif el 'Abed Salem & 2 ors. — RESPONDENTS.

Action for declaration of ownership in land and for injunction against interference — No title to the land but agreement to purchase — Proper remedies in such case.

In dismissing an appeal from the judgment of the Magistrate's Court, Ramallah, sitting as a Land Court, dated the 13th December, 1941, in case No. 346/41 :—

HELD : As the Appellant had no title to the land, but only an agreement to purchase, his proper remedy was to bring an action for possession, specific performance or damages.

ANNOTATIONS : See, on the effect of an agreement to purchase, C. A. 195/40 (1940, S. C. J. 491, 572) ; *cf.* C. A. 48/41 (1941, S. C. J. 499).

APPELLANT : In person.

FOR RESPONDENTS : No. 1 — absent — served.
Nos. 2 & 3 — Sa'adeh.

JUDGMENT.

This case was originally improperly brought before the Magistrate's Court, in that the Plaintiff (Appellant) misconceived his remedy by applying for a declaration of ownership and for an order to restrain

the Defendants from interfering with his title and possession. Undoubtedly, the Magistrate could not grant the declaration because the Appellant does not hold title to the land, but instead has an agreement to purchase.

On these facts it appears to us that his remedy is to bring another action for possession, specific performance or damages.

The appeal will be dismissed, but without prejudice to the Appellant in bringing another action for such other remedies as he may be advised.

Appellant will pay the second and third Respondents their costs, which we fix at an inclusive sum of LP. 5.—.

Delivered this 5th day of March, 1942.

Chief Justice.

CRIMINAL APPEAL No. 30/42.

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

BEFORE : Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Musa Muhammad Abdullah el Taman. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Evidence — No evidence of identification — Nothing on record to support findings of fact — Conviction to be quashed, Criminal Procedure (T. U. I.) Ord., Sec. 51, proviso.

In allowing an appeal from the judgment of the District Court of Haifa, dated the 16th day of February, 1942, in Crime No. 4/42, whereby the Appellant was convicted of robbery contrary to section 287 of the Criminal Code Ordinance, 1936, and of being in possession of a firearm and ammunition without a licence, contrary to section 36(2)(a) and (f) of the Firearms Ordinance, and sentenced to seven years' imprisonment, and in quashing the conviction :—

HELD : 1. There was not sufficient evidence of identity, an identification at the Magistrate's Court only being quite useless.

2. There was no evidence on the record to support the findings of fact and, in the circumstances, it was impossible to apply the proviso to Section 51 of the Criminal Procedure (Trial upon Information) Ordinance.

ANNOTATIONS :

1. On identification see CR. A. 8 & 9/41 (1941, S. C. J. 42) and note 3, CR.

A. 18/41 (*ibid.*, p. 51), CR. A. 24/41 (*ibid.*, p. 95), CR. A. 118/41 (*ibid.*, p. 419), CR. A. 7/42 (*ante*, p. 41) and CR. A. 37/42 (*ante*, p. 180).

2. On Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance *vide* CR. A. 54/41 (1941, S. C. J. 183) and note 2.

FOR APPELLANT : Abdul Hadi.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

The Appellant was charged on an information of 8 counts before the District Court of Haifa, six of the counts being for robbery with violence and the other two counts for being in possession of a firearm and ammunition. He was found guilty on all counts and sentenced to seven years' imprisonment.

On appeal, his advocate has argued that the evidence of identification was completely insufficient. Now, of the various witnesses that were called against him only one apparently knew this Appellant beforehand. One of the other witnesses says that he was never called to any identification parade but that he identified him in the Magistrate's Court. Other witnesses said that the one witness who knew the Appellant told them who he, the Appellant, was. Now an identification at the Magistrate's Court only is quite useless. The District Court in their judgment dealt with all the evidence in these words : "We are satisfied that the Accused was identified in the course of this robbery by some of the complainants who gave evidence before this Court." Now, brevity of language of course is very often desirable but it can be carried too far and in this case it is carried much too far. It is really rather ridiculous, if we may say so, that in a serious charge of robbery with violence where sentence can be imprisonment for life, that all the pith of the judgment is contained in two lines of typescript. The District Court does not even say which witnesses it believed and with regard to the counts of possession of the rifle and ammunition there is in the record not the slightest scrap of evidence with regard to the possession or otherwise of the Appellant. Neither does the Court below state the facts upon which it arrived at the conclusion at which it did and in the circumstances of this case it is quite impossible to apply the proviso to Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance.

In the circumstances the appeal must be allowed and the conviction quashed.

Delivered this 24th day of March, 1942.

British Puisne Judge.

HIGH COURT No. 15/42.

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

BEFORE : Gordon Smith, C. J., Edwards and Frumkin, JJ.

IN THE APPLICATION OF :—

Raji and Bahjat el Issa. PETITIONERS.

v.

1. The Chief Execution Officer, Haifa,
2. The Syndic in the Bankruptcy of S. N. Khoury,
3. Nasrallah Khoury. RESPONDENTS.

Execution — Proceedings set aside for irregularities.

Application for an order to issue directed to the first Respondent calling upon him to show cause why the execution proceedings in Execution Office File No. 532/34, Haifa, should not be set aside.

The proceedings in this case are in execution of a judgment given by the District Court of Haifa on 13.12.33 and partly confirmed by the Supreme Court in C. A. 72/34 (not reported). The judgment in question — as varied by the Supreme Court — ordered the Petitioners to refund to the second Respondent the sum of LP. 1324.—. In 1935 the Petitioners filed an action in the District Court of Haifa claiming from the second Respondent the very same amount, *i. e.* LP. 1324.— and the hearing of this action has not yet been completed (*cf.* C. A. 145/40 (1940, S. C. J. 219) wherein an application for leave to appeal from an interlocutory order in the case was refused). The execution proceedings commenced by the second Respondent were, on 18.4.35, stayed by an order of a judge of the Haifa District Court until the decision of the above action by Petitioners against the second Respondent ; this order of stay was, on 12.12.39, confirmed by the Registrar of the District Court, Haifa. On 3.1.1941, the second Respondent renewed the proceedings and the Petitioners were served with a notice to pay LP. 4355.—, *i. e.* the amount for which the District Court had originally given judgment (and which had been reduced by the Supreme Court to LP. 1324.—). The Petitioners objected to the renewal of the proceedings, but on 3.6.1941 the Acting Chief Execution Officer held that the order of stay of proceedings given on 18.4.35 (*supra*) was invalid and ordered the execution proceedings to continue. Petitioners, thereupon, applied to the District Court for an order of stay but that Court held that it had no jurisdiction. On the Petitioners again applying to the Chief Execution Officer, stay of proceedings was again refused but Petitioners were given time to apply to the High Court.

HELD : As the execution notice of 3.1.41 was bad and as there had been many irregularities, the execution proceedings would be set aside.

ANNOTATIONS : On fatal irregularities in execution proceedings *cf.* H. C. 14/39 (1939, S. C. J. 163). See, on irregularities generally, H. C. 21/42 (*ante*, p. 184) and note.

FOR PETITIONERS : Goitein and Geiger.

FOR RESPONDENTS : Nos. 1 & 2 — Absent — served.
No. 3 — Asfour and Gatafago.

ORDER.

We propose to make this order absolute on the technical grounds that the notice of the 3rd January, 1941, was bad, but apart from that we feel that there have been many irregularities, orders wrongly made, delays, *etc.*, that it would be advisable to clear everything up and start afresh as regards the proceedings.

It will, therefore, need a fresh application to proceed with execution of the judgment, and we propose to order that the amount already paid into Court should remain there another seven days. That will give time to the Respondents to take any steps that they think fit, and also for the Petitioners if they can proceed wih any action now in progress.

We make no order as to costs.

Given this 6th day of March, 1942.

Chief Justice.

CRIMINAL APPEAL No. 39/42.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

1. Fares Mahmoud Baker,
2. Fathi Ismail Abu Shabaan,
3. Salim Haj el Hirtani,
4. Mahmoud Ibn el Abed Hirz. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Possession of dangerous drugs, Dangerous Drugs Ord., Sec. 7 as amended — No evidence of guilty knowledge on the part of some Appellants — Corroboration.

In dismissing two appeals and in allowing two applications for leave to appeal from the judgment of the District Court of Jaffa in Criminal Case No. 9/42, dated 7.3.42, whereby the Appellants were convicted of the offence of being in possession of dangerous drugs, contrary to section 7 of the Dangerous Drugs Or-

dinance, 1936, as amended by section 4 of the Dangerous Drugs (Amendment) Ordinance, 1941, and sentenced the 1st Appellant to one year's imprisonment and a fine of LP. 100.— and the 2nd and 3rd Appellants to six months' imprisonment and the 4th Appellant to one year and 3 months' imprisonment :—

HELD : 1. Corroboration was to be found in the evidence of the man who was acquitted and who could not be regarded as an accomplice.

2. There was no evidence to show that the second and third Appellants knew of the unlawful nature of the journey in which they were engaged.

3. *Quaere* whether corroboration was necessary for a statement made by an accused in the dock against a co-accused.

ANNOTATIONS :

1. On the question as to who is to be regarded as an accomplice, *vide* CR. A. 124/41 (1941, S. C. J. 451) and note 2.

2. Generally, on corroboration of the evidence of an accomplice, see CR. A. 65/41 (1941, S. C. J. 194) and note, CR. A. 77/41 (*ibid.*, p. 317), CR. A. 146/41 (*ante*, p. 22) and in particular the annotations to CR. A. 160/37 (1938, 1 S. C. J. 103) where the principle was first laid down.

Note that a statement from the dock is no evidence at all against a co-accused. See T. U. I. Ord., sec. 37(3).

3. See, on evidence as to guilty knowledge, CR. A. 146/41 (*supra*) and CR. A. 23/42 (*ante*, p. 133).

FOR APPELLANTS : No. 1 — Abcarius.
Nos. 2 & 3 — Ghussein.
No. 4 — In person.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

The four Appellants together with a fifth man were charged before the Jaffa District Court of being in possession of dangerous drugs, contrary to section 7 of the Dangerous Drugs Ordinance, 1936, as amended by section 4 of the Dangerous Drugs (Amendment) Ordinance, 1941. The learned Judges of the District Court unanimously acquitted the man who is not here, Abdo Muhammad Abdo. They unanimously convicted Fares and Mahmoud and convicted Fathi and Salim by majority, the learned Relieving President, Judge Bodilly, dissenting.

The evidence in short is as follows :—

A car was hired by Fares for a trip to Gaza. Fathi was the driver of the car, Salim the owner of the car and Mahmoud was a friend of Fares. The car proceeded on the journey with five men and a sixth man, who disappeared later on, as far as the Gaza turn, when Fares ordered the driver Fathi to proceed down the Beit Dajan track. Up to this moment there is no evidence that either Fathi or Salim knew anything

about the diversion to Beit Dajan. When a short way down this side track, Fares and Mahmoud got out of the car, proceeded to an orange grove accompanied by the sixth man, and later on reemerged carrying two sacks, which were subsequently discovered to contain 148 slabs of hashish, which they placed in the carrier behind the car. Neither Fathi or Salim left the car, nor is there any evidence that they took any part in the handling of the sacks. The car then started and was stopped by a party of police who, on information received, was waiting for it. The hashish was discovered and all five men in the car were detained. On appeal, Abcarius Bey for Fares complains that there were no findings of fact in the judgment of the Court. That is not really so because the judgment consists of the recital of the facts of the case from the first moment when the car was hired and goes on to deal with the evidence of the Defendants and the Court says :—

> "This story we unhesitatingly discard. We are satisfied that No. 2 Accused was the prime mover in this offence in conjunction with the stranger, and No. 3 was his active helper".

All the Appellants made statements in the witness-box seeking to exculpate themselves and implicate the co-accused.

That was the gist of their evidence. Quite apart from any question of corroboration, if corroboration is necessary, it is to be found in the evidence given in the witness-box by the man Abdo, who was acquitted and who cannot be regarded as an accomplice.

The conclusion that we reach in this case is that the conviction as against Fares and Mahmoud must stand and nothing can be said against it. With regard to Fathi and Salim, Mr. Rigby does not press the appeal in any way agreeing that the case at the highest is only one of suspicion. We agree with the opinion of the learned President that there is no evidence to show that these men knew the unlawful nature of the journey in which they were engaged.

The result is that the appeals of Fares and Mahmoud are dismissed. The applications for leave to appeal of Fathi and Salim are allowed and the appeals are allowed and the convictions are quashed.

We have dealt with this case on the footing that corroboration is necessary but I think there is English authority, in a case such as this, where it was held that corroboration of a statement made by an accused in the dock against a co-accused, is not necessary.

Delivered this 1st day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 16/42.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Fahmi Qassem Agha Nimer, in his capacity as Mutawalli of Wakf (1/3) Agha Nimer. APPELLANT.

v.

1. Ihsan Agha Nimer on behalf of the estate of his late father Najib Agha, Nablus,
2. Ragheb Affouri, Nablus. RESPONDENTS.

Claim in Magistrate's Court for ajr misl — Decisions to the effect that certain land included in valid waqfieh — Defence denying the identity of the land leased — Exclusive jurisdiction of Land Court.

In dismissing an appeal from the judgment of the District Court of Nablus (Appellate Capacity) in Civil Appeal No. 35/41, dated 11.12.41, whereby the judgment of the Magistrate's Court, Nablus, dated 6.8.41 in Civil Case No. 529/41 was set aside :—

HELD : The question in dispute was whether the land which the Respondent had been leasing was in fact the same land as the land called Maidan Ein Miri which appeared in the *waqfieh*. This was a matter for the Land Court and beyond the jurisdiction of the Magistrate.

ANNOTATIONS :

1. On the Agha Nimer *Waqf* see C. A. 235/40 (1941, S. C. J. 18).
2. *Cf.*, on *ajr el misl*, C. A. 94/41 (1941, S. C. J. 275) and C. A. 115/41 (*ibid.*, p. 292).

FOR APPELLANT : Barguthy and Abcarius.

FOR RESPONDENTS : No. 1 — Khamra.
No. 2 — In person.

JUDGMENT.

This is an appeal by leave from the District Court of Nablus, which Court set aside a judgment of the Magistrate of Nablus, who had given judgment in favour of the Appellant for the sum of LP. 56 as *Ajr Misl*, or equivalent rent, in respect of a certain portion of *wakf* land.

At the hearing of this appeal Abcarius Bey, advocate, on behalf of

the Appellant, drew our attention to certain judgments of this Court on appeal from the Land Court of Nablus. These judgments establish the fact that the *wakfieh* in question is a valid *wakfieh* and that the land called Maidan Ein Miri is included in that *wakfieh*. When the case came before the Magistrate the present Respondent, then Defendant, produced a *kushan* and in effect denied that the land which he was alleged to have leased, and which was the basis of the claim, was the identical land called Maidan Ein Miri. In spite of this the Magistrate proceeded to adjudicate on the matter. In our view, the question was not a question as to the validity of the *wakfieh* or as to whether Maidan Ein Miri was land included in the *wakfieh*. These matters are now beyond dispute. The question was whether the land which the Respondent had been leasing was in fact the same land as was called Maidan Ein Miri and as appears in the *wakfieh*. In our view, this was a matter for a Land Court and beyond the jurisdiction of the Magistrate. The District Court of Nablus has given several reasons for its judgment and we must not be regarded as agreeing with all those reasons. We think that the result arrived at by the District Court is correct although we decide this solely on the grounds which we have just stated.

In the result the appeal is dismissed with costs to be taxed on the lower scale and we certify advocate's attendance fee for the first Respondent LP. 10 and to the second Respondent we grant fixed inclusive costs of LP. 1.

Delivered this 12th day of March, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 49/42.

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

BEFORE: Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Ahmad Abed Mohammad el Kaisi & 4 ors. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Appeals against sentence — Burglary — Effect of conviction for theft nine years ago — Aggravating circumstance that offender had

been in complainant's service — Previous convictions — Commencement of sentence.

In partly allowing an appeal from the judgment of the District Court of Jerusalem, dated 16.3.42, in Felony No. 19/42, whereby the Appellants were convicted of burglary, contrary to Section 295(a) of the Criminal Code Ordinance, 1936, and sentenced 2nd Appellant to three years' imprisonment, and Appellants Nos. 1, 3, 4 and 5 to five years' imprisonment each :—

HELD : 1. Three years' imprisonment was not an excessive sentence for burglary.

2. A conviction for theft nine years ago with a sentence of 20 days' imprisonment should not be considered as a ground for a heavier sentence.

3. The fact that an offender had previously been a servant of the complainant and had acted as a guide to the party was an aggravating circumstance which had properly been taken into consideration.

4. Where the accused had several convictions for theft the Court was entitled to take the view that the previous sentences had not had a sufficiently deterrent effect and to impose a heavier sentence.

5. The sentence of the first Appellant, whose appeal was successful, should run from the date of conviction ; as regards the unsuccessful appeals the usual rule would be followed.

ANNOTATIONS :

1. On questions material in assessing the length of the sentence see CR. A. 20/42 (*ante*, p. 130) and note 2.

2. On sentence in case of previous convictions *cf.* CR. A. 24/42 (*ante*, p. 219) and note.

3. See, on the last point, CR. A. 5/42 (*ante*, p. 31) and note 2.

APPELLANTS : In person.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

These are appeals against sentence only.

The second Appellant, who had no previous conviction, pleaded guilty in the Court below and was sentenced to a term of three years' imprisonment. That is in no way an excessive sentence for the offence of burglary, and we think that the appeal must fail and the sentence be confirmed.

With regard to the first Appellant, he was sentenced to five years' imprisonment, the distinction presumably being because he had one previous conviction for theft. This conviction was nine years old and the sentence imposed was one of twenty days' imprisonment. We think that perhaps it is a little severe to penalize this man nine

years later for what was apparently regarded as a comparatively minor offence. We think, therefore, that his sentence should be reduced to one of three years to make it the same as that of the second Appellant.

With regard to the third Appellant, he was sentenced to five years' imprisonment. He had no previous conviction. As against him it is alleged that he had previously been a servant of the complainant, and acted as a guide to the party. We think that that is an adverse factor, which the trial Court was entitled to take into consideration. We see no reason, therefore, to interfere with the sentence of five years' imprisonment, and his appeal must be dismissed.

With regard to the fourth Accused, he had, apart from other minor offences, no less than four previous convictions for theft and being in possession of stolen property, the last conviction being as recent as 1940. The sentences imposed in each of the cases were comparatively short, and we consider that the Court was entitled to take the view that these short sentences had not had the necessary deterrent effect. We think, therefore, that the trial Court was entitled to distinguish his case from that of the second Accused, and we see no reason to interfere with the sentence of five years' imprisonment.

With regard to the fifth Appellant, substantially the same considerations apply. He has, apart from other minor convictions, three previous convictions for theft, the last one being in 1937, when he was sentenced to two months' imprisonment. We think that in his case also the Court was entitled to take the view that these small sentences had not had sufficient deterrent effect, and we do not propose to interfere with the sentence of five years' imprisonment. His appeal, therefore, also fails.

In the case of the first Appellant, whose appeal was successful, the sentence will date from the date of conviction.

As regards the four whose appeals were unsuccessful, the usual rule will be followed.

Delivered this 14th day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 47/42.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPEAL OF :—

Sara Lea Ulman. APPELLANT.

v.

Samuel Ulman. RESPONDENT.

Maintenance — Judgment by Rabbinical Court of Appeal awarding compensation to the Appellant in the event of her accepting the divorce — Subsequent action for maintenance in District Court — Evidence as to Jewish Law — Personal law applicable, P. O. in C., Art. 47 — District Court not empowered to give order which Rabbinical Court could not give — Impossibility of applying to District Court after parties had been before Rabbinical Court, C. A. 112/36, C. A. 51/38 — Unsatisfactory state of Religious Law.

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated 27th February, 1942, in Civil Case No. 56/41 :—

HELD : 1. The District Court could not award permanent maintenance as it was found as a fact that Rabbinical Law, *i. e.* the personal law of the parties, did not allow the making of such an order.

2. (Following C. A. 112/36, C. A. 51/38) : The Appellant could not come to the District Court after having brought her claim already before the Rabbinical Court.

FOLLOWED : C. A. 112/36 (C. of J. 1934—6, 750 ; 1, Ct. L. R. 12) ; C. A. 51/38 (1938, 1 S. C. J. 224).

ANNOTATIONS :

1. On the first point *cf.* C. A. 238/40 (1940, S. C. J. 515).

2. On the second point see, in addition to the cases cited, C. A. 6/40 (1940, S. C. J. 61). *Cf.* C. D. C. T. A. 180/37 (Tel-Aviv Judgments 1937, p. 30).

FOR APPELLANT : Hake.

FOR RESPONDENT : Silberg.

JUDGMENT.

Gordon Smith, C. J. : This was an appeal against the judgment of the District Court, Tel-Aviv, dated the 27th February, 1942, which dismissed the claim for maintenance by the Appellant on the grounds that, being dissatisfied with the judgment of the Rabbinical Court,

she could not now come to a Court of concurrent jurisdiction with her claim for maintenance. The facts are sufficiently and lucidly set forth in the judgment of the District Court, and it is unnecessary to repeat them at length.

The main point in the appeal was whether the District Court was correct in this respect in view of the fact that the Rabbinical Court had not, so it was submitted, dealt with the Appellant's claim for maintenance at all.

In reply to the claim for maintenance before the Rabbinical Court, the Respondent had claimed a divorce, and after hearing the parties the Rabbinical Court ordered "(a) no prospects for peace between the spouses and they must be divorced. (b) Defendant to pay to Plaintiff LP. 450 compensation", and then followed details as to how the compensation was to be paid. The Appellant appealed to the Rabbinical Court of Appeal, and as a result the amount of compensation was reduced and the Court of Appeal confirmed that the parties must be divorced. The judgment concluded, "Should she refuse to accept the divorce within four months from date of the deposit he shall be entitled to claim the repayment of the money and the return of the notes".

Evidence as to the Jewish law was taken and was summarized as follows in the District Court judgment :—

> "It is clear from his * evidence that where a wife applies for maintenance to the Rabbinical Court that Court may make an order ordering the husband to pay compensation or *"Ketuba"*, and pending the payment of same that he shall pay to the wife maintenance. It is forbidden moreover to give the wife a divorce without her consent or against her will but this divorce or *"get"* may be deposited until the wife chooses to accept it.
>
> "In this particular case the wife was not compelled to receive the *"get"* but that upon depositing the money the husband is released from paying maintenance to his wife ; if the wife refuses to accept the *"get"*, the husband can obtain the return of the money after the time laid down in the judgment, but the wife is still entitled at any time to go to the Rabbinical Court and again claim her compensation if she is willing to receive the *"get"* and the Court may then deal with the matter and fix the compensation."

Counsel for the Appellant before us emphasized the fact that the Appellant did not claim a divorce, did not want a divorce and could not be divorced without her own consent, and that all she wanted was maintenance. That this is so is quite clear both from the proceedings and from all the facts of the case. Evidence as to the Jewish law was

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* *Scil.* Chief Rabbi Uziel.

Editor's note.

given, but nowhere is there a clear answer to the question which was actually put to the Chief Rabbi in the following terms : "Under the Jewish law, in the case where the couple was married for 38 years, and the wife being now 66 years, and there are children and grand-children, is it possible to refuse maintenance and to leave her without means of support in old age ?" To say the least, the reply given was no answer to this question. Most of the evidence given was as to divorce, the *"Ketuba"* or compensation and the *"get"*, but as I have said the Appellant was not seeking a divorce.

In this respect, I would again quote the judgment of the District Court, as follows :—

> "It is necessary, therefore, in this case to come to a decision as to what appears to be the exact effect of the Rabbinical Court judgment. It seems to me that the judgment is in no sense a judgment for maintenance but purports to grant the Plaintiff compensation or *"Ketuba"* which the Plaintiff cannot receive unless she accepts the *"get"*, in other words unless she agrees to a divorce she gets nothing. This would appear to be the situation according to Jewish Law as a result of the judgment of the Rabbinical Courts. Can the Plaintiff, therefore, now come to this Court, having failed to obtain maintenance before the Rabbinical Court ? When it seems clear that the Rabbinical Court could not grant her permanent maintenance in any case and could have granted maintenance only pending some event such as possibly the return of the husband to live with her, or the lodgment of the sum ordered by the judgment."

It seems clear, therefore, that the District Court found as a fact that under Jewish law the Rabbinical Court was not entitled to award permanent maintenance. If this is so, then the District Court itself could not grant such relief, as under Article 47 of the Order-in-Council the personal law of the parties is applicable.

A further point arose as to whether the Appellant, having applied to the Rabbinical Court and having submitted to the jurisdiction of such Court, could subsequently come to a Court of concurrent jurisdiction for the same relief previously sought. In this connection two local cases were cited : Dienfield *v.* Dienfield, C. A. 112/36, Rotenberg, Vol. 9, p. 750, was an action before the District Court by a wife against her husband for maintenance of their children. The husband pleaded that a Rabbinical Court had already made an order in favour of the wife and that, therefore, the District Court could not give a fresh order. In the Court of Appeal it was held that the District Court would have had jurisdiction in the first instance, yet since the parties had chosen another competent Court of concurrent jurisdiction any variation of the order made by the latter Court could only be obtained from

that Court. With respect, I quite agree.

In Mintz *v.* Mintz, C. A. 51/38, P. L. R. 1938, p. 263, the facts were somewhat different. The Rabbinical Court had "arranged" a divorce upon terms and the Respondent had paid LP. 300 compensation, the daughter to remain with the wife and the son could elect, and if he elected to remain with his mother the husband was discharged from liability to maintain him. Subsequently the wife applied to the District Court for maintenance of both the children and was awarded LP. 4.— a month. The judgment on appeal was to the effect that the Respondent had elected to go to the Rabbinical Court and Appellant had consented to the jurisdiction of that Court and that the Rabbinical Court was the proper and competent Court to apply to and not the District Court. The judgment referred to the Dienfield case and stated that in that case "this Court had held that the practice of going from one Court to another should not be allowed".

In effect, this application to the District Court appears to me to be almost in the nature of an appeal from the Rabbinical Court of Appeal, for which there is no provision, and moreover, as I have stated, if the Jewish law, *i. e.* the personal law of the parties, precludes the award of permanent maintenance to a deserted and abandoned wife, as has been found as a fact in the judgment of the Court below, then the District Court would have no power to make such an award.

I fully endorse the remarks in the judgment as to the unsatisfactory position of a wife so deserted, and I have every sympathy with the Appellant, and it is with regret that I feel compelled to dismiss this appeal.

Whether it would be possible to amend the law so as to compel a husband to contribute to the maintenance of his deserted wife and children, irrespective of race, religion, creed or divorce, as a matter of a civil duty and obligation, is one for consideration by others, but in view of the increasing number of such claims it is time such matters were considered.

The appeal must be dismissed with costs, to include LP. 10 advocate's fee.

Delivered this 18th day of May, 1942.

Chief Justice.

Edwards, J.: I agree that the appeal should be dismissed.

British Puisne Judge.

CRIMINAL APPEAL No. 42/42.

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

BEFORE : Copland, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Mahmud Ali El-Odeh. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Evidence — Principal witness swearing affidavit retracting his evidence — Witness heard by Court of Criminal Appeal — Conviction quashed, R. v. Hullett.

In allowing an appeal from the judgment of the Court of Criminal Assize, sitting at Nablus in Criminal Assize Case No. 68/41, dated the 10th of March, 1942, whereby the Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death, and in quashing the conviction :—

HELD : (Following R. *v.* Hullett) : The principal witness having withdrawn his evidence there was not enough evidence to support the conviction.

FOLLOWED : Rex *v.* Hullett (1922), 17, CR. A. Rep. 8.

ANNOTATIONS : *Cf.* CR. A. 10/42 (*ante*, p. 35) and note 3.

FOR APPELLANT : Abcarius and G. Salah.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

The Appellant was convicted at the Nablus Assizes of murder, on the 11th of October, 1941, of one Salim Ibn Hassan el Rahhal and was sentenced to death. One of the principal witnesses against him was one Abdul Aziz el Assad. That witness definitely identified the Appellant as having been present at the scene of the crime and having fired shots. On that evidence, which is referred to in the judgment of the Assize Court, and the evidence of Abdul Aziz's brother, Zuhdi, the Court convicted the Appellant. That evidence, if true, was amply sufficient to support the conviction. Subsequent to the conviction, the witness Abdul Aziz gave an affidavit sworn to before the Magistrate in Jerusalem, that his evidence given at the Assize Court was false. He said in his affidavit that whilst he had sworn in the Assize Court that he definitely recognised the Appellant, yet in fact he did not re-

cognise him but only suspected him because he had a Hourani accent. And he further said that his brother Zuhdi's evidence was based upon what he, the witness, had told him.

In this case the appeal originally came before us on the 31st March and was then adjourned for the witness Abdul Aziz to be produced before us. Abdul Aziz has now given evidence before us confirming his statement in his affidavit.

The case was an unsatisfactory one because another witness went back on his evidence at the preliminary enquiry, actually at the Assize Court trial itself. The case seems to us to be on all fours with the case of Rex *v.* Catherine Hullett, 17 Criminal Appeal Reports, p. 8. In that case a witness who had given evidence at the trial later on went back on that statement and said that she had not heard certain remarks made by the Accused which in the trial Court she said she had heard. The Court of Criminal Appeal, thereupon, quashed the conviction.

Now, the principal evidence against this Appellant was, as we have said, that of Abdul Aziz and his brother Zuhdi. Besides his recantation today, the witness Abdul Aziz has made a statement on oath withdrawing really the effective part of his evidence against the Appellant. He is, therefore, an unsatisfactory witness and as without his evidence it cannot be said that the Court must have convicted, the conviction must be quashed. In fact I think we can go so far as to say that without his evidence no Court could possibly have convicted. Mr. Rigby informs us that he cannot support the conviction.

The appeal is, therefore, allowed and the conviction is quashed.

Delivered this 15th day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 250/41.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

1. Julia, wife of Abed Khayatto, born Mehesham,
2. Nabiha, wife of Ibrahim Azzam, born Mehesham. APPELLANTS.

v.

Yusif Mehesham and 3 others. RESPONDENTS.

Succession — Member of Latin Community disposing by will of his mulk property and dying in 1901 *— Immovable property transferred in* 1917 *on strength of certificate of succession — Validity of will as regards mulk property, L. A.* 145/22, *L. A.* 111/24, *P. O. in C., Arts.* 52(1) *and* 54(1), *Baz' Commentaries on the Ottoman Civil Procedure — Will confirmed in* 1901 *by "Spiritual Head of the Latins" — Second confirmation by Ecclesiastical Court in* 1932, *C. A.* 120/34 *— Registration effected on strength of certificate of succession not valid where there is a valid will covering the mulk property in question — Whether parties of different communities, P. O. in C., Art.* 55.

In dismissing an appeal from the judgment of the Land Court of Haifa, dated the 21.11.41, in Land Case No. 35/32 :—

HELD : 1. (Following L. A. 145/22, L. A. 111/24) : In 1901 a member of the Latin Community in Palestine was entitled to make a will and to leave *mulk* land by will.

2. A will made in 1901 by a non-Moslem in the presence of witnesses and confirmed by the Patriarch or the Metropolite or their deputies was valid and executable.

3. After the lapse of forty years and in the absence of any evidence tending to throw doubt on the validity of the confirmation by Father Elias Saba, or of his authority to give it, it could not be said that he was not one of the properly appointed deputies ; the confirmation of 1901 was, therefore, good and valid.

4. (Referring to C. A. 120/34) : *Quaere* whether the confirmation of 1932 by the Ecclesiastical Court of Nazareth was valid.

5. A certificate of succession is merely a certificate stating who are the heirs and what are their shares in movable and *mulk* immovable property, in the event of an intestacy.

6. A registration following on a certificate of succession could not be allowed to stand if there is a valid will covering *mulk* immovable property.

FOLLOWED : L. A. 145/22 (C. of J. 1580) ; L. A. 111/24 (*ibid.*, p. 1864).

REFERRED TO : C. A. 120/34 (2, P. L. R. 447).

ANNOTATIONS :

1. See L. A. 145/22 and L. A. 111/24 (*supra*).

2. On the fourth point see, in addition to C. A. 120/34 (*supra*), C. A. 156/33 (2, P. L. R. 198, C. of J. 1680).

3. On the nature of a certificate of succession *vide* C. A. 83/39 (1939, S. C. J. 467, on p. 470).

4. On the sixth point *cf.* H. C. 55 & 57/40 (1940, S. C. J. 259, on p. 264) and C. A. 103/40 (*ibid.*, p. 454).

FOR APPELLANTS : Eliash.

FOR RESPONDENTS : Weinshall and Abcarius.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the Land Court of Haifa whereby that Court ordered cancellation of registration of certain immovable property and in lieu thereof ordered registration in accordance with the terms of a Will. The facts as found by the Land Court are briefly as follows :—

The deceased who was a member of the Latin Community died in the year 1901 having left a will by which his property went to his wife and four sons and there was a bequest of 10,000 piastres to each of his daughters upon their marriage. The signature of the testator was attested and on 18th January, 1901, the Religious Head of the Latin Community in Haifa purported to confirm it.

Two of the daughters subsequently married and each received 10,000 piastres in accordance with the Will — the marriages of each took place within a few months of the death of the Testator.

In October, 1917, the property in dispute, a *mulk* house, was apparently transferred in accordance with a Certificate of Succession without (it is alleged) the knowledge of the Plaintiffs (the present Respondents) and it was not until 1932, when one of the daughters brought an action against Plaintiffs claiming a share in the rents for 1925, that the Plaintiffs became aware of the registration. Plaintiffs, therefore, applied for cancellation of that registration.

The main point argued on appeal was as to the confirmation of the will. We shall deal, first of all, with the confirmation of the 18th January, 1901. Before doing so, we think it right to point out that there can be no question that this will was in fact the last will of the deceased Khalil Mehesham. At the hearing before the Land Court, the first Defendant, Julia, admitted that her father signed it and that he had made the will three hours before his death. She knew that the 10,000 piastres represented her share of her father's estate and she admitted that it was not until 1932 that she brought an action for rent. The second Defendant, Nabiha, likewise admitted that her father made his will in the agony of death and that she received 10,000 piastres to buy her trousseau and that she was married only two months after her father died. There can be little doubt that the will represented the last wishes of the deceased as to the disposal of his estate and that both Julia and Nabiha accepted the 10,000 piastres under the will. There is ample authority in law for the proposition that in 1901 a member of the Latin Community in Palestine was entitled to make a will and to leave *mulk* land by will. We refer to the following cases, namely, Land Appeal 145/22, Rutenberg's Collec-

tion of Judgments, Volume 4, p. 1580, Land Appeal 111/24, Rutenberg, Vol. 5, p. 1864. Young's Corps de Droit Ottoman, Volume 1, p. 322 and Goadby's International and Interreligious Private Law in Palestine, p. 104. We also refer to the Palestine Order-in-Council, 1922, Articles 52(1) and 54(1). We have been referred to various commentaries such as Fares el Khoury's commentary on the Ottoman Civil Procedure Code, p. 194, dealing with the jurisdiction of the *Sharia* Court, and to the Vizirial circular of 8th October, 1868, that is, 4 *Rajab* 1285 *A. H.*, and to Art. 18 of *Khati Hamayouni* of 10 *Jamad el 'Akher* 1272 and to Salim Baz' Commentaries on the Ottoman Civil Procedure Code, p. 127. The last named is so important that we here set it out fully :—

> "If the maker of the will was other than a Moslem and wrote his will in a deed in presence of witnesses of the notables of his Community, and confirmed it by the Patriarch or the Metropolite or their deputies (*wakils*), or was a foreigner and confirmed his will at the Consulate of the State to which he belongs, the will is deemed proper and executable, as is inferred from the Circulars issued on 12th *Safar*, 298, and 1st January, 296, by virtue of an Imperial Order."

Now, the only serious objection to the confirmation of 1901 raised by Dr. Eliash, advocate for the Appellants, was that the person who purported to confirm the will, that is, Father Elias Saba, was not the Patriarch or the Metropolite or a properly appointed deputy. Now, all this happened in 1901. Father Elias Saba signed as the "Spiritual Head of the Latins." There is no suggestion that there was anything fraudulent or that Father Elias Saba was not in fact the Spiritual Head of the Latins. After the lapse of so long a period of time as forty years, and in the absence of any evidence tending to throw doubt on the validity of this certificate by Father Elias Saba or of his authority to give it, we are quite unable to say that Father Elias Saba was not one of those properly appointed deputies such as were contemplated by Salim Baz in the commentary which we have cited. In our view, the confirmation of 1901 must be regarded as being good. It is to be noted that the Land Court was also inclined to consider it good ; in any event they did not hold it to be bad. All they said was that, whatever view one might take of the 1901 confirmation, there could be no question but that the confirmation of 1932 by the Ecclesiastical Court of Nazareth was good. With regard to the 1932 confirmation, Dr. Eliash has cited Civil Appeal 120/34, Vol. 2, P. L. R., p. 447. At p. 448 it is stated :—

> "In the case of the Succession Ordinance, 1923, the only provision which affects rights of succession arising on a death prior to the

Ordinance is contained in Section 22(ii) ; and the operation of that Section is limited to cases in which the death occurred since the 31st December, 1918."

Dr. Eliash's contention in this regard may or may not be sound ; as to this we express no opinion, but, as we think that the confirmation of 1901 was good, the appeal must fail. We think it proper, however, to deal with certain other matters argued before us. It is said that it is now too late to upset this registration. This action was brought in 1932 and there was, of course, no cause of action till 1917 when registration was effected on the assumption that there had been an intestacy. It is quite clear that the Defendants to the present action did nothing till 1932 when Julia brought an action for rent against one of her brothers. The Defendants Nos. 1 and 2 were never in actual possession and it was admitted that the present Respondents were in actual physical possession. In the judgment of the Land Court it was stated that it was not until 1932 when Julia brought her action claiming her share of the rents for 1925 that the present Respondents became aware of the registration. This statement does not seem to have been disputed. Now, a certificate of succession is merely a certificate stating who are the heirs and what are their shares in movable and *mulk* immovable property, in the event of an intestacy. It is clear, therefore, that a registration following on a certificate of succession cannot be allowed to stand if there is a valid will covering *mulk* immovable property. We, therefore, think that there is nothing in the contention of the Appellants' advocate on this ground. Dr. Eliash raised a point with regard to Article 55 of the Order-in-Council ; but Article 55 refers to actions of personal status involving persons of different religious communities. In the case now before us there is nothing to show that all the sons and daughters of the late Khalil Mehesham were not members of the same community, namely, the Latin Community. In the result, the appeal fails and is dismissed.

The Appellants will pay one set of costs to the first and 2nd Respondents to be taxed on the lower scale, to include an advocate's attendance fee of LP. 15. The Appellants will also pay the costs of the 3rd Respondent to be taxed on the lower scale to include an advocate's attendance fee of LP. 15.

No costs to the 4th Respondent.

Delivered this 17th day of April, 1942.

British Puisne Judge.

HIGH COURT No. 25/42.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPLICATION OF :—

Karl Scherer. PETITIONER.

v.

The Superintendent of the Detention Camp, Mazra', near Acre. RESPONDENT.

Detention of enemy aliens, Defence Regulations, Reg. 17B — *Previous detention possibly irregular, H. C.* 7/42 — *Regulation* 17B *not ultra vires, Emergency Powers (Defence) Act, Section* 1, *Emergency Powers (Colonial Defence) Order in Council, Emergency Regulations, Reg.* 17(1) — *General directions for detention of enemy aliens properly given under Regulation* 17B — *Affidavit in reply* — *English authorities, English Regulations, Reg.* 18B.

In refusing an application for a summons to issue directed to the Respondent, calling upon him to produce the body of Karl Scherer, Petitioner, on a date fixed by the Court and to show cause why the said Karl Scherer is being detained in Detention Camp, Mazra', near Acre, and why he should not be released from custody :—

HELD : 1. (Referring to H. C. 7/42) : Regulation 17B was not *ultra vires* Section 1 of the Emergency Powers (Defence) Act, 1939.

2. There was no substance in the submissions that either all enemy aliens had to be detained or none at all, that it had to be stated in the directions that they were given in the interests of public safety or the defence of Palestine, *etc.*

3. The affidavit in reply was properly made by the Acting Deputy Superintendent of the Detention Camp, Mazra', as he was the person in charge of the Detention Camp and in charge of the Petitioner, and the petition was addressed to him.

4. It was clear from the directions themselves that the discretion as to who should be detained had been exercised by the High Commissioner himself.

5. As Regulation 18B of the English Defence Regulations was very different in detail from the Palestinian Regulation 17B the English authorities cited had no real relevance.

REFERRED TO : H. C. 7/42 (*ante*, p. 51).

ANNOTATIONS :

1. On detention of enemy aliens, generally, *cf.* H. C. 7/42 (*supra*) and note 1.

2. See, on the first point, H. C. 105/41 (1941, S. C. J. 636, at p. 638).

3. On the third point compare note 5 to H. C. 96/41 (1941, S. C. J. 654).

FOR PETITIONER : Weyl.

FOR RESPONDENT : Crown Counsel — (Hogan).

ORDER.

This was an application to make absolute a rule *nisi* issued by the Court on the 20th March, 1942. At the conclusion of the hearing we ordered the rule to be discharged and stated that we would give our reasons in writing later.

So far as is relevant to these proceedings, the Petitioner states in his petition, dated the 19th March, 1942, that he is detained unlawfully at the Mazra' Detention Camp; that he came to Palestine at the end of 1935 as a legal immigrant; that he had previously lived in the Saar Territory, and that after the Saar plebiscite his passport was exchanged for a German passport. He states that he had been an active member of the Social Democrat party and in consequence thereof and in view of threats against his life by the Nazis, he and his family left the Saar Territory and came to Palestine.

It is clear that he was and is a German subject, and therefore an enemy alien.

The affidavit of the Acting Deputy Superintendent of the Detention Camp, Mazra', in reply, dated the 30th March, 1942, states that the Petitioner is an enemy alien and is detained in pursuance of directions issued by the High Commissioner to the Inspector General of Police under Regulation 17B of the Defence Regulations, 1939, to detain all enemy aliens other than those excepted by the said directions, of whom the Petitioner was not one, and that he was informed of such facts on the 27th March, 1942. A copy of these directions was attached to the affidavit and the original was produced in Court. It is signed by the Chief Secretary and is dated the 22nd March, 1942, although deemed to have come into operation on the 5th March, 1942.

The Petitioner has been detained since the 13th June, 1940, and although it was not disputed that since the Olles case (H. C. No. 7/42) and prior to this new Regulation 17B coming into force, and the directions issued thereunder, his detention might have been irregular, it was submitted that, anyhow at the date of the hearing, his detention was lawful and in order.

The various submissions made by Counsel for the Petitioner may conveniently be combined and grouped under two heads, namely, (a) that Regulation 17B is itself *ultra vires*, and (b) that if *intra*

vires, then the powers therein contained have not been properly or lawfully executed.

As regards the first point, in the Olles case (*supra*) the Emergency Powers (Defence) Act, 1939, the Emergency Powers (Colonial Defence) Order-in-Council, 1939, and the regulations made thereunder, were all exhaustively discussed, and in particular as regards Regulation 17(1) I stated: "It is somewhat difficult to envisage a more comprehensive or all-embracing power to interfere arbitrarily with and restrict the liberty of the subject, than that contained in this regulation", and I would add that it was not suggested in that case that this Regulation 17(1) was *ultra vires*. It is equally clear, in my opinion, that Regulation 17B is not *ultra vires* the powers conferred by sub-sections (1) and (2) of Section 1 of the Emergency Powers (Defence) Act, 1939.

As regards the second point, Regulation 17B, which came into force on the 5th March last, reads as follows:—

> "When the High Commissioner is of opinion that it is expedient in the interests of public safety or the defence of Palestine so to do, he may, by special or general directions addressed to the Inspector General of Police, direct the detention of all or any enemy aliens in Palestine, and such enemy aliens may thereupon be detained in such place and under such conditions as the High Commissioner may from time to time determine and they shall, while so detained, be deemed to be in legal custody."

From the wording of this regulation it is clear that such directions may be general or special, and they may refer to all aliens generally as a class or to individual aliens.

A general direction was issued by the High Commissioner to the Inspector General of Police which had effect as from the 5th March last, in the following terms:—

> "In exercise of the powers vested in him by Regulation 17B of the Defence Regulations, 1939, the High Commissioner directs you to detain all enemy aliens in Palestine other than those in respect of whom directions have already been given or may hereafter be given that they be not detained."

This is a general direction as regards all enemy aliens but envisages limitations, past or future.

It is under this regulation and under this direction that the Petitioner is detained, and he has been informed to such effect, and that he does not come within the limitations or exceptions.

Various submissions were put forward as to the interpretation of this regulation and as to the manner in which such directions should be given and carried out. It was suggested that either all enemy aliens must be detained or none at all could be detained — that it

must be stated in the directions that it was in the public safety or in defence of Palestine that such direction was given — that a person detained must be informed that he was on the prescribed list — *etc., etc.*, but there is no substance in any of such submissions. It was also submitted that the affidavit in reply to the petition was by an unqualified person, but he was the person in charge of the Detention Camp and in charge of the Petitioner, and to whom the petition was addressed. It was further submitted that the discretion as to who should be detained was vested in the High Commissioner and must be exercised by him. It is clear from the directions themselves that this discretion has been so exercised.

Various recent English authorities were quoted to us in relation to the English Regulation 18B, but although the principles enunciated therein may have some relevance, as they refer to a regulation very different in detail they have no real relevance.

It was for these reasons and that as it was not disputed that the Petitioner was an enemy alien, we were clearly of the opinion that the Petitioner was lawfully detained under the regulation, and that, therefore, the rule *nisi* should be discharged.

We fix the costs of the Respondent at LP. 10 to include advocate's fee.

Delivered this 20th day of April, 1942.

Chief Justice.

CRIMINAL APPEAL No. 44/42.

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

BEFORE : Gordon Smith, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Mahmoud el Jammal. APPELLANT.

v.

Local Town Planning Commission of Ramleh. RESPONDENT.

Criminal Procedure — Case not to be remitted where appellate Court finds that there was no evidence to support the charge.

In allowing an appeal from the judgment of the District Court of Jaffa, sitting as a Court of Appeal, in Criminal Appeal No. 1/42, dated 14.2.42 :—

HELD : Where the District Court allowed an appeal on the basis that there was no evidence to support the charge the accused had to be acquitted and the District Court erred in remitting the case for retrial.

FOR APPELLANT : Siksik.

FOR RESPONDENT : Municipal Engineer — (Badawi).

JUDGMENT.

This appeal should be allowed. In his judgment the learned President of the District Court found that there was no evidence to support the charge ; he then allowed the appeal and remitted the case to the Magistrate's Court for retrial. In this he erred. Once he allowed the appeal on the basis that there was no evidence to support the charge, he should have acquitted.

The appeal is, therefore, allowed, and the conviction and sentence quashed. The Appellant will have his costs, which we fix at an inclusive sum of LP. 10.

Delivered this 15th day of April, 1942.

Chief Justice.

HIGH COURT No. 35/42.

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

BEFORE : Gordon Smith, C. J. and Copland, J.

IN THE APPLICATION OF :—

Benno Marx. PETITIONER.

v.

The Commissioner for Migration & Statistics, Acting Director, Department of Immigration. RESPONDENT.

Immigration — Non interference with discretion as to issue of immigration certificates — Hardship.

In refusing an application for an order to issue directed to the Respondent, calling upon him to show cause why he should not allot one of Immigration Certificates of Category B(iii), given to the Jewish Agency for Palestine (Youth Immigration Department) for distribution amongst young immigrants by that

Youth Immigration Department, to Petitioner's minor grandson, Heinz Hirschmann :—

HELD : The application had to be refused as the matter was purely discretionary and the High Court was not concerned with the hardship involved.

ANNOTATIONS :

1. *Cf.* H. C. 38/39 (1939, S. C. J. 387).

2. On non-interference with the exercise of discretionary powers see H. C. 16/42 (*ante*, p. 139) and note.

3. See, on hardship not being a matter for the High Court, H. C. 31/39 (1939, S. C. J. 333, on pp. 336—7), H. C. 109/41 (1941, S. C. J. 628) and H. C. 5/42 (*ante*, p. 161, on p. 169).

FOR PETITIONER : Perles and Giladi.

ORDER.

This application must be refused. The matter is purely discretionary, with which we will not interfere. It may be a hard and harsh case on the Petitioner, but with this we are not concerned.

Given this 17th day of April, 1942.

Chief Justice.

CRIMINAL APPEAL No. 33/42.

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

BEFORE : Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Ali Muhammad Ibrahim. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Attempted murder, C. C. O., Sec. 222(a) — Finding by District Court that Accused acted under provocation and in hot blood — Premeditation not present — Conviction quashed and one for doing grievous harm substituted, C. C. O., Sec. 238 — Sentence.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated 17.2.42, in Crime No. 367/41, whereby the Appellant was convicted of attempted murder, contrary to sec. 222(a) of the Criminal Code Ordinance, 1936,

and sentenced to 3 years' imprisonment, and in varying the conviction and confirming the sentence :—

HELD : 1. As the Court had found that there was provocation and that the Appellant had acted in hot blood, there was no premeditation and the conviction for attempted murder had to be quashed.

2. The Appellant should be convicted of doing grievous bodily harm.

3. The sentence of three years' imprisonment would not be disturbed.

ANNOTATIONS :

1. On premeditation generally see CR. A. 38/42 (*ante*, p. 194) and note 3.

2. See, on provocation, CR. A. 4/42 (*ante*, p. 19) and note 2. *Cf.*, on cold blood, CR. A. 8/40 (1940, S. C. J. 33) and note.

3. Note the further possible alternative of attempted manslaughter. *Cf.* CR. A. 14/38 (1938, 1 S. C. J. 121, on p. 126) and CR. A. 1/39 (1939, S. C. J. 32).

4. See, on the last point, CR. A. 17/42 (*ante*, p. 212) and note 6.

FOR APPELLANT : Nasr.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

In this case the Appellant was convicted by the District Court, Jerusalem, of attempted murder, *contra* Section 222(a) of the Code, and was sentenced to three years' imprisonment.

The facts of the case apparently were that a brawl or altercation broke out between the complainant and the Accused, in which there is no doubt that the complainant was in the wrong in the initial stages, having, in company with some relatives, started an attack on the Accused; but the Court found that of the persons who took part in this quarrel, the only one who used a dagger was the Accused. With that finding, of course, we cannot interfere.

Now, the Court, in a part of its judgment, says "Undoubtedly there was provocation and the Accused acted in hot blood". Having regard to that observation and to the facts of the case as found in the judgment, we think that the Court was wrong in holding that the offence of attempted murder was proved. One ingredient of the offence of attempted murder is premeditation and that was not present in this case. We think, however, that the Accused should be convicted of an offence *contra* Section 238 of the Code, of unlawfully doing grievous harm.

The question we have to consider is what is a reasonable sentence to impose for that offence. It is true that there are considerable

mitigating circumstances in this case, but we think that sufficient allowance is made for all those circumstances if a sentence of three years' imprisonment is imposed.

The conviction of attempted murder is, therefore, quashed and instead the Accused must be convicted of doing grievous bodily harm *contra* Section 238. The sentence of three years' imprisonment will not be disturbed.

Delivered this 25th day of March, 1942.

British Puisne Judge.

HIGH COURT No. 30/42.

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

BEFORE : Copland, Edwards and Khayat, JJ.

IN THE APPLICATION OF :—

Mohammad Sharif el Nuss. PETITIONER.

v.

The Director of Customs, Excise & Trade, Haifa. RESPONDENT.

Import of goods in transit — Conditions imposed after authorization granted — Goods declared forfeited as imported without a licence, Import, Export and Customs Powers (Defence) Ord., Sec. 5(1) — Meaning of licence — Power to withdraw licence once granted — Alternative remedy, Customs Ord., Sec. 190.

In allowing an application for an order to issue, directed to the Respondent to show cause why the Petitioner should not be allowed to consign 77 bales of cotton yarn to Syria :—

HELD : 1. A licence is an authorization and Respondent's letter was an authorization to import in transit for Syria, and therefore a licence to do so.

2. The Respondent could not withdraw a licence when that licence had been acted upon and goods had been imported in transit on the strength of it.

3. There was no other remedy to secure the importation of the goods into Syria.

ANNOTATIONS :

1. *Cf.* H. C. 31/42 (*post*).
2. See, on the last point, H. C. 13/42 (*ante*, p. 145) and note 2.

FOR PETITIONER : Abcarius and Weston Sanders.

FOR RESPONDENT : Crown Counsel — (Rigby).

ORDER.

Copland, J.: This case can be disposed of in a few words and in fact the less said about certain aspects of it the better.

The Petitioners were desirous of importing 77 bales of Indian cotton thread from Baghdad to Syria in transit through Palestine. On the 18th August, 1941, their agents in Haifa applied to this effect to the Director of Customs, Excise and Trade at Haifa. On the 23rd August, 1941, the Director of Customs replied as follows:—

> Messrs. Wardeh Kabbab.
> Gentlemen,
>
> Reference: Your letter dated 18.8.41.
>
> You are hereby authorised to import from Baghdad to Palestine in transit to Syria the 77 bales of Indian cotton thread referred to in your above mentioned letter.
>
> I have *etc.*
> DIRECTOR.

At or about the same time the Petitioners obtained Syrian import licences, permitting the importation of the said goods into Syria, and these licences were produced to the Director of Customs in Haifa.

When the goods arrived in Palestine about 8th October, 1941, the Director refused to allow their consignment to Syria but required documentary evidence from the Iraqian Customs that the said goods were actually sent in transit from Baghdad to Syria through Palestine. The Manifest issued in Iraq showed that the goods were consigned in transit for Syria.

It is true that the invoice from Bombay shows that the goods were consigned to Baghdad in transit for Palestine, but there is nothing to prevent the owner changing the destination whilst in transit, and there is not the slightest suggestion even that the Syrian destination is not the correct one.

Evidence was also produced proving, beyond any doubt, that the goods were paid for in Baghdad and that no Palestine funds were involved, but the Palestine Customs authorities, for some reason known only to themselves, required the original bill of lading and original invoice from Japan. How these could have been of any relevance completely passes my comprehension, since these goods were probably merely a small portion of the goods imported from Japan and the firms in Japan had probably never in their lives heard of the Petitioners of their agents in Baghdad. The only possible relevant document could have been in the bill of lading from Bombay and evidence from the

bank in Baghdad of payment against documents there, both of which were duly furnished.

Finally, the supply of excuses for not complying with their own written word having apparently run short, on the 17th December, 1941, the Respondent informed Petitioners for the first time that as the said goods were imported without an import licence they had been forfeited under section 5(1) of the Import, Export and Customs Powers (Defence) Ordinance, 1939.

It is difficult, if not impossible, to imagine a more flagrantly dishonest reply than this letter of the 17th December, 1941. A licence is an authorization, and there can be no doubt that the Respondent's letter of the 23rd August, 1941, was an authorization to import in transit for Syria, and, therefore, a licence to do so. There is no prescribed form for a licence.

It has been argued somewhat half-heartedly that the Director at any time has an absolute discretion to withdraw a licence. He cannot at any rate withdraw a licence, when that licence had been acted on and on the strength of it goods have been imported in transit. And to say that the goods had been imported without a licence was, not to mince words, a lie. They had been imported by virtue of the authorization or licence of the 23rd August, 1941, and the Respondent knew it.

As to the argument that there is an alternative remedy and, therefore, this Court will not interfere, I do not think that there is any effective alternative remedy. To sue for the goods under section 190 of the Customs Ordinance will not give the Petitioners what they want which is to secure the importation of these goods into Syria, and there is no other measure. The whole matter reflects the gravest discredit on the Respondent's department and gives rise to very sinister suspicions.

The rule must be made absolute and the Petitioners will have their costs assessed at a total sum of LP. 15.—.

Given this 17th day of April, 1942.

British Puisne Judge.

Edwards, J.: I agree that the rule must be made absolute.

British Puisne Judge.

HIGH COURT No. 31/42.

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

BEFORE : Copland, Edwards and Khayat, JJ.

IN THE APPLICATION OF :—

Adel Coudga & Co., of Damascus. PETITIONERS.

v.

The Director of Customs, Excise & Trade, Haifa. RESPONDENT.

Import of goods in transit, H. C. 30/42 — Authorization granted — Untrue statement in affidavit in reply — Goods declared forfeited, Import, Export and Customs Powers (Defence) Ord., Sec. 5(1) — Practice of not requiring import licence for goods in transit — Discretionary powers not to be delegated to subordinate officials.

In allowing an application for an order to issue, directed to the Respondent to show cause why the Petitioners should not be allowed to forward 152 cases of artificial silk yarn to Syria :—

HELD : 1. (Following H. C. 30/42) : Respondent's letter was an authorization to import the goods in transit for Syria.

2. The goods in question were not imported into Palestine but were in transit for Syria, and had not been paid for by Palestine funds.

3. *Quaere,* whether the Import, Export and Customs Powers (Defence) Ordinance applied to goods in transit.

4. Cases involving discretion should be dealt with by the Officer to whom the discretion was given by law, and should not be delegated by him to a subordinate.

FOLLOWED : H. C. 30/42 (*ante*, p. 248).

FOR PETITIONER : Abcarius and Weston Sanders.

FOR RESPONDENT : Crown Counsel — (Rigby).

ORDER.

This case is slightly different from High Court 30/42 heard on the same day, but many of the main facts are the same. It concerns 152 cases of artificial silk yarn which the Petitioners wished to import from Baghdad to Syria in transit through Palestine. The Syrian authorities granted import licences for these goods into Syria, and Petitioners' agents in Baghdad were instructed to forward the said goods to Damascus *via* Palestine. In letters dated 18th and 19th September, 1941,

Petitioners' agents asked for permission to forward certain goods, including twenty-two cases of artificial silk yarn, in transit to Syria, and on the 22nd September the Respondent replied as follows :—

"Messrs. Wardeh Kabbab & Co.

Reference : Your two letters dated 18th and 19th September.

I have no objection that you import in transit to Syria the goods referred to in your above-mentioned letter, provided the original Manifest is presented to this office on arrival of the goods in Palestine.

I have *etc.*

DIRECTOR.

This letter of September 22nd, 1941, is an authorization to import in transit for Syria twenty-two cases for the reasons given in High Court 30/42.

After some correspondence, the Respondent addressed the following letter to the Petitioners' advocate :—

"Mr. H. C. Weston Sanders. 20th November, 1941.

Sir,

With reference to your interview at this Office and in conformation of my telephone message this morning, the goods referred to will be allowed to go forward in transit to Syria provided you produce documentary evidence showing that the goods were originally paid for by funds from Iraq and that no funds from Palestine were involved in this purchase.

Satisfactory evidence would be :

(a) The original B/L from Japan to Bombay.

(b) The original invoice from the firm in Japan.

(c) The contract made by your clients on 26.7.41.

(d) A statement from the bank which opened credit for the payment of the goods in Japan.

I have *etc.*

DIRECTOR.

This letter refers to an interview and a telephone message but does not in any way give any clue to the goods referred to. For a business letter it is a masterpiece of ambiguity.

Prior to this, on November, 17th, 1941, the Petitioners' advocate had sent a letter to the Respondent in which reference is made to 152 cases of Artificial Silk Yarn to be imported by the Petitioners, and to the 77 bales of Indian cotton which were the subject-matter of High Court 30/42.

On the 2nd December, 1941, the Petitioners' advocate wrote to the Respondent in answer to the latter's letter of November, 20th, Ex. 90, and in this letter we again find mention of the 152 cases of artificial

silk. In that letter attention is called to the documents already produced by the Petitioners, and that all the transactions were between Baghdad/Damascus and Bombay, and all bore the stamp of the Ottoman Bank in Baghdad. From the correspondence as a whole it seems clear that the letter from the Respondent of 20th November, 1941, referred also to the 152 cases of artificial silk. Here again all the invoices from Baghdad for these 152 cases show them as consigned "Haifa, in transit for Syria". The Bombay invoices show destination as Baghdad, in transit for Palestine. Again there is nothing to prevent an owner changing the destination of his goods whilst in transit, and as the goods were shipped from Bombay they were obviously not enemy property. How, therefore, the original bill of lading and invoice from Japan could have any bearing on the character or ultimate destinations of these goods again defeats me completely.

Incidentally paragraph 6 of the Respondent's affidavit in reply is untrue — application had been made to the Respondent in respect of the 152 cases of artificial silk. The Respondent's letter of the 17th December, 1941, is proof of that.

Finally we come again to the notorious letter of the 17th December, 1941, in which the Respondent informed the Petitioners that as the 152 cases of artificial silk had been imported without a licence, they were seized and forfeited under Section 5(1) of the Import, Export and Customs Powers (Defence) Ordinance, 1939.

The Petitioners' main arguments are that the goods were not imported without a licence, that a licence when granted and acted upon cannot be withdrawn arbitrarily, and that the Regulations do not refer to goods in transit, to which indeed they would be inapplicable. The Respondent traverses all these arguments, at any rate as regards 130 cases, in respect of which he says no authority of any kind was ever granted.

Now, it is as clear as daylight, or should be, to any person who had not already made up his mind not to be convinced that these 152 cases on arrival in Palestine were not imported into this country but were in transit for Syria, and were not paid for by Palestine funds. In answer to a question put by me from the Bench we were informed that with regard to goods in transit the practice was not to issue an import licence but only an export licence in transit. There was no evidence before the Respondent upon which he could hold that the goods were "destined for and imported into Palestine", but all the evidence was to the effect that they were in transit for Syria, and in such circumstances the Department's practice is not to demand an import licence. The reason given, therefore, for their forfeiture cannot

hold water, and the goods were illegally seized. I very much doubt if these Regulations apply at all to goods in transit, which are in a class by themselves, and that would seem to be the Department's own view, since they do not ask for import licences for them.

From the affidavits in reply, in both these cases, which were made by a subordinate official, it would seem a reasonable inference that the Respondent himself had no knowledge of what was taking place. Is it too much to express the hope that cases involving discretion should in future be dealt with by the officer to whom that discretion is given by law, and should not be delegated by him to a subordinate.

The rule must be made absolute, with costs to the Petitioners fixed at the inclusive sum of LP. 15.—.

Given this 24th day of April, 1942.

British Puisne Judge.

HIGH COURT No. 12/42.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPLICATION OF :—

Leja Sztrajmel. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Israel Sztrajmel. RESPONDENTS.

"Halitza" — Rabbinical Court ordering monthly payments to sister in law until fulfilment of formality allowing her to remarry — Parties Palestinian Jews — Whether matter one of divorce, P. O. in C., Art. 53(1) — Nature of amount awarded — Meaning of "maintenance", P. O. in C., Art. 51, H. C. 22/39 — Jurisdiction by consent, H. C. 79/40.

In allowing an application for an order to issue, directed to the first Respondent, calling upon him to show cause why the execution proceedings in file No. 1006/41, Execution Office, Tel-Aviv, should not continue according to the application of the Petitioner :—

HELD : 1. As the parties were never married the matter was not one of divorce.

2. (Following H. C. 22/39) : Under Jewish law a brother refusing

to give his sister-in-law the freedom to remarry by undergoing the formality of *"Halitza"* was liable to payments in the nature of maintenance.

3. (Following H. C. 79/40) : By appearing before the Rabbinical Court and putting up counterclaims there the Respondent had consented to the jurisdiction of the Rabbinical Court.

FOLLOWED : H. C. 22/39 (1939, S. C. J. 273) ; H. C. 79/40 (1940, S. C. J. 354).

ANNOTATIONS :

1. On the meaning of "alimony" and "maintenance" see S. T. 1/28 and C. A. 62/37, cited in H. C. 22/39 (*supra*).

2. On the last point see, in addition to H. C. 79/40 (*supra*), H. C. 22/40 (1940, S. C. J. 87) and note.

FOR PETITIONER : Lustig.

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

ORDER :

Frumkin, J. : The brother of Respondent died without issue leaving a wife, who is the Applicant in this case. Both parties are Palestinian Jews. Under Jewish Law the Petitioner cannot remarry unless she obtains a relief from her brother-in-law in the form known as *"Halitza"*. She sued Respondent before the Rabbinical Court and in the result the Court ordered the Respondent to pay Applicant maintenance in the sum of LP. 2 per month until the performance of the said religious formality which will give the woman her freedom to be married. The Chief Execution Officer refused to execute the judgment of the Rabbinical Court and hence this application.

The matter is one of jurisdiction. On behalf of Petitioner it was first argued that the Religious Court has exclusive jurisdiction under article 53(1) of the Palestine Order-in-Council because *"Halitza"* is to be regarded as divorce in as much as without it the woman cannot remarry. There is nothing in this argument. The parties were never married and there could be no divorce.

Alternatively counsel for Petitioner argued that the Rabbinical Court has obtained jurisdiction by consent of the parties under 53(2) and the first point which arises is whether the amount awarded by the Rabbinical Court is maintenance and thus a matter of personal status within the meaning of article 51 of the Palestine Order-in-Council.

The law on this point has been laid down by Trusted, C. J., in

Shtark *v.* Chief Execution Officer and others, H. C. 22/39, 6 P. L. R. 323, when after dealing with the previous case in which it was held that alimony and maintenance in the Order-in-Council should be given the English meaning he said :—

> "As Articles 53 and 54 of the Order-in-Council draw a distinction between alimony and maintenance, I think these Courts are bound to enquire into the English meaning of these words, but having ascertained that thereunder alimony is a payment by a husband to a wife in consequence of divorce proceedings, and that maintenance means certain other payments, such payments, when their nature is ascertained, will respectively be governed by the law of the community concerned. I do not think the application of the English meaning goes further than that."

We are told that under Jewish Law a brother refusing to give his sister-in-law the freedom to remarry by undergoing the formality of *Halitza* is liable to pay her maintenance and the word *"Mezonot"* which is the Hebrew translation for maintenance would, under Jewish law, include maintenance for a widow sister-in-law in a case of the nature of the present case. It is not for us to decide whether it is so or not, but I had an opportunity of examining the legal position under Jewish law on this subject and I found that there is considerable authority to support that view. And so we come to the next point as to consent.

In Leibowitz *v.* Leibowitz, High Court 79/40, where previous decisions on the matter of consent were reviewed it was held that although "Consent must be clear and beyond doubt" and "a definite consent by the parties themselves", in a proper case it is permissible for a Court to infer consent by conduct. In the present case the Respondent appeared before the Rabbinical Court and put up a number of counterclaims for certain property to be delivered to him as a condition for giving the Petitioner the relief required. In the circumstances we consider that this is consent by conduct and the judgment of the Rabbinical Court was, therefore, within its jurisdiction.

The Order will, therefore, be made absolute with costs, *i. e.* fixed (inclusive) costs of LP. 5.

Given this 31st day of March, 1942.

Puisne Judge.

Edwards, J. : I concur.

British Puisne Judge.

HIGH COURT No. 33/42.

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

BEFORE : Gordon Smith, C. J. and Copland, J.

IN THE APPLICATION OF :—

Khamis Dib Jarbo'a. PETITIONER.

V.

The Director, Department of Land Registration, Jerusalem. RESPONDENT.

AND

Khamis Dib Jarbo'a. PETITIONER.

V.

1. The Director, Department of Land Registration, Jerusalem,
2. Khalil Saleh Jarbo'a, duly appointed guardian of Khamis Dib Jarbo'a. RESPONDENTS.

(By order of the Court dated 28.4.42).

Director of Land Registration refusing to register transaction of person under guardianship — Exclusive jurisdiction of Sharia Court as to guardianship, P. O. in C., Art. 51 *— Termination of guardianship in respect of immovables, Mohammedan Personal Law, Art.* 496 *— No appeal brought against appointment of guardian — Alternative remedy — Cyprus and Indian authorities of no avail as against Palestine O. in C.*

In refusing an application for an order to issue, directed to the 1st Respondent, calling upon him to show cause why he should not allow the Petitioner to complete the transaction of sale of his property in file No. 595/41, Land Registry, Tel-Aviv :—

HELD : 1. Guardianship over Moslems is within the exclusive jurisdiction of the *Sharia* Court and it was for that Court to decide whether the guardianship in respect of the property in question should continue or not.

2. The Petitioner could have appealed against the appointment of the present guardian and no writ of *mandamus* would issue since he had failed to make use of this alternative remedy.

3. Cyprus or Indian authorities could have no real application to the particular laws of Palestine, as specifically laid down in the Order in Council.

ANNOTATIONS :

1. On the termination of guardianship *cf.* Art. 981 of the *Mejelle*. See, on the

applicability of the Mohammedan Personal Law, the Moslem Family Law (Application) Ordinance.

2. On the second point *vide* H. C. 13/42 (*ante*, p. 145) and note 2. *Cf.* H. C. 14/42 (*ante*, p. 149, on p. 153) and H. C. 30/42 (*ante*, p. 248).

3. Compare, on the inapplicability of English authorities in the face of Palestinian provisions, CR. A. 126/41 (1941, S. C. J. 492, on p. 494).

FOR PETITIONER : Eliash.

FOR RESPONDENTS : No. 1 — Crown Counsel — (Hogan).
No. 2 — Abcarius.

ORDER.

We are quite of the settled opinion that this Order *Nisi* must be discharged on two grounds. Firstly, the Order-in-Council specifically confers jurisdiction on the question of personal status on the *Sharia* Courts. They have exclusive jurisdiction in these and other matters. Guardianship is one of these matters of personal status, as defined in Article 51. As to whether this Petitioner has or has not attained full majority, so that he can deal with his property, is a question for the *Sharia* Court and not a question for us. Section 496 of the Mohammedan Personal Law is quite clear on that point. It says :—

> "Nevertheless guardianship does not cease in respect of property by the minor attaining majority and attitude for good administration."

That is part of the Mohammedan Personal Law, and it is a question for the *Sharia* Court to say whether the guardianship in respect of the property should continue or should cease.

Secondly, the present guardian was appointed in 1941 at which date, I think, the Petitioner, according to Mr. Eliash had then attained the age of 21. He did not appeal when the new guardian was appointed, to the *Sharia* Court of Appeal, but has subsequently made this application to us, and it is clear that, there being an alternative remedy open to the Petitioner, we should not exercise our discretion in ordering the issue of a *mandamus* to the Director of Lands.

We are certainly not bound by, and I think we can say that, cases quoted to us from Cyprus or from India can have no real application to the particular laws of this territory, as specifically laid down in the Order-in-Council and under which matters of this kind are referred to the *Sharia* Courts, and they have exclusive jurisdiction in such matters.

For these reasons the Order *Nisi* will be discharged with costs to include LP. 10 advocate's attendance fee to the Respondent, and to Abcarius Bey who appears for the present guardian.

Given this 28th day of April, 1942.

Chief Justice.

CIVIL APPEAL No. 22/42.

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

BEFORE : Gordon Smith, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Olga Walder
(also known as Azgour). APPELLANT.

v.

1. Samuel Azgour,
2. The Attorney General. RESPONDENT.

Marriage and Divorce — Action for declaration that parties validly divorced — Application for leave to appeal signed by advocate not holding Power of Attorney — Intervention of Attorney General — Local jurisdiction — Proceedings properly brought by motion, C. P. R., Rules 2, 7, 12 and 305, R. S. C. J., Order 25, Rule 5 — Affidavit as to Foreign Law — Parties being divorced in Egypt according to Jewish Law — Such divorce recognised by Egyptian Law — Parties foreigners, P. O. in C., Art. 59 — Nature of Jewish divorce, C. A. 22/34 — Power to make declaration prayed for, P. O. in C., Arts. 47, 51, 52, 53, 54, 64, 65, 65 A, Sasson v. Sasson, C. D. C. T. A. 340/37, Sarabai v. Rahiabai.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 21st January, 1942, in Motion No. 299/41 :—

HELD : 1. The Advocates Ordinance required a delegation in writing only when one advocate represented another at a hearing. Such delegation was not necessary for the mere signing of an application. The application for leave to appeal was, therefore, properly signed by an advocate on the instructions of another advocate, properly appointed.

2. The Attorney General had been properly served with the notice of motion and it could be left to him to appear or not, irrespective of whether he was named as a Respondent or not.

3. As the proceedings had originally been brought only against the Attorney General they had been properly instituted in the District Court of Jerusalem although the first Respondent resided in Tel-Aviv.

4. The proceedings were properly instituted by notice of motion this being the most expeditious, convenient and satisfactory manner of obtaining a declaration of this nature.

5. (Following C. A. 22/34) : Divorce under Jewish Law is an act of mutual consent contracted between husband and wife and supervised by Rabbinical authorities only so far as necessary to

secure that all requirements of Jewish Law in this respect have been fully observed.

6. The national law of the parties, *i. e.* Egyptian Law, recognised a Jewish divorce as valid.

7. (Following Sasson *v.* Sasson) : The Appellant was entitled to an order declaring that, having obtained a divorce valid under Jewish Law and recognized under her national law, she was divorced from her husband, the first Respondent.

FOLLOWED : C. A. 22/34 (2, P. L. R. 365, C. of J. 1934—6, 588, P. P. 31.vii.35) ;
Sasson *v.* Sasson, 1924, A. C. 1007 ; 132 L. T. Rep. 163.

ANNOTATIONS :

1. See, on the first point, CR. A. 14/42 (*ante*, p. 109, at p. 112) and note 2.

2. As regards the second and third points : The Attorney General had originally been cited as sole Respondent. The Court subsequently ordered that the first Respondent be joined, and the Attorney General was struck out of the proceedings, at his request, the District Court expressing the opinion that it should be left to the Attorney General to intervene and appear, if he so desired, under the Law of Procedure (Am.) Ordinance, 1934, Section 6. Reference was made to Herd *v.* Herd (52, T. L. R. 709), Rosin *v.* Attorney General (34, L. T. R. 417) and C. D. C. T. A. 340/37 (Tel-Aviv Judgments, 1938, p. 31).

3. See, on the fourth point, C. A. 216/41 (1941, S. C. J. 579).

4. On the merits of the case see C. A. 22/34 (*supra*) and C. D. C. T. A. 340/37 (*supra*), the latter judgment being the case referred to by the District Court. *Cf.* Dicey, Conflict of Laws, 5th ed., *p.* 922 and footnote (*p*) and *p.* 983, footnote (*u*). See also Goadby, International and Interreligious Private Law in Palestine, *pp.* 152 *seq.*

FOR APPELLANT : Goitein and Weyl.

FOR RESPONDENTS : No. 1 — Gorodissky.
No. 2 — Solicitor General — (Griffin) and Beham.

JUDGMENT.

Gordon Smith, C. J. : This was an appeal against the judgment of the District Court, Jerusalem, which dismissed the application which had been made by way of motion, for a declaration by the Court that the Applicant, Olga Walder, (also known as Olga Azgour) was divorced from Samuel Azgour in December, 1940.

As various and numerous technical objections were made on behalf of the first Respondent, both before the District Court and before us, it is desirable to deal with these matters before coming to the substance of the motion. My brother Frumkin, whose judgment I have had the opportunity of reading, has fully dealt with the technical objection

that there was no proper appeal before this Court, and I agree that there is no substance in this objection and I need say no more in this respect. Considerable argument appears to have been addressed to the District Court as to whether the Attorney-General was properly made a Respondent, and he appears to have been struck out of the proceedings, but I think he was properly served with the notice of motion and it could be left to him to appear or not, irrespective of whether he was named as a Respondent or not. Actually, we heard the Solicitor-General in argument, at his own request, and we are grateful to him for his comments.

Another point was that the application should have been made in the Tel-Aviv District Court and not the District Court at Jerusalem, but at the date the motion was filed the first Respondent was not then a Respondent and was joined later. The President dealt with this point and held that it was properly before his Court, and we agree. Neither is there any substance in the point that the matter should have been brought by way of action and not by motion, and reference was made to our local definition of action in Rule 2 and to Rules 7 and 12. But I would observe that the preceding words "unless the context otherwise requires", qualify this definition which says that "action" includes all civil proceedings commenced in any manner prescribed. No relief is sought against the Respondent, and under Rule 7(1)(h) such must be stated in an "action". Rule 305 and following Rules specifically provide for applications by way of motion, and I think the learned President erred in saying that not only was it inconvenient and unsuitable to try this matter by motion but that such matter could not be brought before the Court or originated by way of motion. I would also refer to Order 25 Rule 5 of the English Rules, which says that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not. It is clear from the notes to this rule, and authorities there quoted, that although there is a discretion in the Court to hear such matters by way of motion and which should be carefully exercised, in my opinion it is the most expeditious, convenient and satisfactory manner of obtaining a declaration of this nature.

A further objection before us, and one made for the first time, was that Abcarius Bey, who filed an affidavit as to the law in Egypt on the point, was not competent to advise this Court. This is rather an astonishing objection in view of the fact that no counter affidavit was filed in this respect, and moreover Abcarius Bey states that for many years

he was sub-Director of the Mixed Tribunal in Egypt in the Ministry of Justice at Cairo.

All these technical objections are somewhat surprising in view of the facts of the case. Some of these facts are set out in the application, as follows :—

(1) The Applicant, a widow, and whose previous marriage took place outside Palestine, came to Palestine after the death of her husband, and in August, 1937, married the first Respondent, I assume, in Palestine.

(2) No details are given of this marriage but it is stated that at that time the first Respondent was, and still is, an Egyptian subject.

(3) No civil ceremony was performed, and one must assume that such religious ceremony took place before a Rabbi and in accordance with Rabbinical law and custom.

(4) It is not so stated, but one can and must assume that both parties are Jews.

(5) In December, 1940, so it is stated, the parties were divorced according to Jewish Law, and such divorce was recognised by the Rabbis of the Chief Rabbinate and a certificate to this effect was issued, dated the 29th December, 1940, a copy being attached to the application.

(6) The application then goes on to state that under Jewish law and as has been recognised and confirmed by this Court, Jews can divorce themselves by a ritual of mutual consent without any order of a Rabbinical Court being necessary.

(7) That, similarly, under Egyptian Law, such a divorce by mutual consent is recognised in the case of Jews, once it has been recognised by the Rabbis.

The details given in the application might have been much fuller and also more precise, and it would then have been more helpful in what is admittedly a difficult case, but so far as they go the facts have not been disputed nor have any assumptions I have made or which were made by Counsel for the Applicant, been controverted.

The application concludes by praying for a declaration that the Applicant was divorced from the first Respondent in December, 1940.

There is a further fact that must not be lost sight of and that is that both parties, not having acquired Palestinian citizenship under the Palestine Citizenship Order-in-Council, 1925, as amended in 1939, are therefore foreigners, (*vide* Art. 59 of the Order-in-Council, 1935), and as stated in the application the first Respondent is an Egyptian subject and so I believe was the Applicant.

I accept the statement contained in paragraph (6) *supra*, as to the

Jewish law and custom, confirmed as it is not only by the case of Volkenberg *v.* Volkenberg, C. A. 22/1934, but also ratified, if I may say so, in the judgment to be read by my brother Frumkin, and I accept the statement contained in paragraph (7) *supra*, as to Egyptian law, confirmed as it is by the affidavit of Abcarius Bey.

Is there any reason therefore why this Court cannot make the Declaration sought ? Apart altogether from the question of the form in which these proceedings were brought, the learned Judge in the District Court dismissed the application, distinguishing the case Sasson *v.* Sasson, which I will refer to later, and stating, "I do not think this Court can go further than to pronounce upon the effect of the national law of the parties in relation to the divorce which the Applicant states she has obtained. That is a very different matter to declaring that the Applicant was divorced". In other words, he would have been prepared to make a declaration that the Egyptian law (*i. e.* the national law of the parties) recognized this divorce obtained under the religious law of the parties, as being valid but he was not prepared to declare that the divorce was valid or to be recognized as valid under Palestinian law for all purposes, or that the marriage had in fact been dissolved. At least, that is how it appears to me that his judgment is to be interpreted. It was with some hesitation that the learned Judge came to this conclusion but he quoted a Tel-Aviv District Court ruling as supporting his view, but he admitted that Sasson *v.* Sasson had not been referred to or quoted in that case.

Jurisdiction in connection with divorce is dealt with in the Order-in-Council, 1922, as amended from time to time, and by an amendment in 1939, Article 65A envisaged and authorised a Marriage and Divorce Ordinance being enacted for non-Moslems and non-Members of religious communities, which unfortunately has not yet come into force. We, therefore, have to refer to the provisions in the Order itself.

Marriage and divorce are both matters of personal status (Art. 51) and by Articles 52, 53 and 54 respectively, the Moslem Religious Courts, the Rabbinical Courts of the Jewish Community and the Courts of the several Christian Communities are to have exclusive jurisdiction in these two matters (*inter alia*), but it is to be observed that foreigners are expressly excluded from coming within this jurisdiction, anyhow so far as concerns Jews and Christians, and that by Article 47 the Civil Courts also have jurisdiction in matters of personal status, of persons in Palestine, but subject to the foregoing other provisions I have mentioned. Again, by Article 64, the District Court is to have jurisdiction in matters of personal status of foreigners and the personal law of such foreigners is to be applied. Both in this article

and in the succeeding Article 65, under which foreigners may consent to the jurisdiction of Religious Courts, there is a prohibition on the granting of a divorce to foreigners. The latter article has been amended to include a prohibition of a decree of nullity of marriage, but the former article has not been so amended.

I have thought it desirable to refer briefly to these somewhat complicated and confused provisions, as they appear to me to be somewhat relevant, in a greater or less degree.

In effect, however, the argument for the Applicant is that they are hardly relevant at all, as it is not suggested that any Rabbinical Court has in fact attempted to grant a divorce or exercise jurisdiction at all over the parties in this respect.

What is argued is that under Jewish Law and custom, the parties have by mutual consent divorced themselves and have merely been before a Rabbi who, having satisfied himself as to such mutual consent, and on other matters, has given the parties a certificate to the effect that they are validly divorced according to Jewish law. This view is confirmed by Volkenberg *v.* Volkenberg to which my brother Frumkin refers in his judgment, and I have nothing to add to his comments in this respect and in regard to the Certificate issued by the Rabbinate.

The Applicant relies on this case and also on the Sasson *v.* Sasson case (1924 A. C. 1007), which was a case of very similar nature and in which the Privy Council stated that the Appellant was entitled to the declaration asked for.

For the first Respondent it was submitted that that part of the Volkenberg judgment quoted was *obiter,* but this is clearly not so, and also that the Sasson case could and should be distinguished in that the respective Orders-in-Council are different. The wording is slightly different, but the effect is the same, and the facts in that case are so similar to the facts in the case before us that we are bound by that decision.

I am not aware of any similar local case as between Moslems having come before this Court but I imagine that the position would be very much the same, and in the Sasson case the following part of the judgment of Lord Dunedin seems to be relevant :— "Divorce by means of the use of the phrase "*talak*" is not a ground which would be governed by English law. Nonetheless, the British Courts have often given effect to Mahomedan divorces, and an instance may be found in the case of Sarabai *v.* Rahiabai" (reported in the Bombay Reports, I. L. R. 30, p. 537).

In my view the appeal should be allowed and the declaration asked for should be made, the Appellant to have the costs on the lower scale here and below, including LP. 15 attendance fee.

Delivered this 20th day of May, 1942.

Chief Justice.

Frumkin, J.: This is another personal status case not free of either interest or difficulty. The facts are simple and not unusual. The Appellant was married in Palestine to the Respondent, an Egyptian subject. Both parties are Jews and the marriage was a religious one. It turned out to be an unhappy alliance and the woman sought for, and allegedly obtained, a divorce before the religious authorities. She then applied, by way of motion, to the District Court for a declaratory order that she was divorced, and her application having been refused she has now appealed.

A preliminary objection was taken that there is no appeal before this Court because the advocate who signed the application for leave to appeal on behalf of the Appellant had no power of attorney at the time. It appears, however, that Mr. Weyl, who signed the application, was an advocate in the office of Mr. Goitein acting upon his instructions. Mr. Goitein represented the Appellant all through the proceedings and under the Advocates Ordinance a delegation in writing is only necessary when one advocate represents another in a hearing before a Court. Such delegation is not necessary for a mere signing of an application. The objection must therefore be overruled.

On the merits of the case, it is clear that neither the Rabbinical Court nor the Civil Courts in this country have jurisdiction to pronounce a decree of dissolution of marriage of foreigners. The position is, therefore, such that a foreign Jew or Jewess living in Palestine wishing to obtain a divorce against the will of the other party to the alliance has no direct legal remedy in this country. This is an unfortunate state of affairs, as there are Jews of many foreign nationalities living in this country and in the natural course of events cases are bound to arise when a party has to seek for legal relief from a Court in order to put an end to a broken family life; very often the only effective relief is by way of a dissolution of the marriage. This is a hardship for which, of course, the remedy lies with the legislature, and in fact the Order-in-Council envisages legislation in this respect; pending such legislation however which is still to come, the Courts should not, to my mind, lose sight of such hardships and try, while construing the law, to give it the most liberal interpretation permissible.

Now, while the Rabbinical Court as a Court has no jurisdiction over foreigners, there is nothing to prevent Jews from seeking the help of their religious dignitaries in giving effect to their mutual desire to put an end to their matrimonial relationship by effecting a divorce in the prescribed ritual form. In Volkenberg *v.* Volkenberg (C. A. 22/34, 2 P. L. R. 365) the nature of a divorce under Jewish Law was explained and the distinction was drawn between the function fulfilled by Rabbis in their judicial capacity as Judges of Rabbinical Courts and in their capacity as religious dignitaries. I may here cite the following two passages of that judgment :—

> "Divorce under Jewish Law is an act of mutual consent contracted between husband and wife and supervised by Rabbinical authorities only so far as necessary to secure that all requirements of Jewish Law in this respect have been fully observed. In any dispute between husband and wife as regards a divorce the Rabbinical Court can only decide whether or not the husband is bound to divorce his wife and whether or not the wife is bound to accept a divorce from her husband. With the issue of an order to that effect, the jurisdiction of the Rabbinical Court as such ceases. There is no way of enforcing such a judgment except by using moral, religious and social pressure on the parties to obey the order ; and notwithstanding any order of the Rabbinical Court to the effect that a divorce shall take place, there is no divorce and no dissolution of marriage unless and until the husband has by his own will granted the divorce in the form prescribed by religious authorities (a form which has practically not changed for the last 2,000 years), and that the wife has by her own will accepted such divorce.
>
> The divorce under Jewish Law is thus on the one hand a contract by mutual consent. On the other hand, however, it is a ritual institution strictly governed by religious rules of traditional methods performed by persons of special qualifications and supervised by recognized Rabbinical authorities acting not in a judicial capacity, but, let us say, in the capacity of a priest. Occasionally the Rabbis so acting in a purely religious capacity are also members of a Rabbinical Court, but their functions in the two capacities are distinctly different from one another".
>
> (2, P. L. R., p. 366, 7).

I would add that this applies not only as regards foreigners over whom Rabbinical Courts have no jurisdiction at all, but also as regards Palestinian Jews over whom the Rabbinical Courts have exclusive jurisdiction in matters of divorce. Even in the latter case all a Court, as such, can do is to rule that a divorce should or should not take place, but once the Rabbi ceases to act in his judicial capacity he can exercise his authority as religious head over those Jews who voluntarily seek his help or submit otherwise to his authority, be they Palestinians or foreigners. When, whether by original consent or in obedience to a reli-

gious direction imposed upon him, a husband divorces his wife by giving her a bill of divorcement, the couple are, to all intents and purposes, considered divorced under the Jewish Law. This, it may be mentioned, is the only way, as a woman cannot, under Jewish Law, divorce her husband.

Whether such a divorce would be recognised under the Civil Law is quite a different matter. The law of some States including nearly all countries in the Middle East, Eastern Europe and, I think, India, would recognise and give effect to such divorce. Other States like England and other European countries would not. In Volkenberg *v.* Volkenberg the view was expressed that the Courts of this country should take cognizance of a divorce issued by Rabbinical authorities if such divorce is recognized by the national law of the parties. It has been argued that this view is *obiter*. Whether that be so or not, I still consider that it is a proper statement of the law.

Admittedly the District Court could not decree a dissolution of the marriage between the parties. But that is not what the Appellant is asking for. Her application is for a declaration that she has already been properly divorced. In order to succeed she has to satisfy the Court on two points namely, that under Jewish Law she has obtained a valid divorce and that such a divorce would be recognized by the law of Egypt.

On the first point a certificate of divorce was produced, issued by the Rabbinate of Petah-Tiqva, countersigned on behalf of the Chief Rabbi of Palestine, with the seal and signature of the Civil Registering authorities under the Marriage and Divorce (Registration) Ordinance. According to that certificate a divorce was given dissolving the marriage of the parties. That is, to my mind, sufficient evidence to show that the parties in this case are duly divorced under Jewish Law. The allegation that one of them, the Respondent, is not a member of the Jewish Community is of no relevance since the Rabbinate in performing its functions in this matter did not act as a Court and therefore no question of jurisdiction arises. The certificate is not only evidence of the divorce but also evidence that the divorce was contracted by consent, as it could not otherwise have been contracted.

On the second point there is also unrebutted evidence that under the national law of the parties, namely the Egyptian Law, a Jewish divorce is recognized. The affidavit of Mr. Abcarius to this effect is supported by the Sasson *v.* Sasson case (1924, A. C. 1007).

We therefore have reached the point where the Appellant has succeeded in producing satisfactory evidence on the two issues involved.

Is she, then, entitled to the declaration claimed by her ? I can see no reason to prevent the issue of a declaratory judgment of this nature. The only doubt I had was whether the application, especially since it is the first of its kind so far as I am aware, should not have been made by way of action. But it was open to the Respondent, by asking for evidence to be heard, or otherwise, to make the continuation by way of motion impossible. The case having, however, reached a stage where all the law has been explored, and no facts being in dispute, it would be as well to dispose of the matter at once as no useful purpose would be served by protracting the proceedings any longer.

In my view, the appeal should be allowed, the judgment of the District Court set aside and a declaratory judgment issued to the effect that having obtained a divorce valid under Jewish Law and recognized under her national law, Olga Walder (also known as Azgour) was divorced from her husband, Samuel Azgour. The Appellant will have costs on the lower scale here and below, and we assess LP. 15 attendance fee for the hearing of this appeal to be paid by the first Respondent.

Delivered this 20th day of May, 1942.

Puisne Judge.

Khayat, J. : I agree with the judgment delivered by my brother Frumkin, J. I wish to add that the divorce certificate in this case does not require, for the validity thereof, a judgment or decision by a Rabbinical Court, since the divorce took place by the consent of the parties concerned and was confirmed by a Rabbinical authority which does not possess judicial powers ; and therefore this confirmation is not contrary to Article 65 of the Palestine Order-in-Council which prohibits Rabbinical Courts from dissolving marriages between foreigners, and there is no unimpeachable reason against the validity of adopting this course, since it does not contravene the provisions of the said Article. Likewise the giving of a declaratory judgment on questions of fact does not, in my opinion, clothe this Court with jurisdiction contrary to the provisions of Article 64 of the Order-in-Council which prohibits the Civil Courts from issuing a decree of dissolution of marriage in respect of foreigners.

Delivered this 20th day of May, 1942.

Puisne Judge.

HIGH COURT No. 43/42.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :—

Muhammad 'Abdul 'Al. PETITIONER.

v.

District Officer, Haifa. RESPONDENT.

Mukhtars — Application to set aside dismissal of mukhtar, Vilayet Law of 1281 — All legislation as to mukhtars repealed, Municipal Corporations Ord., Sec. 133(1) and Schedule 13 — H. C. 70/27 and H. C. 4/30 no longer applicable — Order nisi not to issue where no legal duty on officer concerned.

In refusing an application for an order to issue, directed to the Respondent, calling upon him to show cause why his order dated 15th of April, 1942, removing Petitioner from office as a *Mukhtar* for the Egyptian Community in Haifa should not be set aside and why he should not continue to act as a *Mukhtar* for the said community in Haifa :—

HELD : 1. (Distinguishing H. C. 70/27, H. C. 4/30) : There was no law defining the conditions of service of *mukhtars* who, therefore, held office at the District Commissioner's pleasure.

2. The High Court could not order a public officer to do or refrain from doing something where there was no law applicable and, hence, no legal duty upon him.

DISTINGUISHED : H. C. 70/27 (1, P. L. R. 174, C. of J. 1307) ; H. C. 4/30 (1, P. L. R. 468, C of J. 1309).

ANNOTATIONS : *Cf.* H. C. 85/40 (1940, S. C. J. 413) and note 1, H. C. 75/41 (1941, S. C. J. 369) and H. C. 5/42 (*ante*, p. 161, at pp. 164 and 170).

FOR PETITIONER : Khamra.

FOR RESPONDENT : *Ex parte.*

ORDER.

In this case the Petitioner, who is stated to be the late *Mukhtar* of the Egyptian Community in Haifa, asks for an order *nisi* to issue to the District Officer, Haifa, to show cause why an order for his dismissal from the office of *Mukhtar* dated 15th April, 1942, should not be set aside. The Petitioner relies upon the *Vilayet* Law of 1281, *A. H.* Unfortunately that law was repealed many years before the British Occupation of Palestine, and all subsequent laws affecting the same sub-

ject, that is to say, the Law regarding the administration af *Vilayets* of 1287, *A. H.*, the Regulations regarding the administration of *Vilayets* of 1293, *A. H.*, the Provisional Law for the general administration of *Vilayets* of 1331, *A. H.*, with the amendment of 1332, *A. H.*, have all been repealed by Section 133, subsection 1 of the Municipal Corporations Ordinance, 1934 which says: "The Ottoman laws mentioned in the thirteenth Schedule to this Ordinance shall cease to have effect", and there is unfortunately no saving clause with regard to rural areas though the Municipal Corporations Ordinance itself, of course, deals solely with the administration of municipal areas.

There is, therefore, no law at the moment authorising the appointment of *Mukhtars* or defining their conditions of service or the reasons which might justify their dismissal. It seems, accordingly, that the position is that such persons who are designated as *Mukhtars* hold office solely at the pleasure of the District Commissioner who appoints them and, that being so, the District Commissioner, if so moved, can dismiss them for any reason or indeed for no reason at all. The cases referred to by the Petitioner, Bayyad & an. *v.* District Officer Jaffa, H. C. 70/27 (1 P. L. R. 174) and Al. Bustani *v.* District Commissioner Haifa, H. C. 4/30 (1 P. L. R. 468), were both decided before 1934, when different considerations applied — since the enactment of the Municipal Corporations Ordinance in that year, they can no longer be relied upon.

This Court is limited in its duties with regard to this particular type of order which is asked for by the fact that it can only order a District Commissioner to do something which, by law, he is authorised to do or to refrain from doing something which the law orders that he shall not do. There being no law here this application must fail.

The application for an order *nisi* must be dismissed.

Given this 7th day of May, 1942.

British Puisne Judge.

HIGH COURT No. 39/42.

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

BEFORE: Gordon Smith, C. J., Edwards and Frumkin, JJ.

IN THE APPLICATION OF :—

David Bronstein. PETITIONER.

V.

1. The Chief Execution Officer, Tel-Aviv,

2. The firm Essinger & Kahn,
Insurance & Financial Brokers. RESPONDENTS.

Attachment — Provisional attachment on motor car pending proceedings before Magistrate — Magistrate's judgment set aside for irregularities — Magistrate ordering release of attachment on terms — Order later varied to require bank guarantee — Bank guarantee not furnished — C. E. O. deciding to retake the car — Notarial deed and surety ordered — Costs.

Petition for an order commanding the first Respondent to show cause why his orders of 9th April, 1942, in so far as it relates to furnishing of a guarantee and of 21st April, 1942, should not be set aside.

These proceedings concern the motor car which was the subject matter of C. A. 252/41 (*ante*, p. 95). After the judgment in that case the Petitioner applied to the Chief Magistrate for an order to the Execution Office to return the car in question to him pending the determination of the action for a declaration of ownership in the car. The Chief Magistrate granted the application against an ordinary guarantee by the Petitioner and the car was thereupon delivered to the Petitioner. On an application by the second Respondent the Chief Magistrate varied his order and required the Petitioner to furnish a bank guarantee. The Petitioner did not comply with that order and the first Respondent thereupon ordered the retaking of the car. The Petitioner applied to the High Court and submitted that the Chief Magistrate had no jurisdiction since the original proceedings had been set aside. Alternatively, he asked that a notarial deed be accepted in substitution for the bank guarantee.

HELD: 1. The effect of the decision in C. A. 252/41 was not to set aside the proceedings, but to set aside the judgment. When the matter was remitted to the Magistrate the attachment still held good and the Magistrate, therefore, was properly seized with the matter.

2. The Petitioner should give a notarial guarantee, with a surety, in the amount of LP. 400.— for the safe custody of the car.

ANNOTATIONS:

1. See the previous proceedings in this matter: C. A. 252/41 (*ante*, p. 95).

2. On the effect of a judgment being set aside *cf.* C. A. 197/41 (1941, S. C. J. 458, on p. 461) and note 2. See also CR. A. 127/41 (*ibid.*, p. 635) and note 1.

3. *Cf.* H. C. 99/41 (1941, S. C. J. 513, on pp. 514—5).

FOR PETITIONER: Goitein and Hake.

FOR RESPONDENTS: No. 1. — absent — served.
No. 2 — Ben-Jamini.

ORDER.

This is an application to set aside two orders of the Chief Execution Officer, one of the 9th April and one of the 21st April. It has been submitted in argument that the Magistrate was not properly seized of

the matter and that his order was in effect *ultra vires*. In the original proceedings the judgment was set aside and the matter has been remitted to the Magistrate's Court to decide the question of ownership of the car but in those early proceedings the car had been properly attached and when the matter was remitted to the Magistrate's Court that attachment still held good. It is not that the proceedings were set aside but the judgment was set aside. Therefore, the position was, as is stated in the judgment, that the car was in '*custodia legis*'. Then we get an application *ex-parte* to the Magistrate to release the attachment of the car. The Magistrate heard that application and, in our view, was properly seized of the matter, and made an Interim Order. After that order had been served on the Respondents they objected to the Interim Order on the grounds of the insufficiency of the security demanded by the Magistrate, who was prepared to release the attachment on terms. The Magistrate then, and we agree, properly varied the order previously made. So far we think the matter was in order and the question of the guarantee was in the discretion of the Magistrate. Somehow, however, the Plaintiff has now got possession of the car from the Execution Officer. The Execution Officer had, however, by his final order decided to retake possession of the car in view of the fact that the guarantee as finally ordered by the Magistrate has not been forthcoming. We feel that the Magistrate's order is correct and what we are not satisfied with is the actual sufficiency of the guarantee. We have a certain amount of sympathy with the Plaintiff, and Mr. Ben-Jamini, I think, is prepared to accept a notarial deed under which the Plaintiff will undertake to keep the car insured and to enter into a guarantee of LP. 400 with surety. We agree that there should be a surety to that amount. We, therefore, order that a notarial guarantee be given by the Plaintiff, with a surety, for the safe custody of the car in the sum of LP. 400. Such surety and the securety pledged to be to the satisfaction of the Magistrate and if real property is included in such security then such is to be attached. On such guarantee being duly executed and approved by the Magistrate, the attachment on the car is to be released.

We make no order as to costs.

Delivered this 11th day of May, 1942.

Chief Justice.

HIGH COURT No. 45/42.

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

BEFORE : Copland and Edwards, JJ.

IN THE APPLICATION OF :—

Albert Schutz. PETITIONER.

v.

The Commissioner for Migration & Statistics, Acting Director, Department of Immigration, Jerusalem. RESPONDENT.

Citizenship and Immigration — Marriage between Palestinian subject and foreigner in October, 1939 *— Husband joining His Majesty's Forces in* 1940 *— Naturalization under Citizenship Order,* Art. 12(2)*— Endorsement on passport impossible in the absence of valid passport — Discretion as to issue of immigration certificates not interfered with — Exemption from provisions of Immigration Ordinance for wives of members of the services, Immigration Ord., Sec.* 4(1)(e) *— Ordinance to be read as a whole — Discretion in respect of person illegally in Palestine before her marriage.*

In refusing an application for an Order commanding the Respondent :—

(a) to grant Petitioner's wife, Gertrud Schutz, a certificate of naturalization as a Palestinian citizen under Art. 12(2) of the Palestine Citizenship Order as amended in 1939, or to proceed with her application for such a certificate on the footing that she is lawfully in Palestine ; or

(b) to endorse the Passport of Petitioner's wife to the effect that she is exempt from the provisions of the Immigration Ordinance, 1941 ; and/or

(c) to grant, at present or out of the next immigration quota, Petitioner's application for the issue of an immigration certificate to be forwarded to a British Consular or other Representative outside Palestine :—

HELD : 1. The prayer for endorsement of a passport could not be granted as the Petitioner's wife had no valid passport in her possession.

2. The issue of immigration certificates in category "D" was entirely in the discretion of the Respondent.

3. The Immigration Ordinance had to be read as a whole and Petitioner's wife being a foreigner and having been illegally in the country at the time of her marriage, she was not necessarily exempt from the provisions of the Immigration Ordinance on account of her husband being a member of the Forces.

4. As the Petitioner's wife was in Palestine illegally and had not acquired Palestinian citizenship by her marriage it was within the

Respondent's discretion whether to admit her as a legal resident of Palestine or not.

ANNOTATIONS :

1. *Cf.* H. C. 35/42 (*ante*, p. 245) and notes 1 and 2.

2. On statutes to be read as a whole see H. C. 45/40 (1940, S. C. J. 213) and note 2. *Cf.* Misc. Appl. 5/40 (*ibid.*, p. 215).

3. See, on acquisition of Palestinian citizenship by a marriage contracted after 25.vii.1939, H. C. 55/41 (1941, S. C. J. 328) and CR. A. 115/41 (*ibid.*, p. 407).

FOR PETITIONER : Perles.

FOR RESPONDENT : *Ex parte.*

ORDER.

This is a peculiar application, the first of its kind to come before this Court. The Petitioner is a Palestinian and since the 16th July, 1940, he has been a member of His Majesty's Air Service. On the 22nd October, 1939, that is to say, before he joined His Majesty's Forces, he married a Miss Gertrude Hausmann, who was at that moment a German subject. By that marriage, under the law as it stands at this present moment, Miss Hausmann or Mrs. Shutz did not acquire Palestinian nationality, but under the provisions of the German law, it is stated, she lost her German nationality and has now become stateless. The Petitioner is anxious to legalise the position of his wife in Palestine and he has applied to the Commissioner of Migration to grant his wife a certificate of naturalization under Article 12(2) of the Palestine Citizenship Order-in-Council, as amended. Alternatively, he asked for the endorsement of his wife's passport to the effect that she is exempt from the provisions of the Immigration Ordinance. Alternatively again, he asked that the Commissioner of Migration should issue an immigration certificate in category 'D' in respect of the Petitioner's wife. All these requests the Immigration Officer refused. The Petitioner has therefore come to this Court.

With regard to the first request, that we should order the Commissioner to endorse the passport of Petitioner's wife to the effect that she is exempt from the provisions of the Immigration Ordinance, that is a matter that we cannot do for the simple reason that the Petitioner's wife has no valid passport in her possession. Neither can we direct the Commissioner to issue an immigration certificate in category 'D' for the lady because we are not an Immigration Office and this is entirely in the discretion of the Commissioner of Migration.

The only point that arises is really this : Section 4 (1) (e) of the Immigration Ordinance says :

"This Ordinance shall not apply to the wives of any persons exempt-

ed under the provisions of paragraphs (a), (c) and (d) hereof."
and paragraph (c) exempts members of His Majesty's Military, Air, Diplomatic or Consular services.

The point for decision is, therefore, whether the provisions of Section 4 (1) (e) apply to this lady, who is undoubtedly, according to the law of this country, a foreigner. In our opinion, the Ordinance must be read as a whole and just because any particular lady may be the wife of a member of His Majesty's Air Service, if she is a foreigner and was illegally in the country at the time of her marriage, she is not necessarily exempt from the other provisions of the Ordinance. It is not disputed that this lady was in Palestine illegally before her marriage, she therefore did not become a Palestinian citizen on marriage to a Palestinian. It seems to us that it is within the discretion of the Commissioner of Migration in such a case whether he should admit her as a legal resident of Palestine or not.

The application must therefore be refused.

Given this 13th day of May, 1942.

British Puisne Judge.

CIVIL APPEAL No. 34/42.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

Margarete Kahn. APPELLANT.

v.

1. Hardware Manufacturing Co. (Tooval), Ltd.,
2. Jechiel Weizmann. RESPONDENTS.

Fraudulent misrepresentation — Existence of remedy in Palestine — Ingredients to support claim — Continuing representation by failure to correct representation no longer true — Document in question not relied upon — Failure to prove fraud.

Appeal from the judgment of the District Court of Tel-Aviv, dated 10.2.42, given in Civil Case No. 327/40, as far as the claim was dismissed against Respondent No. 2.

On the preliminary question whether an action for damages for fraudulent misrepresentation lay in Palestine the District Court ruled as follows :—

"Dr. Sommerfeld for the Plaintiff stated in his final address that his action was based in the alternative on the *Mejelle,* on English Common Law and on the English principles of equity.

With regard to the two latter the remedies are practically the same. Pollock, in his Law of Torts (13th ed.) at page 287, says :—

"The wrong called Deceit ..... is a cause of action by the common law ..... and it has likewise been dealt with by courts of equity under the general jurisdiction of the Chancery in matters of fraud. The principles worked out in the two jurisdictions are believed to be identical, though there may be a theoretical difference as to the character of the remedy, which in the Court of Chancery did not purport to be damages, but restitution".

Mr. Fraenkel, for the defence, submitted that no action lay for the tort of deceit in Palestine, and relied on C. A. 113/40. That case was a claim for damages for injuries to the person only. The judgment of Copland, J., however, besides deciding the point in issue, dealt generally with the introduction of the law of torts into Palestine, and the *"obiter dicta"* in that judgment must be treated with the greatest respect and carefully studied by this Court. On consideration, however, they do not appear to me to exclude the tort of deceit. The circumstances of the inhabitants of Palestine are no bar, since it is clear from article 658 of the *Mejelle,* on which the Plaintiff also relies, that a similar liability is recognised by the indigenous law. The objection that the common law action for deceit has been modified by the enactment of Lord Tenterden's Act does not appear to me to have any validity, as the chief justification for that act was that at the time the parties could not be witnesses in a court of common law (Pollock, at p. 310). This is not so in Palestine, and there appears to me no reason why the action of deceit should not lie without the protection of similar legislation, subject to there being no local remedy.

With regard to a claim in equity to be indemnified against loss arising from misrepresentation on the part of one who owes to the Plaintiff a duty of *"uberrima fides"* there is, as far as I am aware, no Palestinian judgment limiting the application of Art. 46 of the Palestine Order-in-Council as far it concerns doctrines of equity, and for the same reasons as I have adduced in the case of the tort of deceit, I am of opinion that such action lies, subject again to there being no local remedy. The Plaintiff, however, relied also on Art. 658 of the *Mejelle* (see also Hooper, Vol. II, pages 111—113). No detailed argument was addressed to me on this point, but on a consideration of the article, the examples annexed to the article and the commentary on the article by Salim Baz, it appears to me that the *Mejelle* does supply a remedy for the facts alleged in this case, and that there is no room for the introduction of English Common Law, or doctrines of equity, unless it be of subsidiary principles and remedies from the latter."

HELD : As the Appellant had failed to prove her allegations of fraud the appeal had to be dismissed.

ANNOTATIONS : See, on a continuing representation, Halsbury, Vol. 23, *pp.* 29—30, *No.* 44 and *pp.* 43 *seq., No.* 61.

FOR APPELLANT : Sommerfeld.

FOR RESPONDENTS : Fraenkel.

JUDGMENT.

Rose, J.: This is an appeal from a judgment of the District Court of Tel-Aviv, dismissing an action by the Appellant (Plaintiff) for damages for fraudulent misrepresentation. The case is an unfortunate one as there is no doubt that the Appellant has lost a substantial sum of money as a result of a most unfortunate investment. The question, however, that the Court has to decide is whether the Plaintiff has been able to show that there was a fraudulent misrepresentation within the meaning of the law.

The elements that it is necessary for a plaintiff to prove in such a case are, of course, well known — that there was a representation which was false, to the knowledge of the Defendant, or which was made recklessly without caring whether it was true or false, and that the Plaintiff relied upon this representation.

In this case the false representation alleged is contained in the document Exh. P/1 which is a document written in almost colloquial language and does not purport to be, and certainly is not, a balance-sheet, and cannot even be said to be a prospectus in the ordinary sense of the term. It is admitted by counsel for the Appellant that the statements in this document were true at the time that it was issued. But he says, and there is substance in his contention, that by the time his client finally invested her money in the Company concerned, the figures had changed for the worse.

There is authority for the proposition that, in certain instances, a material representation which was true at the time of its being made but is falsified by later events is, if allowed to remain uncorrected, a continuing representation. In this case, however, the lady in question was advised throughout by an experienced business-man, Mr. Sherek, and Mr. Sherek stated in evidence that he did not rely on this document and that he asked no subsequent questions about the figures mentioned in the document. I have little difficulty in believing him on this point as it would seem to be most unlikely that a person of any commercial experience would invest money, or advise anyone else to invest money, on the basis of such a document.

Apart from this, the question of fraud or no fraud is eminently one for the Court of first instance and where, as in this case, the trial Court has made a finding that there was no fraud, a Court of Appeal is most reluctant to interfere unless it can be satisfied that the trial Court did not apply its mind to the proper considerations.

It is an unfortunate case, but the Appellant (Plaintiff) has failed

to prove her allegations of fraud and the appeal is, therefore, dismissed with costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 28th day of April, 1942.

British Puisne Judge.

Copland, J.: I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 52/42.

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

BEFORE: Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Sadek Abdullah el Kurd. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Sexual intercourse with imbecile, C. C. O., Sec. 154 — Whether accused knew of the woman's mental condition.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 19th of March, 1942, in Felony No. 228/41, whereby the Appellant was convicted of attempting to have unlawful sexual intercourse with an imbecile, contrary to section 154 of the Criminal Code Ordinance, 1936, and sentenced to 3 years' imprisonment :—

HELD: There was sufficient evidence before the District Court to justify the inference that the Appellant knew of the woman's mental condition.

ANNOTATIONS: See, on evidence as to guilty knowledge, CR. A. 39/42 (*ante*, p. 224) and note 3.

FOR APPELLANT: Kamal.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, convicting the Accused of an offence against section 154 of the Criminal Code Ordinance. There is, of course, no doubt whatever

on the Doctor's evidence, which the Court accepted, that the woman in question was imbecile. His exact words were "The girl is suffering from a very deep degree of feeble-mindedness, I would say idiocy". He goes on to say, "In her case there is no possibility of any lucid interval. I am sure she does not know what she is doing at any given moment and never has".

The question then arises as to whether the Appellant knew of her mental condition. Knowledge, of course, is a matter of inference from the facts and in its judgment the trial Court dealt with this issue correctly. It said :—

> "Did he (*i. e.* the Accused) know at the time of her mental condition ? We have no doubt that he did. It was a bright night. If he had never known her before a glance would suffice for any reasonable person to appreciate that she was a person in no normal mental condition, and who gives every indication of complete idiocy."

The trial Court, presumably, had an opportunity of seeing this unfortunate woman and in addition their view is amply reinforced by the evidence of Dr. Herman. That being so, we think that the trial Court was correct in inferring knowledge on the part of the Accused.

With regard to the sentence, this is a most deplorable offence and we cannot say that a sentence of three years is in any way excessive.

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

Delivered this 14th day of April, 1942.

British Puisne Judge.

HIGH COURT No. 51/42.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :—

Israel Reznitzky. PETITIONER.

v.

1. Inspector General of Police and Prisons, Jerusalem,
2. Assistant Superintendent, Jaffa Lock-up, Jaffa. RESPONDENTS.

Habeas corpus — Affidavit filed on return day showing that person committed pending trial for possession of bomb, Emergency Regulations, Reg. 8c(a), Defence (Military Courts) Regulations — Solitary confinement.

In discharging an order *nisi* in the nature of *Habeas Corpus* issued on the 18th of May, 1942, directed to the Respondents, calling upon them to produce Itzhaq Reznitzky before the High Court, and to await the further order of this Court :—

HELD : 1. The affidavit and warrant showing that Itzhaq Reznitzky was committed to prison pending his trial for possession of a bomb were a sufficient return to the writ.

2. There was nothing in the Defence (Military Courts) Regulations requiring that prisoners should be kept in association and the point about solitary confinement was, therefore, without substance.

ANNOTATIONS : *Cf.*, on an alleged irregularity being regularised before the return day, H. C. 82/41 (1941, S. C. J. 547, at p. 553).

FOR PETITIONER : Apelbom.

FOR RESPONDENT : Crown Counsel — (Rigby).

ORDER.

This is a return to an order *nisi* in the nature of *Habeas Corpus* made by Israel Reznitzky *ex parte* Izhaq Reznitzky. On the return an affidavit has been filed by Mr. Catling, Assistant Superintendent of Police, and the Respondent has produced a Warrant of Commitment pending trial on the charge of possession of a bomb, contrary to Regulation 8c(a) of the Emergency Regulations, 1936, signed by Mr. Morton, Assistant Superintendent of Police, who has the power to sign such warrants under the Defence (Military Courts) Regulations, 1937. That, of course, is a sufficient return to the writ, and Izhaq Reznitzky is, therefore, properly detained in custody.

With regard to the point that was raised about the solitary confinement, there is nothing in the Regulations, as far as I know, that prisoners should be kept in association, and as is common knowledge, in England all prisoners are detained in separate cells. In this country, of course, no prisons have been built with that very desirable arrangement, but there is nothing in that point, and, as I said before, he cannot claim to be associated with other persons. The Petitioner does not contest the matter any further.

The order *nisi* is, therefore, discharged. The Respondent is entitled to LP. 4 expenses for producing the body of Izhaq Reznitzky before this Court.

Given this 21st day of May, 1942.

British Puisne Judge.

CIVIL APPEAL No. 41/42.

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

BEFORE : Gordon Smith, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Abraham Kossover, represented by his son Gedalya. APPELLANT.

v.

Hirsh Bronstein. RESPONDENT.

Execution — Action for cancellation of registration on account of irregularities in execution proceedings — Period of auction — Notification of three days' notice, Execution Law, Art. 107.

Appeal from the judgment of the Land Court of Tel-Aviv, in Land Case No. 16/40, dated the 20th February, 1942.

The relevant part of the Land Court judgment is as follows :—

"In this case the Plaintiff has applied to the Court to cancel the transfer of the property in question in the *Tabu* on the ground that the advertisement for sale was not correct because according to the Ottoman Mortgage Law sale should have been for 45 days whereas it was advertised for 30 days.

Secondly because the final three days' notice was not properly served upon the mortgagor.

From the Execution file it appears that several delays of the final order of sale were granted over the period from 24th April, 1940 to the 17th September 1940. On this latter date the mortgagor again requested a further delay of three months to enable him to find a purchaser but the mortgagee refused but agreed to give an option to the mortgagor to redeem within three months after the registration. After the final order the usual three days' notice was served upon the mortgagor but due to the fact that this notice did not contain the paragraph which gives him the alternative to transfer the property to the purchaser, a further notice was served in the presence of a clerk of the Execution Office, a daughter of the mortgagor and a certain Mrs. Weizman. This notice was posted on the mortgagor's house which was locked."

HELD : The Appellant had had ample time to redeem the mortgage and he had been properly served with the three days' notice.

ANNOTATIONS :

1. See, on irregularities in execution, H. C. 21/42 (*ante*, p. 184) and note.

2. On the final notice under Art. 107 of the Execution Law *cf.* note to H. C. 93/41 (1941, S. C. J. 443).

FOR APPELLANT : Krauthamer.

FOR RESPONDENT : Minkowitz.

JUDGMENT.

There are two main complaints in this appeal which on the face of it contain no substance and are only intended to cause further delay. It appears that the Appellant had, before the final order of sale, a period extending about five months, from 24.4.40 to 17.9.40, within which to repay the mortgage debt and after the final order of sale he was further granted a period of three months to redeem the property, but he did not avail himself of the opportunity. All the time he was endeavouring to cause further delays. He had every opportunity to redeem his property if he really intended to do so.

The two complaints are that he did not have a period of 45 days as required by the Mortgage Law and that the three days' notice under Article 107 was not served upon him. It appears to us that there is nothing in these two points. He had more than 45 days and the learned President was satisfied that the Appellant was properly served and undoubtedly knew of the notice.

The appeal is frivolous and is intended to cause further delay. The appeal is dismissed with costs on the lower scale to include the sum of LP. 15 advocate's attendance fee.

Delivered this 28th day of April, 1942.

Chief Justice.

HIGH COURT No. 23/42.

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

BEFORE : Copland and Rose, JJ.

IN THE APPLICATION OF :—

1. Yacoub Bey Tewfiq el Ghussein,
2. The heirs of Tewfiq Bey el Ghussein. PETITIONERS.

v.

1. The President District Court, Jaffa, sitting as Chief Execution Officer,
2. Hemnutah Ltd.,
3. The Agricultural Mortgage Co. of Palestine Ltd. RESPONDENTS.

AND

1. Yacoub Bey Tewfiq el Ghussein,

2. The heirs of Tewfiq Bey el Ghussein. PETITIONERS.

v.

1. The President District Court, Jaffa, sitting as Chief Execution Officer,
2. Hemnutah Ltd.,
3. The Agricultural Mortgage Co. of Palestine Ltd.
4. The Arab National Fund Ltd. RESPONDENTS.

(By order of the Court dated the 18th of March, 1942).

Sale in execution — Substitution of one bidder for another — Bid rejected because guarantee for deposit insufficiently stamped — Rejected bid already advertised — Debtor prejudiced — Extension of auction — Point not raised in petition.

In refusing an application for an order to issue, directed to the Respondents, calling upon them to show cause why the order dated 27.2.42, made by the first Respondent in Jaffa Execution Files Nos. 2767/37 and 1841/38, should not be set aside and/or why the auction for the sale of the mortgaged property in question should not be extended for one further month in accordance with his previous order, dated 23.1.42, and in varying the order of the first Respondent :—

HELD : 1. A bid is only completed by the deposit of 10%, whether in cash or in security, and the Chief Execution Officer was justified in disallowing the bid of the fourth Respondents as the guarantee for the deposit was insufficiently stamped.

2. The point about the sum of LP. 6,150.— was not mentioned in the application to the High Court.

3. As the publication of the bid of LP. 6,000.—, which had subsequently been disallowed, might have misled intending bidders the sum of LP. 6,000.— would be substituted for LP. 5,500.— to be paid by the fourth Respondents.

ANNOTATIONS : See, on the impossibility of raising a point not contained in the petition, H. C. 60/38 (1938, 2 S. C. J. 96) and H. C. 80/40 (1940, S. C. J. 350, at p. 353).

FOR PETITIONERS : Cattan and Ghussein.

FOR RESPONDENTS : Nos. 1 & 2 — Absent — served.
No. 3 — Levin and Persitz.
No. 4 — Abcarius and Husseini.

ORDER.

This is a return to an order *nisi* asking that an order made by the Chief Execution Officer in Jaffa Execution Files 2767/37 and 1841/38 should be set aside and further asking for an extended auction of

one month in accordance with the Chief Execution Officer's previous order dated 23.1.42.

In the first place we can state straight away that we see nothing wrong in Execution File 1841/38. There are no possible objections that can be urged against the Chief Execution Officer's order. The auction was held in the presence of the Chief Execution Officer. The bid LP. 4,250 was the highest bid given and was accepted as such on the 23rd February, 1942, and then later on, on the 6th March, 1942, another Chief Execution Officer agreed to the substitution of the 4th Respondents in place of the 2nd Respondents as the purchasers of the property comprised in this particular file. The only real dispute comes in regard to the amount of the bid in file 2767/37.

Now, these execution proceedings commenced in the year 1937 and 1938 and it is a fact, not disputed apparently, that since that date only a comparatively minor sum, stated to be LP. 170, has been paid by the first Petitioner in respect of three mortgages. When the auction was held on the 27th February, there were two bids finally before the Chief Execution Officer, one LP. 5,500 made by the 2nd Respondents and one for LP. 6,000 made by the 4th Respondents. The Chief Execution Officer disallowed the bid for LP. 6,000 on the ground that the guarantee which had been tendered in place of the deposit of 10% on the amount of the bid was not in order having been insufficiently stamped. Now, we do not say that the Chief Execution Officer was wrong in this respect in making this order because a bid is only completed by the deposit of 10% whether in cash or in security as the Chief Execution Officer may order, that is to say, the mere offer of a bid not accompanied by the deposit is not a valid bid, but a further point arises in this case which affects the matter to a considerable extent.

Before the final auction was held before the Chief Execution Officer, the amount of LP. 6,000 had been published in the papers in accordance with instructions and the usual procedure, as the amount of the last highest bid then accepted, and the Petitioner complains that the fact that that sum of LP. 6,000 was mentioned as the last bid prejudiced him because it prevented anyone who was prepared to offer a sum between LP. 5,500 and LP. 6,000 from appearing at the auction. He argues that the acceptance by the second Chief Execution Officer of LP. 5,500 and the substitution of the bidder by the 4th Respondents has caused him considerable harm. He also asks for the auction to be extended and a further delay of one month to be given. The delay of one month which was granted on the 23rd of January, 1942, has already been completed and we see no reason

why any further extension of auction should be given but we do feel that there is some substance in the argument that the publication of the LP. 6,000 in the papers may quite possibly have misled intending bidders, even if unlikely, it might be possible. The Petitioners also ask that, at any rate, the sum of LP. 6,150 should be the sum to be allowed in respect of the property in file 2767/37, but if we turn to the petition we find that there is no mention of their objection to this Court of this sum of LP. 6,150. We, therefore, think that the rule *nisi* granted should be discharged but with the alteration of the figure of LP. 5,500 in the order of Judge Bodilly in respect of Execution file 2767/37, to the sum of LP. 6,000 to be paid by the 4th Respondents — otherwise with the exception of this alteration the rule *nisi* is discharged. We allow the sum of LP. 10 as total costs to each of the 3rd and 4th Respondents. We allow the same figure because the 4th Respondents have substantially succeeded in their opposition to the rule *nisi*.

Delivered this 27th day of March, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 60/42.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPLICATION OF :—

Mahmoud Hussein Ahmad Shahrour. APPLICANT.

v.

The Attorney-General. RESPONDENT.

Official corruption, C. C. O., Sec. 106 — Several accused acting in concert — Offence under C. C. O., Sec. 270 — Sentence.

In refusing an application for leave to appeal from the judgment of the District Court of Jaffa, dated the 13th April, 1942, in Criminal Case No. 41/42, whereby the Applicant was convicted on five counts, contrary to section 106 of the Criminal Code Ordinance, 1936, and sentenced to three months' imprisonment :—

HELD : 1. There was evidence to support the finding that the Applicant and his companion had acted in concert.

2. The facts as disclosed in the evidence pointed to an offence of simple theft, and not to one of official corruption.

ANNOTATIONS :

1. *Cf.*, on the offence of official corruption, CR. A. 108/41 (1941, S. C. J. 416).

2. See, on the first point, CR. A. 83/41 (1941, S. C. J. 266). *Cf.* CR. A. 146/41 (*ante*, p. 22, at p. 31).

FOR APPLICANT : Cattan.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

This is an application for leave to appeal against the conviction under section 106 of the Criminal Code of the Applicant who is a policeman, being one of two persons convicted of receiving money corruptly. The Applicant and his companion were originally charged with robbery, but the District Court apparently was not satisfied that the evidence disclosed this offence. The evidence is perfectly clear. This Applicant and his fellow constable entered a café, the Applicant with his pistol in his hand ordered those persons present to stand up and his companion searched those persons and took various sums from five persons in the café. It is argued that the Applicant had no knowledge of the theft, but this is a matter of fact upon which it was open for the Trial Court to find whether he acted in concert. The Court sees no reason to interfere with this finding. There was ample evidence to support it.

With regard to the actual offence of which the Applicant and his companion were convicted, the Court thinks that the facts as disclosed in the evidence point to an offence under Section 270 of the Criminal Code, simple theft being the proper section to apply, and not Section 106. As the application on the evidence is totally devoid of any merits, the application for leave to appeal is dismissed.

With regard to sentence, the sentence of three months' imprisonment for a policeman of many years standing, convicted of such an offence as stealing from the public, is ridiculously light.

Delivered this 11th day of May, 1942.

British Puisne Judge.

CIVIL APPEAL No. 45/42.

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

BEFORE : Copland, Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Deeb Ali Abu Zeedeh. APPELLANT.

v.

1. Mustafa Surani,
2. Yusif Surani. RESPONDENTS.

Application to set aside judgment by default, C. P. R., Rule 213 — Applicant at the time in prison, but duly served — Discretion of Court below not interfered with.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 6th day of January, 1942, in Motion No. 317/41, Civil Case No. 70/41 :—

HELD : 1. An appellate Court would not interfere with a discretion merely because they might have exercised it differently, but would interfere only if the Court below had failed to take into consideration some material matter.

2. The District Court had duly considered the material facts and had come to the conclusion that the Appellant had had ample time to arrange for his representation.

ANNOTATIONS :

1. See, on setting aside of judgments by default, C. A. 81/39 (1939, S. C. J. 419) and C. A. 118/41 (1941, S. C. J. 371) and note 1.

2. On the first point *cf.* C. A. 171/40 (1940, S. C. J. 308) and note 2. *Cf.* C. A. 164/41 (1941, S. C. J. 390) and note 2.

FOR APPELLANT : Nashashibi.

FOR RESPONDENTS : Muhtadie.

JUDGMENT.

This is an appeal against a refusal by the District Court of Jerusalem to set aside a judgment given in default. At the time the summons was served on the Appellant, he was a prisoner, serving a sentence of three years in the Jerusalem Prison. The summons was duly served upon him as certified by the Assistant Superintendent, Central Prison, Jerusalem. The Appellant endorsed on the summons — "I pray that this case be adjourned pending my discharge from Prison in view that I cannot defend myself, to show justice". After that

he took no further steps. The case came on for trial and the Appellant did not brief anybody to defend him and did not make any application to appear and defend himself. It is said that he had no knowledge of advocates but he had three advocates to defend him in the Court of Trial for his criminal offence. The District Court came to the conclusion that there was ample time from the service of the summons until the hearing for the Appellant to take legal steps and dismissed the application.

Whether a decree or order given *ex parte* should be set aside or not under Rule 213 of the Civil Procedure Rules, 1938, is a matter for discretion for the Court or Judge who gave the order and in questions of discretion an appellate Court is always extremely loath to interfere. The rule is that an appellate Court will not interfere with a discretion merely because they might have exercised the discretion, if it had attached to them, in another way. An appellate Court will interfere if it is shown that the Court below failed to take into consideration some material matter. From the order it is quite clear that the District Court had the material facts before them and that they duly considered the matter and came to the conclusion that there was ample time.

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 29th day of April, 1942.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 21/42.

IN THE SUPREME COURT OF PALESTINE.

BEFORE : Gordon Smith, C. J.

IN THE APPLICATION OF :—

Mousa Mikhael Elias El Jeires. APPLICANT.

v.

Almaxa Sama'an Nasra. RESPONDENT.

Application to determine which Religious Court has jurisdiction, P. O. in C., Art. 55 *— Decisions of Greek Orthodox and Greek Catholic Court to the effect that Petitioner's father and step mother were members of Melkite community — Exclusive jurisdiction as to confirmation of wills, P. O. in C., Art.* 54(1).

In deciding an application under the first part of Article 55 of the Palestine Order-in-Council to determine which Religious Court has jurisdiction :—

HELD : The application was misconceived since both the Greek Orthodox and the *Melkite* Court had held that the deceased and Respondent were of the *Melkite* Community. It was clear, therefore, that the *Melkite* Court had exclusive jurisdiction to confirm the deceased's will which jurisdiction had already been properly exercised.

ANNOTATIONS : *Cf.* Misc. Appl. 19/42 (*ante*, p. 209) and note 2.

FOR APPLICANT : Abdul Hamid.

FOR RESPONDENT : Asal.

ORDER.

This application has been referred to me under the first part of Article 55 of the Palestine Order-in-Council to determine which Religious Court has jurisdiction to settle the dispute between the parties. The Petitioner contends that he was born of Greek Orthodox parents, that his mother died and in order that his father might marry his deceased wife's sister (the Petitioner's aunt and step mother) they contracted a marriage in the Greek Catholic *Melkite* Church. The father died in 1933 leaving a will and the widow (the Respondent) applied to the Greek Orthodox Court for confirmation of this will. This was granted but the Petitioner appealed to the Greek Orthodox Court of Appeal which upheld his appeal holding that the Greek Catholic (*Melkite*) Court had jurisdiction in the matter. On application by the Respondent to this latter Court, it was held that both the deceased and the Respondent were of that community and the will was confirmed. The Petitioner is attempting to approbate and reprobate. Both Courts have held that the deceased and Respondent were of the Greek Catholic (*Melkite*) Community and the Court of this Community has exclusive jurisdiction in the matter of the confirmation of the will under Article 54(1) of the Order-in-Council. This application under the first part of Article 55 is, therefore, misconceived and I hold that the Greek Catholic (*Melkite*) Court was and is the proper Court to exercise jurisdiction and which in fact it has already done by its judgment of the 14th March, 1942. The Respondent will have an inclusive sum of LP. 5 as costs.

Given this 15th day of April, 1942.

Chief Justice.

CIVIL APPEAL No. 50/42.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPEAL OF :—

Maroun Ibrahim Imtanis. APPELLANT.

v.

Deebeh Azar on her own behalf and on behalf of her minor children, Munir, Mufid and Munib. RESPONDENT.

Maintenance — Claim not raised at the trial — Maintenance payable only from date of institution of action, C. A. 14/35 — Amount of maintenance — Costs.

In partly allowing and partly dismissing an appeal from the judgment of the District Court of Haifa, in Civil Case No. 214/41, dated the 14th March, 1942 :—

HELD : 1. The Court of Appeal was not concerned with the custody of the children as there had been no claim to that effect.

2. (Following C. A. 14/35) : Maintenance was payable from the date of institution of the action and the order for maintenance as from the time the Appellant had ceased to support the children till the date of the action could not be supported.

3. The amount of LP. 1.500 a month for each child was not unreasonable, nor was there any evidence to show that the eldest son was in regular employment.

FOLLOWED : C. A. 14/35 (2, P. L. R. 336, C. of J. 1934—6, 584).

ANNOTATIONS :

1. See, on the first point, C. A. 140/41 (1941, S. C. J. 554) and note 3.
2. On the second and third points *cf.* C. A. 119/39 (1940, S. C. J. 38).

FOR APPELLANT : Asfour.

FOR RESPONDENT : Sahyoun.

JUDGMENT.

Although in this appeal a great deal of argument was addressed on the point as to whether the father was not entitled to the custody of

the children, there has in fact been no claim for the custody of the children by him. If he insists on having that custody, then he must take action in the proper Court and obtain an order of that Court, which would only be given after going into the matter comprehensively and considering all the details and all the facts. So we are not concerned with the question of the custody of the children.

All we are concerned about is the maintenance awarded by the District Court. On the authority of the case quoted, namely Civil Appeal 14/35, 2 P. L. R., p. 336, which held that maintenance was payable neither from the date when the Appellant ceased to maintain the Respondent, nor from the date of the judgment of the District Court, but from the date of the commencement of the action by the Respondent, we feel that that order awarding LP. 50 maintenance as from the time the husband ceased to support the children till the date of the action, cannot be supported.

As regards the amount in respect of the three children, *i. e.* LP. 1.500 mils per month in respect of each of them, we do not propose to interfere with that. As admitted by Mr. Asfour, it is not at all an unreasonable amount, — LP. 4.500 mils a month in respect of three children. There is no evidence that the eldest son is in a job ; it may be that he goes down town and tries to earn an odd piastre or two by doing something or other, but apparently he is living with his mother. He helps his mother just for his keep, and we can by no means say that that is regular employment. There is no reason, therefore, why there should not be an order of maintenance in respect of the eldest son. In his evidence before the District Court he stated he was 12, and the other children are both smaller and younger, but apparently he was born in 1927.

The appeal, therefore, will be dismissed, except that we find that the Court erred in awarding LP. 50 for past maintenance. Judgment will be varied in that respect. Each party will pay its own costs of this appeal.

Delivered this 5th day of May, 1942.

Chief Justice.

HIGH COURT No. 32/42.

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

BEFORE : Gordon Smith, C. J. and Copland, J.

IN THE APPLICATION OF :—

Epstein-Strykowsky, Ltd., Haifa Bay. PETITIONER.

v.

1. The Chairman and Members of the General Claims Tribunal, Jerusalem, *viz.* :—
   (a) E. Mills, Esq.,
   (b) W. A. Morrison, Esq.,
   (c) Lt. Col. L. Pedretti,
2. The Assistant Director of Public Works, as Competent Authority. RESPONDENTS.

Compensation for requisition — Discretion of General Claims Tribunal not interfered with, H. C. 78/39.

In refusing a petition for an order to issue to the first Respondents directing them to show cause why they should not award compensation in accordance with law for Requisition No. 742 :—

HELD : (Following H. C. 78/39) ; The discretion of the General Claims Tribunal would not be interfered with.

FOLLOWED : H. C. 78/39 (1940, S. C. J. 25).

ANNOTATIONS : *Cf.* H. C. 78/39 (*supra*, bottom of p. 29), H. C. 16/42 (*ante*, p. 139) and note, H. C. 35/42 (*ante*, p. 245) and H. C. 45/42 (*ante*, p. 273).

FOR PETITIONER : Eliash.

FOR RESPONDENTS : Crown Counsel — (Hogan).

O R D E R.

We are of the definite opinion that the order *nisi* should be discharged. This is not a Court of Appeal from the Tribunal, which went into the matter very carefully and were at the same time liberal in the assessment which they made according to their discretion. We, therefore, do not wish to interfere with this discretion. High Court 78/39 fully sets out the law to be followed by this Court.

The order *nisi* is, therefore, discharged, with costs for the Respondents which we fix at LP. 10.

Given this 23rd day of April, 1942.

Chief Justice.

CIVIL APPEAL No. 116/41.

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

BEFORE : Gordon Smith, C. J. and Khayat, J.

IN THE APPEAL OF :—

Sabri Shawa. APPELLANT.

v.

Jamil Shawa. RESPONDENT.

Damages — Case remitted to District Court for ascertainment and assessment of damages — No right to claim damages which are too remote — Interest on damages — Liquidated damages and penalty.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 26th of February, 1942 in Civil Case No. 481/35 :—

HELD : 1. As the contract between parties was not one for the sale of land the Appellant was not liable for loss of profits on a resale of the land.

2. Neither was the Appellant liable for the costs of Respondent's litigation with Appellant's mother as these damages did not flow directly from Appellant's default and were otherwise too remote.

3. The Appellant was liable for the direct damages caused by his default and this liability was independent of the judgment obtained by Respondent against Appellant's mother being satisfied or not as the contracts between Respondent and Appellant, and between Respondent and Appellant's mother were entirely different, so that Appellant and his mother could not be regarded as joint tort feasors.

4. The Respondent was not entitled to interest on the damages awarded except from the date of this judgment.

5. *Quaere* whether the LP. 1,000.— stipulated in the contract were in fact a penalty.

ANNOTATIONS :

1. *Cf.* the previous judgment in this case : C. A. 116/41 (1941, S. C. J. 476) and annotations thereto.

2. On direct and indirect loss *vide* C. A. 217/38 (1938, 2 S. C. J. 221) and C. A. 79/39 (1939, S. C. J. 493).

3. See, on remoteness of the damage, Halsbury, Vol. 10, *pp.* 103 *seq.*, *sub-sec.* 4.

4. On damages against joint tort feasors *cf.* Halsbury, Vol. 10, *pp.* 149, *seq.*, No. 190.

5. On the fourth point compare C. A. 85/40 (1940, S. C. J. 474) and note 4.

6. See, on the last point, P. C. 30/39 (1940, S. C. J. 279) and note 3.

FOR APPELLANT : Cattan.

FOR RESPONDENT : Goitein and Barbari.

JUDGMENT.

This matter was before this Court on the 8th July, 1941, on appeal from the District Court's judgment dated the 13th May, 1941, under which judgment had been given for the Plaintiff-Respondent in the sum of LP. 1700 and costs. On such appeal the case was referred back to the District Court, the material parts of the decree reading — "to decide if, having regard to the Plaintiff's statement as to the delay in the Land Registry, and the conduct of Bahiya, and the fact that judgment was obtained against her, the Plaintiff suffered any damage from the Defendant, Sabri's acts, and if he did suffer such damage to apply Articles 109 and 110 of the Ottoman Code of Civil Procedure. If material, the value of the land at the appropriate dates and alleged loss of profit should be properly proved." This decree is based *verbatim* on the concluding paragraph of the appeal judgment.

The claim against the Defendant was for LP. 1000 damages for breach of contract, dated the 19th June, 1935, and the return of a bill for LP.700, or its value in cash. This contract which was made between the Plaintiff and Defendant and reduced into writing was one of mutual obligations, those of the Plaintiff being to give the bill for LP. 700 to Defendant in consideration of various undertakings by the Defendant, and it is provided that if the Defendant broke the contract, he undertook to return the bill or its value, and to pay LP. 1000 as being the liquidated sum agreed upon in advance between them.

In its judgment the Court of Appeal confirmed the District Court in its finding that there had been a breach of this contract but held that the provision for LP. 1000 damages was a penalty clause and that the LP. 700 as an ascertained sum was not repayable unless the penalty clause could be enforced, and it pointed out that there had not been a total failure of consideration as the Defendant had released certain seizures.

The question for consideration by the District Court was, therefore, what damages the Plaintiff had suffered by reason of the breach of the agreement, and as the District Court had not indicated the principles on which it had acted, was the District Court right in holding that the evidence had justified the verdict of LP. 1700? The Court of Appeal held that this was not so justified, nor had it been shown in the judgment to be justified, and, therefore, the Court of Appeal referred the matter back, in the terms I have stated.

The District Court took further evidence and has now given its judgment on this question of damages, to which both parties take

objection. The Court found that the Plaintiff was entitled to both direct damages and to what might be called loss of profit damages in respect of the land, if he could prove them. The Plaintiff called the Land Registrar at Gaza in respect of land values, and also gave evidence himself in this respect and also in respect of other matters which he endeavoured to itemize. Before, however, going on to the other items, it is desirable to deal with this point of damages in respect of the alleged loss of profits.

In 1934 the Defendant's mother had entered into a contract for the sale of land, with the Plaintiff, not only for a considerable amount of land but for a considerable sum, and the Plaintiff had paid her at least LP. 7,600. There were numerous attachments of part of this land and considerable litigation, and this agreement between the Plaintiff and Defendant was an endeavour to straighten things out. However, subsequenly the mother defaulted on her agreement of sale (with the collusion of the Defendant) and the Plaintiff sued her, obtained judgment, attached the land and eventually, in 1938, bought the land in question at the subsequent execution sale for LP. 2000, and had it registered in his name.

But how far is all this material on the question of damages in consequence of the breach of contract by the Defendant? It is to be noted that the direction of this Court was only to take this evidence, *if material,* and we cannot see that it is material at all, or that the Defendant can be held responsible in damages for any alleged loss of profits on resale of the land or otherwise, by reason of his breach of his contract which was not a contract for the sale of this land. It is true that under this contract he agreed to withdraw an attachment on the land and to waive any claims in regard thereto, and undertook other obligations, for which he received LP. 700, and he did withdraw the attachment and waive his claims but broke the contract in other respects. The District Court found, however, that the Plaintiff had not proved his damages as regards this loss of profits, and it is unnecessary for us to go into this question, as we find that he is not entitled to damages at all in this respect, anyhow from the Defendant.

Another item of damages which the District Court found had not been proved was a sum of LP. 500 which the Plaintiff estimated was the costs of his litigation with Defendant's mother. Similarly, we find that damages in this amount are not recoverable from the Defendant, as in the case of the loss of profits.

In neither of these cases can it be said that these damages flow directly from the default of the Defendant, and they are otherwise

too remote. We agree, however, as regards the LP. 200 paid to Tennenbaum that this was a direct and consequential damage caused to the Plaintiff by the default or conduct of the Defendant, and similarly as regards the LP. 700, the value of the bill which Defendant discounted or otherwise failed to return, and which the Plaintiff had to meet.

In the result, therefore, there must be judgment for the Plaintiff in the sum of LP. 900, but this cannot be conditional on the judgment obtained against the Defendant's mother being liquidated, nor is the Plaintiff entitled to interest on this amount, except as from the date of this judgment.

We do not agree that the Defendant and his mother are in the same position as joint tort feasors, and that the Plaintiff, having obtained judgment against the mother, is thereby estopped from obtaining judgment against the son, as his breach of his agreement was an entirely different matter to the breach by the mother of her agreement, and the whole subject matter of the claim against him is different. It might very well have been that, although there might not have been a breach by the Defendant of his agreement with the Plaintiff there might still have been a breach of her agreement with the Plaintiff by the mother, or *vice versa*. We might, however, had we been permitted to do so, have taken a different view to that taken by this Court, on the question of whether the clause as to the LP. 1000 liquidated damages was in fact a penalty clause or one of pre-estimated liquidated damages, but the Court of Appeal as then constituted took a different view of this to that previously taken by the District Court, and we might also say that we have not had the benefit, nor were we entitled to the benefit, of argument on this point.

The Defendant-Appellant must pay the costs of all proceedings both in this Court and the Court below, to include advocate's fees of LP. 10 on each hearing in this Court, and LP. 5 in the Court below, similarly on each hearing.

Delivered this 29th day of April, 1942.

Chief Justice.

CRIMINAL APPEAL No. 62/42.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPLICATION OF :—

1. Yunis Ismail,
2. Ahmad Ali el Jundi. APPLICANTS.

v.

The Attorney-General. RESPONDENT.

Stealing by person in public service and/or by agent and receiving stolen property, C. C. O., Secs. 274, 276 and 309 — Evidence — Preliminary enquiry against Government Officers — Order made under Magistrates' Courts Jurisdiction Ord., Sec. 16 and not under T. U. I. Ord., Sec. 74 — Preliminary enquiry as "proceedings".

In partly allowing an application for leave to appeal from the judgment of the District Court of Jerusalem, dated the 20th of April, 1942, in Felony No. 50/42, whereby the Applicants were convicted of stealing by a person in the public service of property which came into his possession by virtue of his employment contrary to section 274 of the Criminal Code Ordinance, of stealing by agent contrary to section 276(c) and the second Appellant also of receiving stolen property contrary to section 309 of the Criminal Code Ordinance, 1936, and sentenced to one year's imprisonment each :—

HELD : 1. The wording of Section 16 of the Magistrates' Courts Jurisdiction Ordinance was sufficiently wide to cover a preliminary enquiry ordered by the Attorney General as such a preliminary enquiry was a proceeding in a Magistrate's Court.

2. The evidence against the second Applicant was insufficient.

ANNOTATIONS : On committal proceedings being criminal proceedings, *vide* CR. A. 144 & 145/41 (*ante*, p. 69) and note.

FOR APPLICANTS : Salah.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

This is an application for leave to appeal from a conviction by the District Court of Jerusalem, in which the two Applicants were convicted under Sections 274 and 276(c) of the Criminal Code and the second Applicant was also convicted under Section 309, and each of them was sentenced to one year's imprisonment.

The evidence may be stated shortly as follows :—

A police patrol in the Jordan valley under the command of British Constable Watt, of which the two Applicants were members, came into contact with a gang of smugglers attempting to cross the Jordan River from Trans-Jordan into Palestine. A certain amount of firing seems to have taken place on both sides and, as a result, the smugglers, with the exception of one, managed to escape leaving the donkeys on which the smuggled goods were loaded behind them. The two Applicants are charged with having stolen some of this smuggled property.

The case for the prosecution depends upon whether there were eight donkeys or nine donkeys in this smugglers' convoy. Only eight donkeys were turned in to the Jericho Police Station and the allegation is that the ninth donkey was taken away by these two Applicants and unloaded and the goods stolen. The District Court found in their judgment that there were in fact nine donkeys seized by the police and not eight. In arriving at that conclusion they seemed to have relied, in part at any rate, upon the evidence of one Salem Mohammad el Ismail. This witness, who is one of the smugglers, stated that they had nine donkeys with them when they crossed the river from Trans-Jordan into Palestine. He also says that when they arrived at Jericho he was told to say that there were only eight donkeys and not nine. He states that he was beaten in order to make him tell this lie. He says that this was done with the knowledge of the British Constable Watt in charge of the patrol. The District Court found as a fact that there were nine donkeys and not eight. From the evidence before them this Court is not inclined to interfere with that finding of fact. Apart from that, the first Applicant, Yunis Ismail, made a full statement in the nature of a confession to the Police of Jericho, in which he detailed the facts and said that the Police of the patrol divided up the property found on the ninth donkey. When a search was made, a considerable part of the stolen property was found hidden in the earth in the garden of the first Applicant. The District Court believed that evidence and in fact it is difficult to see how they could have come to any other conclusion.

The only other point taken on appeal is that there was no proper Order of Committal by the Attorney General ordering the preliminary enquiry, which is necessary seeing that the two Applicants were policemen. The order for investigation was made under Section 16 of the Magistrates' Courts Jurisdiction Ordinance by the Attorney General himself, and it is argued with considerable force by the Applicant that the order should have been made under Section 74 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36. Both these sections in the Magistrates' Courts Jurisdiction Ordinance and the

Trial Upon Information Ordinance are in practically identical terms and the Court is of opinion that the wording of Section 16 of the Magistrates' Courts Jurisdiction Ordinance is sufficiently wide to cover a preliminary enquiry ordered by the Attorney General in this case. This Court has already held that a preliminary enquiry is a proceeding in a Magistrate's Court. The result is that the application by the first Applicant Yunis Ismail beside being completely devoid of any merits is equally unsupportable on any technical ground. The application for leave to appeal in this case must, therefore, be dismissed.

With regard to the second Applicant, Ahmad Ali el Jundi, the evidence against him was very slight and Mr. Hogan, appearing for the Attorney General on this appeal, says that he cannot support the conviction. The only evidence against him was that he was a member of this particular police patrol when the goods were seized and that some property resembling the stolen property was later on found in his house in Jerusalem. The application in his case for leave to appeal must be allowed. The appeal is allowed and the conviction is quashed.

Delivered this 11th day of May, 1942.

British Puisne Judge.

CIVIL APPEAL No. 13/42.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPEAL OF :—

Baruch Birshtein. APPELLANT.

v.

Credit Hadadi Co-operative Society, Ltd. RESPONDENT.

Refund of deposit from Co-op. Society — Estoppel as to person from whom debt due — Admission, Mejelle, Arts. 79, 1588 *and* 1647 — *No estoppel created — Waiver of claim by previous action for part of the amount, M. C. P. R., Rules* 38 *and* 39 — *Point not raised at the trial — Conditions precedent — Interest — Costs.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv, in Civil Case No. 186/41, dated 23rd December, 1941, whereby Appellant's claim was dismissed :—

HELD : 1. There was no estoppel by admission as the fact that a capital sum was admitted to be due by one person did not debar a claim against another person, *e. g.* a surety or guarantor.

2. The plea that the Appellant had by a previous action for return of part of the deposit waived his claims to the remainder had not been raised in the Court below and could, therefore, not be raised on appeal.

3. Judgment should be entered in favour of the Appellant for the amount claimed and the case remitted to the District Court to deal with the question of interest.

ANNOTATIONS :

1. Previous proceedings in this case : C. A. 154/41 (1941, S. C. J. 397), H. C. 99/41 (*ibid.*, p. 513) and C. A. 247/41 (*ibid.*, p. 633).

2. See, on estoppel generally, C. A. 278/40 (1941, S. C. J. 97) and note 2.

3. On the impossibility of raising a point not raised at the trial see C. A. 179/41 (1941, S. C. J. 629) and note 2.

4. As regards the incompatibility of the fourth last paragraph in the judgment remitting the case to the District Court on the merits, and the concluding paragraph of the decision, see C. A. 13/42 (*post*, p. 303).

FOR APPELLANT : Eliash and Dikshtein.

FOR RESPONDENT : Lustig and Goitein.

JUDGMENT.

This was an appeal against the decision of the District Court, Tel-Aviv, whereby the Plaintiff's claim for a refund of his deposit with the Defendant Society was dismissed, as also apparently a separate claim for a small amount of interest thereon.

It was not disputed that the balance of deposit made by the Plaintiff to the Society amounted to LP. 276.588, and such fact was so found in the judgment, but the point was whether it was then due and payable by the Defendant Society to the Plaintiff.

This dismissal was based on two grounds, firstly that the Plaintiff was estopped from claiming it by an admission made in a previous action claiming interest on the amount, to the effect that 'the principal debt is due from Joseph B.' Alternatively it was found that a condition precedent to a refund by the Defendant had not been proved.

The relevant facts can be very briefly stated.

The Plaintiff, who at that time was a member of the Management Board of the Defendant Society, had made a deposit with the Society for the specific purpose of loans by the Society to another Society called "Joseph B.", upon certain terms. Subsequently these terms were varied by agreement, confirmed by resolution of the Council of the Defendant Society.

Apparently "Joseph B." was then in course of liquidation, and analysing this resolution, which, as I have said, confirmed the agreement between the Plaintiff and the Society, we find its effect is as follows :—

(a) If the amount recovered from the liquidator of Joseph B. is insufficient to cover the whole deposit of the Plaintiff, then whatever balance of deposit there may be due to the Plaintiff shall be refunded by the Defendant Society in instalments.

(b) Such instalments should be at the rate of 25% of the gross annual profits of the Defendant Society, commencing as from the 1st January, 1935.

(c) Pending repayment of the whole debt to the Plaintiff he was to be retained as a member of the Management Board of the Defendant Society.

The District Court found that the Plaintiff had failed to prove that the liquidation of Joseph B. had been completed or that the Defendant Society had made any profits on the amounts thereof.

Dealing, however, first with the other ground of dismissal, namely estoppel by admission, the only witness brought by the Defendant Society in the Court below was a clerk of the Magistrate's Court, who produced the record of file 5318/37. In this case, we understand that the Plaintiff obtained judgment against the Society for interest on his deposit, and in the course of his evidence he said : "The capital is due to me from Joseph B.". We also understand that he had then already received repayment of part of his original deposit of LP. 600, from Joseph B.

It is sought to bring this statement in as an admission within Article 79 of the *Mejelle,* which reads as follows : "By his admission one is condemned," and also Article 1588, which reads : "It is not lawful to go back from admissions concerning the rights of people", and also reference was made to Article 1647.

There was no cross-examination of the Defendant in the Court below, on this alleged admission, and Counsel before us stated that he was taken by surprise by the plea. This may well have been so, and no doubt if there had been cross-examination it might very well have been explained. There is no doubt that the capital was due by Joseph B., in the first instance, but failing payment there is no reason at all why, in the alternative, it might not also have been due by somebody else as well. The terms of the resolution expressly provided for this contingency. Take the case of a surety on a promissory

note, or a person who guarantees a debt, the fact that a capital sum is admitted to be due by the principal does not debar a claim being made against the surety or guarantor. We are, therefore, of the opinion that there is no substance in this submission as to an admission, and the Court below erred in this respect.

It was further submitted that by reason of the fact that in an earlier suit (4811/41) in the Magistrate's Court, the Plaintiff had claimed interest and part of the deposit, therefore he had waived his claim to the whole amount, and Rules 38 and 39 of the Magistrates' Courts Rules were quoted. This point was not raised in the Court below and was not an issue, nor does there appear to be any evidence thereon, and it was raised for the first time before us. Apart from the fact that there appears to be no substance in the point, it cannot be raised now.

Other minor points were submitted by Counsel for the Defendant Society, but in none of them is there any substance.

As regards the second and alternative ground of dismissal, it is correct that the terms of the resolution provide conditions as to the repayment of the deposit or the balance, and there was no formal evidence as to the fulfilment of these conditions, although they appear to have been taken for granted. It is not disputed that the deposit was made and that a balance remains unpaid, and it would be contrary to natural justice to dismiss the claim merely on a ground which is almost technical. The case, therefore, should go back to the District Court to hear evidence as to the final liquidation of Joseph B., and as to any profits made by the Defendant Society.

It might also be noted that one of the conditions for payment by instalments was that the Plaintiff should be retained as a member of the Management Board pending the currency of the debt to the Plaintiff. No mention was made of this point, although we understand that the Plaintiff is no longer on the Board and has not been a member for some considerable time. The payment by instalments by the Defendant Society also appears to have been conditional in this respect.

Under the circumstances we think that each side should pay its own costs of this appeal, and that the costs of the original hearing and proceedings in the District Court should be paid by the Defendant (Respondent), and that of the further hearing on the question of interest, should abide the result of such hearing. Costs to be on the lower scale.

The judgment of the District Court dismissing the claim is, therefore, set aside, and judgment entered for the Plaintiff (Appellant) in

the sum of LP. 276.588, and the matter remitted to the District Court to deal with the question of interest which was not dealt with in the judgment.

Delivered this 16th day of April, 1942.

Chief Justice.

CIVIL APPEAL No. 13/42.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPLICATION OF :—

Credit Hadadi, Tel-Aviv, Co-operative Society, Ltd. APPLICANT.

v.

Baruch Birshtein. RESPONDENT.

Slip rule — Inconsistencies in judgment — Application to amend refused.

Application for amendment of the judgment in Civil Appeal No. 13/42, dated the 16th April, 1942.

On April 29th, the Applicant moved the Court of Civil Appeal under Rule 358 of the Civil Procedure Rules to amend the judgment delivered on April 16th (*ante*, p. 299) by correcting the last passage thereof in accordance with the decision expressed in the fourth last paragraph of the judgment.

HELD : The application should be refused.

ANNOTATIONS : See, on the slip rule, C. A. 226/38 (1940, S. C. J. 373) and note 2.

FOR APPLICANT : Lustig.

FOR RESPONDENT : Olshan and Orren.

ORDER.

Having heard Dr. Lustig for Applicant and Mr. Olshan for Respondent, we see no reason to grant the application for the amendment of the judgment in Civil Appeal No. 13/42, dated the 16th April, 1942.

The application is, therefore, refused with costs to include LP. 5.— advocate's attendance fee.

Given this 11th day of May, 1942.

Chief Justice.

HIGH COURT No. 44/42.

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

BEFORE : Gordon Smith, C. J. and Copland, J.

IN THE APPLICATION OF :—

Isaac Trachtengott. PETITIONER.

v.

The Attorney General. RESPONDENT.

Application for change of venue from Municipal Tribunal to Magistrate's Court — High Court not empowered to interfere, Defence (Municipal Tribunals) Regulations, Reg. 6.

In refusing an application for an order to the Respondent to show cause why Criminal Case No. 21/42 (Municipal Tribunal, Tel-Aviv) should not be instituted against the Petitioner in the Magistrate's Court, Tel-Aviv, instead of in the Municipal Tribunal, Tel-Aviv :—

HELD : The High Court had no power to question any proceedings before a Municipal Tribunal.

ANNOTATIONS : *Cf.* H. C. 46/38 (1938, 1 S. C. J. 423), H. C. 74/40 (1940, S. C. J. 348) and H. C. 87/40 (*ibid.*, p. 366).

FOR PETITIONER : Goitein.

FOR RESPONDENT : *Ex parte.*

ORDER.

In view of the terms of Regulation 6 of the Defence (Municipal Tribunals) Regulations, 1941, this Court has no power to question any proceedings before a Municipal Tribunal. The application for a rule *nisi* is, therefore, refused.

Given this 4th day of May, 1942.

Chief Justice.

CRIMINAL APPEAL No. 65/42

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

BEFORE : Gordon Smith, C. J., Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Daoud Butros Jallad. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Sentence — District Court not to increase sentence on appeal without the Accused being present.

In allowing an appeal from the judgment of the District Court of Jaffa, sitting as a Court of Appeal, in Criminal Appeal No. 26/42, dated the 30th April, 1942, whereby it confirmed the conviction of the Magistrate's Court, Jaffa, against Appellant, and varied the sentence to four months' imprisonment, and in reducing the sentence :—

HELD : A District Court should not increase a sentence on an accused person an appeal before it, or vary the sentence to the prejudice of the Accused, without the Accused being present and having the opportunity of being heard.

FOR APPELLANT : Nassar.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

In this case the sentence on the Accused was varied on the appeal before the District Court, such appeal being by the Attorney General. He had been fined LP. 10 before the Magistrate, and the sentence was varied to four months' imprisonment before the District Court. Apparently this increase of sentence took place before the District Court in the absence of the Accused, and it was of course very much to his prejudice, and he had no opportunity of urging any reasons why he should not go to prison and be allowed the alternative of a fine. He had pleaded guilty to the offence but the price which he charged per *kantar* was very nearly four times the maximum controlled price.

We propose to vary the sentence in this case, and we propose to lay down as a rule of practice that a District Court should not increase a sentence on an accused person on appeal before it, or vary the sentence to the prejudice of the Accused, without the Accused being present and having the opportunity of being heard.

The sentence will be varied to the extent of a fine of LP. 50, or in default three months' imprisonment.

Delivered this 18th day of May, 1942.

Chief Justice.

CIVIL APPEAL No. 58/42.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Haj Khalil Bakir el Banna. APPELLANT.

v.

Nimer Ben Yousef Diab. RESPONDENT.

Right of way — Evidence — Binding force of record — Prescription to be proved by party setting up the defence.

In dismissing an appeal from the judgment of the Magistrate's Court Gaza, sitting as a Land Court, dated the 31st day of March, 1942, in Civil Case No. 40/42 :—

HELD : 1. The Magistrate's findings of fact were based upon evidence and would not be interfered with.

2. According to the record the Appellant had finished his case, and the Court of Appeal was bound by the record.

3. It was for the party alleging prescription to prove it and there was no evidence in support of that plea.

ANNOTATIONS :

1. For authorities on the right of way see note 1 to C. A. 80/41 (1941, S. C. J. 220) ; *cf.* H. C. 94/41 (*ibid.*, p. 585).

2. On the binding effect of the record *vide* C. A. 228/41 (1941, S. C. J. 570, at p. 573) and note 3.

3. On the last point *cf.* H. C. 78/28 (1, P. L. R. 376, C. of J. 1218).

FOR APPELLANT : Shawa.

RESPONDENT : In person.

JUDGMENT.

This is an appeal from the Magistrate's Court of Gaza, sitting as a Land Court. The dispute concerns a small passage way considerably smaller than the advocates' table in this room. It concerns the right

to enter this passage way and to proceed from there by a door on the north wall into the house of the Respondent. The Respondent, who was the Plaintiff in the Court below, claimed that this passage was once used by himself and the present Appellant, that the present Appellant had unlawfully closed the door on the North wall leading into the Respondent's house, and had also interfered with and made considerably smaller the door in the East wall leading from the street into the passage.

The Magistrate, after an extremely lengthy hearing extending over six days, during which he heard three witnesses and the two parties to the case and made an examination on some other than the six days, came to the conclusion that the Respondent had proved his case. The Magistrate was satisfied from his examination that the door in the East wall had only recently been made smaller, a year or two previously.

The appeal is based on the grounds that the judgment was contrary to the evidence and the Magistrate refused to hear evidence which the Appellant wished to call and that, in any event, the action is prescribed. As for the evidence and the result of the examination, we see no reason to interfere with the Magistrate's finding of fact. What strikes us most is the fact that the eastern door has been newly rebuilt.

With regard to the complaint that the Appellant was not allowed to call further evidence, we have in the record, on the third day of the hearing, that the attorney for the Appellant said "My witnesses are finished". It is needless to remark that we are bound by the record.

As for the plea of prescription, it is for the person alleging prescription to prove it. When a party says — this action is prescribed — that is not sufficient to call upon the other party to disprove this assertion and in all the evidence heard in this case, there is no evidence whatsoever on which to find that the action was prescribed.

The appeal, therefore, fails and must be dismissed with costs. The Respondent is entitled to LP. 2 travelling expenses.

Delivered this 20th day of May, 1942.

British Puisne Judge.

HIGH COURT No. 55/42.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

1. Shmuel Lebanon,
2. Aharon Zerkoff. PETITIONERS.

v.

1. The President District Court, Tel-Aviv, in his capacity as Chief Execution Officer,
2. Zvi Pechtholt,
3. Shamai Kobrinsky. RESPONDENTS.

High Court — Allegation before C. E. O. that judgment a nullity as given without jurisdiction — Case twice appealed to District Court but no leave to appeal to Supreme Court applied for — Alternative remedy.

In refusing a petition for an order to issue directed to the first Respondent to set aside his decisions dated 12.5.42 in Execution File No. 2781/42 and 19.5.42 in Execution File No. 3051/42 respectively ordering execution to proceed therein insofar as the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated 23.3.42 given in File No. 5/42 as well as the order of the Registrar, District Court, Tel-Aviv in the said file (ordering the payment of LP. 5.385) were and are, in each case, a nullity and that execution proceedings be restored to the same state as it was before the aforesaid orders of first Respondent : —

HELD : 1. The Petitioner could have appealed to the Supreme Court and as he had failed to do so he could not come to the High Court.

2. It was not for the Chief Execution Officer to say that the District Court Judges were wrong.

ANNOTATIONS :

1. The judgment in question was for the refund of LP. 26.— paid by the Respondents to Petitioners and found to be usurious interest. It was contended on behalf of the Petitioners that the only Court having jurisdiction was the Court which would have had jurisdiction in an action for the repayment of the loan in question, in that case the Chief Magistrate's Court since the amount was LP. 200.—.

2. See, on the first point, H. C. 33/42 (*ante*, p. 257) and note 2.

3. On the second point *cf.* H. C. 89/41 (1941, S. C. J. 632).

FOR PETITIONERS : P. Goldberg.

FOR RESPONDENTS : *Ex Parte.*

ORDER.

In this case judgment was first given by the learned Magistrate and that judgment was taken to the District Court on appeal. On

appeal the District Court held that the learned Magistrate had jurisdiction to try the case, but remitted it to the Magistrate with certain instructions, with regard to the question of excessive interest. The Magistrate again gave judgment in the amount claimed and the case was again taken by Petitioner on appeal to the District Court and the District Court dismissed the appeal. The same question of jurisdiction was therefore raised twice before the Magistrate and twice before the District Court on appeal. The Petitioner did not, as he could well have done, apply for leave to appeal to this Court on a point of law. Two Magistrates' Courts and two District Courts have held that the case was within the jurisdiction of the Magistrate. The Petitioner, not content with this mass of judicial opinion against him, proceeds to the Chief Execution Officer and says to him "Magistrates and District Courts were all wrong. You have no power to execute this judgment because it is a nullity'. The Chief Execution Officer, not unnaturally, rejected the application, and the Petitioner, originally full of hope and disregarding the mass of judicial opinion against him, has now come to this Court against the Order of the learned Chief Execution Officer.

Now, the Petitioner cited to us various judgments none of which fit the facts of this case. There is one standard rule of this Court, I suppose, which has been maintained from the earliest days the High Court was instituted, and that is that the High Court will not interfere in any case where another Court had, or would have had, jurisdiction. Now, it is perfectly clear that two District Courts of Appeal have held against the Petitioner. He could have appealed to the Supreme Court if he had wanted and the Supreme Court would have had jurisdiction to entertain his appeal. He did not choose to avail himself of that right and therefore, following our invariable practice, he cannot now come to the High Court. In any case the Chief Execution Officer has no power to say that a judgment of the District Court on appeal is a nullity. The Chief Execution Officer was, therefore, perfectly correct in declining to order that the judgment should not be executed and the Chief Execution Officer being correct, it is not for us to interfere. Whether or not the District Court judgments were right, is a matter that is immaterial. Those judgments were delivered ; they were not appealed ; they are final. It is not for the Chief Execution Officer to say that the District Court Judges were wrong.

The application must be dismissed.

Given this 2nd day of June, 1942.

British Puisne Judge.

HIGH COURT No. 42/42.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPLICATION OF :—

Rahamim Lalo. PETITIONER.

v.

1. The Registrar of Lands, Jaffa,
2. Abbas Abdel Rahim Yusef Beidas. RESPONDENTS.

High Court — Application to direct Registrar of Lands to complete transaction commenced by virtue of allegedly irrevocable power of attorney — Whether Registrar of Lands the proper Respondent — Long practice — Alternative remedy available — Costs.

Application for an order to issue directed to the first Respondent calling upon him to show cause why he should not approve for completion files Nos. 2854/41, 2851/41 and 2853/41 of the Land Registry Office of Jaffa, and why he should not refrain from proceeding with the transactions in files Nos. 1671/42, 1672/42 and 1673/42 of the Land Registry Office of Jaffa.

By an agreement made between the Petitioner and the second Respondent the latter undertook to sell and transfer to the Petitioner certain shares in land. An irrevocable power of attorney was executed by the second Respondent authorising a third person to transfer the said shares to the Petitioner's name. After a file had been opened in the Land Registry the second Respondent sent to the donee of the power a notarial notice purporting to revoke the power of attorney and a copy of that notice was forwarded to the first Respondent. The second Respondent also took steps with a view to sell the shares in question to other persons and opened a file in the Land Registry to that effect. Petitioner thereupon applied to the first Respondent and, relying on Articles 1521 and 1522 of the *Mejelle*, asked him to complete the transactions commenced by virtue of the power of attorney and to refrain from proceeding with the transactions commenced by the second Respondent. The first Respondent refused to accede to Petitioner's request and the present application was made to the High Court.

HELD : 1. Although the application should have been addressed to the Director of Lands and not to the Registrar of Lands the matter would not be decided on that point as a number of similar orders had been directed in the past to the Registrar of Lands without objection having been taken.

2. The Petitioner had an alternative remedy by applying to the appropriate Court.

ANNOTATIONS :

1. Note that by Section 2(2)(a) of the Interpretation (Am.) Ordinance, 1939,

the title "Director of Lands" has been replaced by "Director of Land Registration".

2. On the effect of long practice *cf.* CR. A. 10/42 (*ante*, p. 35) and note 1.

3. See, on the second point, H. C. 33/42 (*ante*, p. 257) and note 2.

FOR PETITIONER : Polonsky.

FOR RESPONDENTS : No. 1 — Crown Counsel — (Hogan).
No. 2 — Olshan.

ORDER.

This is a return to a rule *nisi* directed to the Registrar of Lands, Jaffa ; the first point taken by the Respondent is that this rule should have been directed to the Director of Lands and not the Registrar of Lands. Speaking for myself, I should have thought that that argument was sound. We do not, however, decide this matter on that point because the fact appears to be that in the past a number of rules, on matters of a similar nature to the present one, have been directed to the Registrar of Lands and not to the Director, and that no objection appears to have been taken.

The point on which we decide this matter is the elementary one of the existence of alternative remedies. It is not for us to go into the merits of this matter at all, and we must clearly refrain from making any finding as to whether or not the power of attorney in question was obtained by fraud. That is a matter that may have to be decided in due course by the appropriate Court. But it seems to us to be plain that the Petitioner in this matter has alternative remedies. It is not for us to advise him as to what is his appropriate Court, whether it be the Land Court or the District Court, and generally we think that the less we say about the merits and details of this matter the less embarassing it will be for the Court that may ultimately have to decide the issues in question.

The rule must therefore be discharged with costs, which we assess at an inclusive sum of LP. 10.000, to the second Respondent.

Crown Counsel does not ask for costs for the first Respondent.

Given this 19th day of May, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 82/42.

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

BEFORE : Copland, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Saleh Mohammad Salim Shama. RESPONDENT.

Criminal Procedure — Acquittal under Rule 265 of M. C. P. R. not a bar to a new charge — M. C. P. R. inapplicable to summary trials in District Court — Attorney General's right to appeal, T. U. I. Ord., Sec. 67 — Power to stay proceedings, Magistrates' Courts Jurisdiction Ord., Sec. 18 — Possibility of filing a new charge after staying proceedings upon an old charge, A. A. 3/29 — Effect of nolle prosequi, Archbold's Criminal Pleading, Evidence and Practice, Roscoe's Criminal Evidence — Applicability of Interpretation Ord., Sec. 7.

In allowing an appeal from the judgment of the District Court of Haifa, in Misd. Case No. 98/42, dated the 13th day of May, 1942, whereby Respondent was acquitted on the ground of stay of proceedings in respect of 2 charges under sections 105 and 109 of the Criminal Code Ordinance, 1936, and in remitting the case to the Court below :—

HELD : 1. The Magistrates' Courts Procedure Rules did not apply to summary trials in a District Court.

2. The District Court had not committed an irregularity of procedure but had applied the law wrongly to the facts ; the Attorney General was, therefore, entitled to appeal.

3. (Following A. A. 3/29) : A stay of proceedings was no bar to the filing of a fresh charge against the person concerned.

4. Section 7 of the Interpretation Ordinance applied only to regulations and orders which have to be published in the *Gazette*.

FOLLOWED : *Dictum* in A. A. 3/29 (1, P. L. R. 362 ; C. of J. 604).

ANNOTATIONS :

1. See, on the second point, CR. A. 111/41 (1941, S. C. J. 378) and note 3.

2. On Section 7 of the Interpretation Ordinance *vide* CR. A. 10/39 (1939, S. C. J. 155 on pp. 159—160) ; *cf.* CR. A. D. C. T. A. 23/40 (Tel-Aviv Reports, 1940, p. 83).

FOR APPELLANT : Crown Counsel — (Hogan).

FOR RESPONDENT : Cattan.

JUDGMENT.

This is an appeal by the Attorney General against a judgment of the District Court, acquitting the Accused on the ground that the

Accused was acquitted by virtue of Rule 265 of the Magistrates' Courts Procedure Rules, 1940, and that that aquittal was a bar to the new charge filed against him.

Now, we may say straight away that the reason given by the District Court for the acquittal was a wrong one. It is quite clear that the Magistrates' Courts Procedure Rules do not apply to summary trials held in the District Court because for that purpose there are special District Court (Summary Trials) Rules and just because the equivalent of Rule 265 of the Magistrates' Courts Procedure Rules is not incorporated in the District Court (Summary Trials) Rules that is no reason for importing it in the way that the District Court did. There are, however, further points which have been argued in this appeal with which this Court must deal.

The first point taken by Mr. Cattan is that no appeal lies under Section 67 of the Criminal Procedure (Trial Upon Information) Ordinance, on the ground that here the District Court committed an irregularity of procedure and that that is not a ground of appeal. It is quite true that irregularity of procedure is not a ground of appeal but where the District Court went wrong in this case was in applying the law wrongly to the facts. In this case they applied the wrong law to the facts ; we are, therefore, of opinion that an appeal lies.

It is further argued by Mr. Cattan that the powers of the Attorney General with regard to ordering a stay of proceedings are statutory, being given by Section 18 of the Magistrates' Courts Jurisdiction Ordinance, 1939, and that nowhere is there to be found a power to cancel a stay. In these proceedings, however, the stay has not been cancelled. The stay of the original proceedings remains in effect for all time and the present proceedings are founded on a new charge. Whether the Attorney General has a power to file a new charge after staying proceedings upon an old charge is we think covered by Criminal Assize Appeal No. 3/29 Attorney General *v.* Hilwi Hazboun (1 P. L. R., p. 362). This was an application for leave to appeal to the Chief Justice from a final judgment given by the Court of Criminal Assize. Sir Michael MacDonnell, the late Chief Justice, at page 364 said as follows :—

> "The Attorney General could have stayed proceedings upon that Information and filed a new Information, or new Informations, charging Hilweh as well as Jerius with murder, either jointly with Jerius in one Information, or separately in distinct Informations".

The application for leave to appeal in this particular case by the Attorney General was dismissed on the ground that the Attorney General did not make use of the one means which lay to his hand

under the law as it then existed. It seems to us that the grounds of the decision in that case apply equally to this case. There is no bar to an Attorney General, when once he stays proceedings upon an information or charge, filing a new information or charge, and that seems to be supported also by remarks made in Archbold's Criminal Pleading, Evidence and Practice, 1931, p. 128 where it is stated that a *nolle prosequi* puts an end to the prosecution but does not operate as a bar or a discharge or acquittal on the merits. It is true that in Roscoe's Criminal Evidence it is said, reporting a case on the subject, that up to the year 1705 there had been no instances apparently reported where a fresh information had been filed after a stay. It seems perhaps a little peculiar because in those days criminal trials were considerably more technical in their procedure than they are to-day. The Court is of opinion that a stay of proceedings or a *nolle prosequi,* if one likes to use the Latin phrase, is no bar to the filing of further proceedings against the person concerned.

To deal with one of Mr. Hogan's arguments we do not think that Section 7 of the Interpretation Ordinance actually applies to the case but refers to regulations and orders which have to be published in the *Gazette* but so far as I know, and I am quite sure, that no informations or orders of such a nature have ever been published in the *Gazette*.

For these reasons the Court holds that the appeal must be allowed and the charge remitted to the District Court to be heard on its merits.

Delivered this 15th day of June, 1942.

British Puisne Judge.

HIGH COURT No. 19/42.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPLICATION OF :—

David Ketter. PETITIONER.

v.

1. The District Officer, Jerusalem,
2. The District Commissioner, Jerusalem,
3. The Attorney General. RESPONDENTS.

High Court — Application to direct the holding of a coroner's inquest — Petitioner not personally interested.

In dismissing an application for an order to issue directed to the first Respondent, calling upon him to show cause why he should not be ordered to hold a Coroner's Court and a Coroner's inquest into the causes leading to the immature deaths of Yizhak Aizik Gerhard, deceased, lately an immate of the United Aged Home, Romema Quarter, Jerusalem, Abraham Cohen, also of the said Home, and Dr. A. Ginzburg, of Mekor Barukh, Jerusalem :—
(Order *nisi* discharged).

HELD : The Petitioner had failed to satisfy the Court that he was personally interested in the matter, or that he would sustain damage by the non-performance of the duties sought to be enforced.

ANNOTATIONS :

1. See the explanations to paragraph (i) of Form No. 1 in the Schedule to the High Court Rules, 1937. *Cf.* H. C. 5/42 (*ante*, p. 161, at p. 164).

2. The affidavit in reply was accepted although filed eight days late and sworn before a District Officer with a limited magisterial warrant.

3. The amendment applied for by Petitioner was the addition of another petitioner and filing a fresh affidavit.

PETITIONER : In person.
FOR RESPONDENTS : Crown Counsel — (Rigby).

ORDER.

I am afraid we cannot agree to any amendment to this petition or adjournment to enable Petitioner to file further affidavits. The Petitioner has failed to satisfy us that he is personally interested in the matter, and he agrees that he does not sustain damage by the non-performance of the duties sought to be enforced.

The rule is therefore discharged.

Given this 20th day of March, 1942.

Chief Justice.

CIVIL APPEAL No. 18/42.

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

BEFORE : Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

1. David Ilgovsky,
2. Gedalia Ilgovsky. — APPELLANTS.

v.

Shevach Shprinski. — RESPONDENT.

Action for contribution in respect of taxes paid to foreign Government in connection with common contract — Failure to appeal against remitting judgment of District Court, C. A. 76/38 — Enforcement of foreign penal or revenue laws — Evidence on commission presumed to have been taken in accordance with usual practice and natural justice.

In allowing an appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, in Civil Appeal No. 94/41, dated 16.12.1941, whereby the judgment of the Magistrate's Court, Tel-Aviv, in Civil Case No. 4832/38, dated 4.4.1941, was set aside, and in restoring the judgment of the Magistrate :—

HELD : 1. (Following C. A. 76/38) : It was too late to raise the objection as to the non-production of the whole contract as the Respondent should have appealed on this point from the first (remitting) judgment of the District Court.

2. The payment of the tax was an obligation under the agreement, there was evidence that the obligation had been met and the Appellant could recover from the Respondent one half of the tax so paid.

3. The judgment ordering the Respondent to pay his share of the tax did not amount to the enforcement of the Penal or Revenue Law of a foreign Government.

4. It was not for the Court of Appeal to assume that proceedings in a foreign country had been conducted otherwise than in accordance with the usual proper practice and in accordance with principles of natural justice.

FOLLOWED : C. A. 76/38 (1938, 1 S. C. J. 266).

ANNOTATIONS :

1. The first judgment of the District Court (C. A. D. C. T. A. 310/38) is reported in Tel-Aviv Reports, 1939, p. 61.

2. On the first point see, in addition to C. A. 76/38 (*supra*) and the notes thereto, C. A. 259/40 (1940, S. C. J. 249) and note 2. *Cf.* — as to criminal cases — CR. A. 136/41 (1941, S. C. J. 631) and note 2.

3. On the third point see C. A. 276/40 (1941, S. C. J. 62). *Cf.* the notes in Dicey cited in the judgment.

4. On the last point compare C. A. 86/39 (1939, S. C. J. 450).

FOR APPELLANTS : Goitein & Rabinowitz.

FOR RESPONDENT : Frenkel.

JUDGMENT.

This is an appeal, by leave, from a judgment of the District Court of Tel-Aviv, dated the 16th December, 1941, whereby that Court reversed the judgment of one of the Magistrates of Tel-Aviv, dated 4th April, 1941, by which the Defendant (now Respondent) was or-

dered to pay to the Plaintiff (now Appellant) 1594.86 Lits in Palestinian Currency at the rate of exchange current at the date of payment with interest and costs, *etc.* Shortly stated, the facts were that the present Appellant had obtained a contract with the Lithuanian Government for the construction of certain roads, and later, with the consent of that Government, the Appellant asked the present Respondent to do half the work, to which the latter agreed. In support of the Plaintiff's case, there was produced at the trial a portion of the contract between the Lithuanian Government and the present Appellant. Clause 28 of that contract is in the following terms :—

> Clause 28 : The contractor shall pay all the taxes in connection with the present agreement. The stamp tax is paid by the contractor at the time of the signature of the present agreement ; should the quantity of work increase, the respective share of the stamp tax will be collected by reducing 1/000 from the future accounts or from the amount of the guarantee.
> We the undersigned D. & W. Ilgovsky Bros. undertook to carry out all the works specified in this agreement, as a partner Mr. Shebach Shprinski residing at Mariampol, and Shprinski undertakes to carry out half (50%) of the works as per the present agreement with all rights and obligations of the present agreement.

Eventually the present Appellant paid certain taxes to the Lithuanian Government. He alleged that he had been compelled by that Government to pay ; and in consequence, he sued the present Respondent in the Magistrate's Court, Tel-Aviv, for the recovery of half of the amount which he had paid. As has been said, the Appellant succeeded before the Magistrate.

When the appeal was first heard in the District Court before Judges Curry and Korngrun the present Respondent's advocate took the objection that the whole contract should have been produced ; but that objection was overruled. The same objection was also taken in this Court. We think, however, that it was too late to take the objection before us in view of the judgment in C. A. No. 76/38 in which this Court said :—

> "The proper course for the Appellant to follow was to appeal to the Supreme Court from the first judgment of the District Court."

The next question falling for decision is whether the payment of half the tax due to the Lithuanian Government was an obligation under Clause 28 of the agreement. We are decidedly of the opinion that it was in view of the words in Clause 28 "Sprinsky undertakes to carry out half (50%) of the works as per the present agreement with all rights and obligations of the present agreement".

The next question is "Assuming that it was an obligation did the

Appellant meet it ?" There was ample evidence before the Court of trial to show that the amount was paid by the Appellant. There can, indeed, be really no dispute as to this. At this stage we think that we ought to deal with the argument which seemed to influence Judge Hubbard in his judgment of 16th December, 1941, namely, that, were he to give judgment for the Plaintiff, he would be enforcing the Penal or Revenue Law of a foreign Government (Dicey's Conflict of Laws, 5th Edition, p. 212). In this connection, we think that the learned Relieving President was under a misapprehension as to the facts. To begin with, there was no question of enforcing a penal tax because the tax had already been paid. The Plaintiff sought to recover the sum from the Defendant on the basis of a contract. There seems to be no difference in principle between this case and that of a person who happens, say, to be in New-York and who requests his agent in England to pay his United Kingdom Income Tax and thereafter the agent who has paid the tax on his client's instructions, seeking to recover from his client the amount of the tax so paid.

The next question is whether, once it was proved that the present Appellant had paid the tax on behalf of Shprinski, the latter was liable to the present Appellant in one half of the tax. We think that he was. That separate receipts were given is purely a neutral fact and cannot alter the real state of affairs nor can an inference adverse to the contention of the present Appellant be drawn from it.

This really disposes of the appeal. We would, however, mention that, at the hearing before us, the Respondent's advocate complained that his client had had no chance of cross-examining the witness, Jonas Chmilauskas, who gave evidence on commission at Kaunas, Lithuania. We observe from the record of the evidence on commission that the District Court Judge in Kaunas said "Parties did not appear". From this we assume that the District Court Judge was satisfied that the parties had been duly summoned. In any event, it is not for us to assume that proceedings were conducted otherwise than in accordance with the usual proper practice and in accordance with principles of natural justice. There is, therefore, nothing in this point. The Respondent's advocate also argued that the Appellant had not been compelled to pay the tax. In view of the evidence given on commission at Kaunas as to the consequence ensuing on non-payment of taxes, it is clear that those taxes had to be paid. This point also fails.

For all the foregoing reasons, we allow the appeal, set aside the judgment of the District Court of Tel-Aviv of the 16th December, 1941, and we order that the judgment of the Magistrate of 4th April, 1941, be restored.

The Respondent will pay the costs of the Appellant to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.—.

Delivered this 20th day of May, 1942.

British Puisne Judge.

HIGH COURT No. 59/42.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Ibrahim el Haj Darwish el Haj Ali. PETITIONER.

v.

1. The Chief Execution Officer, Jaffa,
2. Zakiya el Haj Darwish. RESPONDENTS.

Currency — Execution of judgment for French francs — Judgment to be satisfied in Palestinian currency — Rate of exchange at time specified in the judgment.

In refusing a petition for an order to issue, directed to the first Respondent to show cause why his order of 9th May, 1942, given in Execution File No. 74/42, District Court Execution Office, Jaffa, refusing to release the attachment laid on the property of Petitioner should not be set aside, and why the said attachment should not be released ; and why the said order refusing to consider the payment of forty thousand Francs in cash paid by the Petitioner with costs in full settlement of the judgment debt against the said Petitioner in Civil Case No. 60/31 District Court, Jaffa, should not be set aside ; and why such payment should not be considered as proper payment and in full settlement and discharge of the said judgment debt in Execution File No. 74/42 ; and why in the alternative the said order of Respondent No. 1 ordering payment in Palestine currency at the rate of exchange on the date of the judgment, *i. e.* 19.5.31 should not be set aside and instead an order made for payment to be made at the rate of exchange on the date of actual payment :—

HELD : 1. Except in the case of an action for specific coins no judgment could be satisfied in foreign currency.

2. The rate of exchange was laid down in the judgment itself.

ANNOTATIONS :

1. Compare, on the first point, H. C. 2/39 (1939, S. C. J. 29).
2. Authorities on currency are collated in the annotations to H. C. 2/39

(*supra*). *Cf.* also C. A. 17/40 (1940, S. C. J. 100) and notes and C. A. 123/41 (1941, S. C. J. 354).

FOR PETITIONER : Moghannam.

FOR RESPONDENTS : *Ex parte.*

ORDER.

Copland, J. : This is an application to this Court to set aside an order of the Chief Execution Officer in which he refuses to accept the sum of 40,000 French francs in satisfaction of a judgment, but asked for their equivalent value in Palestinian currency at the date when the judgment was given. It is curious to note that the judgment says — "It is for the sum of 2,000 Napoleons, *i. e.* 40,000 francs, or their equivalent value at the present time". Well, French francs, of course, are not legal currency or legal tender in this country, and no judgment can possibly be satisfied in a foreign currency unless one perhaps would be suing for specific coins. In this case, our opinion is that the Chief Execution Officer was perfectly right. He said : "No, I cannot take French paper francs ; they are not legal tender".

The question then arose at what time the equivalent value should be calculated. Well, that point, which might have given some difficulty in this case, does not give any difficulty because it is stated in the judgment : "Their equivalent value at the present time", *i. e.* the date of the judgment which was some time in 1931.

For these reasons the application is refused.

Given this 2nd day of June, 1942.

British Puisne Judge.

Frumkin, J. : I agree that there should be no order.

Puisne Judge.

CRIMINAL APPEAL No. 76/42.

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

BEFORE : Gordon Smith, C. J., Rose and Abdulhadi, JJ.

IN THE APPEAL OF :—

Husni Anabtawi. APPELLANT.

v.

Baker Abdullah Abu Mughli. RESPONDENT.

Uttering a false document — Condition on promissory note erased and stamps put thereon — Sentence.

In dismissing an appeal from the judgment of the District Court of Jaffa dated 31st day of March, 1942, in Misdemeanour Case No. 161/41 whereby Appellant was convicted of uttering a false document contrary to section 340 of the Criminal Code Ordinance, 1936, and sentenced to pay a fine of LP. 10.— or two months' imprisonment in default :—

HELD : There was clear evidence that the promissory note in question had been altered to the knowledge of Appellant who had uttered it.

ANNOTATIONS : *Cf.* CR. A. 23/42 (*ante*, p. 133) and CR. A. 25/42 (*ante*, p. 140).

APPELLANT : In person.

RESPONDENT : In person.

JUDGMENT.

This appeal must be dismissed. The evidence was perfectly plain, straightforward and convincing as to the circumstances in which this promissory note was made and was handed over to the Appellant. One of the men in the coffee-shop had gone out and bought the two stamps necessary for the promissory note. When the promissory note was completed, the Complainant wanted it to be deposited with a third party because it was only conditional. The Accused did not agree and wanted to keep the note. The Complainant, therefore, added a condition on to the note. Then, with that condition the Appellant took possession of the note. Later on the *Kadi*, who is a friend of both of them, saw this note in his possession. There were then only two stamps on it. He remembers that there was some note, *i. e.* the condition added on. When the Appellant came to sue on the note, it had been altered, in that there were four stamps put on the part of the note where that condition had been put in writing, covering it up. There was also writing on those four stamps and the analyst proves that the writing on those four stamps was made in a different ink to that of the writing in the body of the note. It is also obvious, as stated by the analyst, that the writing that had been underneath those four stamps had been erased altogether. When the Appellant sued on that note in the Magistrate's Court, the note was deposited with and remained in the possession of the Magistrate's Court.

Had that condition remained on the note, he would not have been in a position to sue on it in the Magistrate's Court. The evidence is perfectly plain and straightforward. As to the evidence itself given before the District Court, it was a matter for that Court as to whom

they believed, and they believed the evidence for the Plaintiff and his witnesses, and convicted the Accused on that evidence.

He was only fined LP. 10 in view of his age, but an offence of this nature deserves a much more serious sentence. He was not convicted of forging the note himself but was convicted of uttering a forged note, knowing it to be false.

The appeal is dismissed. We give the Appellant time till the end of this week, *i. e.* Saturday, 30th May, in which to pay the fine.

Delivered this 28th day of May, 1942.

Chief Justice.

HIGH COURT No. 28/42.

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

BEFORE : Copland and Rose, JJ.

IN THE APPLICATION OF :—

Izzidian son of Mirza Mahmoud Kashan Irani in his personal capacity and as guardian of his sister Jamileh Mirza Mahmoud Kashan Irani. PETITIONER.

v.

1. The Chief Execution Officer of the Magistrate's Court, Acre,
2. Nazleh, Hawieh, Hasna, Mahro and Shakib, children of Tarazallah Wadoud Mahmoud Kashan Irani. RESPONDENTS.

Laches — Execution of judgment for partition — Failure to apply to the High Court in time.

In refusing an application for an order to issue directed to the first Respondent calling upon him to show cause why his order given in Execution File No. 275/41, Acre, dated 25.3.42, and proceedings purporting to be in execution of a so-called judgment of 25.10.41 in Civil Case No. 93/41, including notices of sale and bidding, should not be set aside, and that the second Respondents should go, if they so wish, to the Magistrate's Court, to follow up the partition proceedings accordingly :—

HELD : The High Court would not interfere as the Petitioner had waited until what he considered the last minute to bring the alleged technical defects to the notice of the High Court.

ANNOTATIONS :

1. *Cf.* H. C. 21/42 (*ante*, p. 184) and note.

2. On the effect of laches on applications to the High Court see H. C. 96/41 (1941, S. C. J. 654) and note 2.

FOR PETITIONER : Hawa.

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

ORDER.

This is a return to an order *nisi* calling upon the Chief Execution Officer to show cause why his refusal of the Petitioner's application of the 14th of March, 1942, which was an application to cancel all the execution proceedings which had hitherto taken place, should not be set aside.

In this case dates are of some importance. The judgment was filed in execution an 11th November, 1941. On the 22nd November, 1941, notice of execution was served on the Petitioner. On 11th December, 1941, the Chief Execution Officer ordered the enforcement of the last paragraph of the judgment based on article 9 of the Law of Partition, in other words, he ordered that the property should not be partitioned but that it should be sold. The notices were published and it was not until the 14th March, 1942, that this application was filed with the Magistrate to cancel the whole of the execution proceedings which had taken place in the last three months. Now it is, I suppose, necessary again to remark that this Court is not a Court of Appeal and that it does not exist to give persons, debtors or creditors, whoever they may be, a chance of further delay or to upset a judgment which has become final. Our activities are purely discretional and it depends upon many factors whether we should exercise them. In this case it seems quite clear from the course of events, that the Petitioner has waited until what he considered to be the last minute in order to cause the maximum amount of inconvenience to his opponents. Unfortunately for him, but fortunately for his opponents, he made a mistake as to what was the last minute, because the last minute expired before he made his application. We do not think that this is a case in which we should exercise our discretion to remedy technical defects which should have been brought to our notice much sooner as we have remarked. In this case we cannot say that any injustice whatever has been suffered.

For these reasons we think that the order *nisi* should be discharged and execution proceedings will continue. Costs to include the sum of LP. 10 advocate's fee for attending this hearing.

Given this 22nd day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 54/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Partnership M. Golodetz of 29 Mincing Lane, London. APPELLANT.

v.

1. Partnership Azriel Schrier and Son,
2. Mr. Azriel Schrier,
3. Mr. Moshe Schrier. RESPONDENTS.

Appeals — District Court striking out statement of claim without going into the merits — Ruling of District Court concluding with the words "the claim must be dismissed" — Ruling striking out a statement of claim not a "decree", C. P. R., Rules 21, 2, 317 and 23, C. A. 219/40 — Action to enforce award — No appeal without leave, Arbitration Ord., Sec. 15(3) — Res judicata — Costs.

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 23rd March, 1942, in Civil Case No. 182/41 :—

HELD : 1. (Following C. A. 219/40) : An order or ruling striking out a statement of claim was not a decree and, therefore, not appealable without leave.

2. The action was one to enforce an award and under the Arbitration Ordinance no appeal lay from an order of the District Court without leave of the District Court or of the Court of Appeal.

FOLLOWED : C. A. 219/40 (1940, S. C. J. 480).

ANNOTATIONS :

1. The District Court found that the action was in the alternative for confirmation of an English arbitration award and for damages for breach of contract and held that these two prayers could not be joined in one action.

2. *Cf.*, on the first point, C. A. 41/40 (1940, S. C. J. 244) and note 3 and C. A. 219/40 (*supra*).

3. See, on the last point, C. A. 234/41 (1941, S. C. J. 545) and cases therein cited.

FOR APPELLANT : Reuss.

FOR RESPONDENTS : Bar-Shira and Elhanani.

JUDGMENT.

Rose, J. : In this case a preliminary point has been taken by the Respondent that the Appellant is at fault in that he should have ob-

tained leave to appeal. It is true that at the conclusion of the ruling of the learned President, he used the words "the claim must be dismissed with costs", but, in order to see what was really meant by those words, I think that it is relevant both to look at the remainder of the ruling itself and also to see what in fact was asked for in the statement of defence. Paragraph 1 of the defence asks that the action be struck out, meaning presumably that the statement of claim should be struck out, and in the final paragraph of the defence, it also prays that the action be struck out on certain technical grounds. Alternative defences were raised on the merits. These merits were not considered by the learned President as he appears to have dealt with the matter purely on a technical footing and in his ruling itself it is, I think, abundantly plain that what he intended to do, and what he in fact thought he was doing, was to strike out the statement of claim.

Now, according to the Law of Palestine the only power to strike out is contained in Rule 21 of the Civil Procedure Rules. Rule 317 of the Civil Procedure Rules says that an order of a District Court, other than a decree, may be appealed against to the Supreme Court with leave. The point then arises as to whether an order or ruling striking out a statement of claim under Rule 21 is a decree within the meaning of Rule 2 of the Civil Procedure Rules. On that point I am clearly of opinion that it is not because it does not conclusively determine the rights of the parties, in that Rule 23 of the Civil Procedure Rules provides that the striking out of a statement of claim shall not preclude the Plaintiff from presenting a fresh statement of claim in respect of the same cause of action.

Authority for this view is contained in Civil Appeal No. 219/40 (7 P. L. R. 600) in which the late Chief Justice said :—

> "We think that the order of the lower Court was made under Rule 21 of the Civil Procedure Rules and that being so leave to appeal should have been obtained under Rule 317 before the appeal could be heard."

I am also of opinion that, having regard to paragraph 6 of the statement of claim, this was an action to enforce an award. That being so, I think that under Section 15(3) of the Arbitration Ordinance an appeal only lies from the ruling of the District Court by leave either of that Court or of the Court of Appeal.

On these two grounds I am of opinion that the appeal must be dismissed for the technical reason that no leave was obtained. In order to meet any difficulties that may arise in the future, I would add that Mr. Bar-Shira has stated to this Court, very properly, that he does not intend, in reliance upon the last few words of the learned

President's ruling, to raise the plea of *res judicata* if the action is brought in another form.

The appeal is therefore dismissed with costs on the lower scale. Having regard to the circumstances and to the fact that the appeal was decided on a purely formal point, we propose to certify the sum of LP. 5 only for advocate's attendance fee.

Delivered this 12th day of May, 1942.

British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 33/42.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: Gordon Smith, C. J.

IN THE APPLICATION OF :—

Willy Alexander Philippsthal. APPLICANT.

v.

Henriette Pauline Martha Philippsthal. RESPONDENT.

Application to determine which Court shall have jurisdiction, P. O. in C., Art. 55 — Parties Palestinian citizens of different Religious Communities married by civil marriage in Germany — Adultery as ground for divorce by German law — Law to be applied.

In deciding an application under the first part of Article 55 of the Palestine Order in Council to determine which Court shall have jurisdiction : —

HELD : The District Court of Tel-Aviv would be given jurisdiction to entertain the suit for divorce and should apply the German law as at the time the marriage was celebrated.

ANNOTATIONS : *Cf.* Misc. Appl. 27/42 (*ante*, p. 187) and notes 1 and 3. See also Misc. Appl. 19/42 (*ante*, p. 209) and Misc. Appl. 21/42 (*ante*, p. 288).

FOR APPLICANT : Silberg and Sandler.

RESPONDENT : Absent — served.

ORDER.

This is an application under the first part of Article 55 of the Palestine Order-in-Council, to determine which Court shall have jurisdiction to deal with, and decide in, an action for a decree of

divorce which the Applicant intends to bring against his wife, the Respondent. The Applicant states in his application that he and the Respondent were married to each other by a civil marriage in Essen, Germany, on the 16th day of May, 1924 ; that both of them are Palestinian citizens and holders of Palestinian passports ; that Applicant is a member of the Jewish Community and the Respondent is a Protestant and was a Protestant at the time of celebration of the marriage ; that both Applicant and Respondent are domiciled in Tel-Aviv ; and that since 1939, the Respondent has been, and still is, entertaining intimate relations with a lover, Dr. Julius Jandorf and committed adultery with him on several occasions. The Applicant further contends that under German law which is the *"lex loci celebrationis"* adultery is a legal ground for granting a decree of divorce.

After hearing Mr. Silberg on behalf of the Applicant, I hereby order that the District Court of Tel-Aviv is to have jurisdiction to entertain the suit and to apply the German law to the matter of divorce as at the time of the marriage in 1924.

Given this 27th day of May, 1942.

Chief Justice.

CRIMINAL APPEAL No. 83/42.

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

BEFORE : Copland, Edwards and Khayat, JJ.

IN THE APPLICATION OF :—

Shaker Hamed el Houtary. APPLICANT.

v.

The Attorney General. RESPONDENT.

Appeal against sentence — Possession of dangerous drugs.

In refusing an application for leave to appeal from the judgment of the District Court of Jaffa dated 1.6.42 in Criminal Case No. 145/42, whereby Applicant was convicted on a charge of being in possession of dangerous drugs contrary to Section 7 of the Dangerous Drugs Ordinance, 1936, as amended by Section 4 of the Dangerous Drugs (Amendment) Ordinance, 1941 :—

HELD : The sentence of one year's imprisonment was not exessive.

ANNOTATIONS : See, on offences against the Dangerous Drugs Ordinance, CR. A. 11/42 (*ante*, p. 81) and note ; *cf.* CR. A. 39/42 (*ante*, p. 224).

FOR APPLICANT : Budeiri.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

The Applicant pleaded guilty to a charge of being in possession of 1.900 kilogrammes of *hashish*. He was sentenced to one year's imprisonment. He says he found it on the sea shore. Why he should have been compelled to pick it up nobody but himself could answer. In any case he was in possession of this *hashish* and there is not the least doubt that he knew this was *hashish ;* if he had not known it he would not have picked it up. It is unfortunate, from the number of the appeals that come up here, that the *hashish* trade seems to be on the increase.

For these reasons we cannot say that the sentence of one year's imprisonment is in any way excessive seeing that the Applicant could have been sentenced to a great deal more. The application for leave to appeal is dismissed.

Delivered this 15th day of June, 1942.

British Puisne Judge.

HIGH COURT No. 60/42.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Khalil Jamil Rishani, Private in His Majesty's Forces. PETITIONER.

v.

1. Superintendent of Central Prison, Jerusalem,
2. The Attorney General. RESPONDENTS.

Extradition — Identity admitted — Clerical error as to date of birth immaterial.

In refusing an application for a writ of *Habeas Corpus* to issue, directing the Superintendent of Central Prison, Jerusalem, to show cause why he should not produce the said Khalil Rishani, Petitioner, before the High Court of Justice on a date to be fixed for the purpose of deciding that Petitioner is unlawfully detained, and to show cause why the said Petitioner should not be released and to await the further order of this Court :—

HELD : The Petitioner, by admitting the correctness of his name, his father's name, his occupation and his nationality, had admitted his identity and the question of the date of birth was, therefore, immaterial.

ANNOTATIONS : *Cf.* H. C. 52/41 (1941, S. C. J. 258) and notes 1 and 4.

FOR PETITIONER : Moghannam.

FOR RESPONDENTS : *Ex parte.*

ORDER.

This is an application in the nature of *habeas corpus* in respect of Private Khalil Jamil Rishani, lately serving in His Majesty's Forces, who is required on a charge of murder in the Lebanon.

He was brought before the Chief Magistrate. The Chief Magistrate had before him the requisite documents, and in answer to questions, this particular person, a young man, admitted his name was as stated in the application for his extradition ; admitted his father's name was correct ; admitted his occupation was correct ; admitted he was a Syrian. It is perfectly clear from this, therefore, that he admitted his identity. Are we to suppose that there are two sets of persons with exactly the same name, exactly the same father's name, exactly the same occupation ? That being so, the only ground — the question of the date of birth — may well be a clerical error. If the identity is admitted by the man himself, that date becomes a matter of minor or no importance at all.

There is nothing in any of the other points raised.

The application is refused.

Given this 2nd day of June, 1942.

British Puisne Judge.

CIVIL APPEAL No. 56/42.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Ohannes B. Krikorian. — APPELLANT.

v.

Haim Arama. — RESPONDENT.

Eviction — Failure to pay rent — Acquisition of part of leased property by third person irrelevant if purchase effected after rent had become due.

Appeal from the judgment of the District Court of Jaffa in its appellate capacity, dated the 30th January, 1942, in Civil Appeal No. 104/41.

Respondent was the owner of a hut erected on a plot of land leased to him by the Appellant. A number of hut owners in the same locality organised as a co-operative society and acquired from one of the seventeen co-owners of the Appellant an area of land in which the Respondent's hut was included. On the hearing of the action for eviction brought by the Appellant against the Respondent for non payment of rent, the Respondent pleaded that he had in effect vacated the land as the co-operative society must be deemed to be in possession through the Respondent as a member of the society. He referred to C. A. 198/37 (2, Ct. L. R. 196). The Magistrate refused to order the joinder of the co-operative society as co-defendant, and ordered eviction. On appeal to the District Court, the case was remitted to the Magistrate to join the co-operative society. On the 14th March, 1942, the Appellant was granted leave to appeal to the Supreme Court. On the 8th April, the Appellant filed an application for exemption from Court fees, which was refused on the 21st April. On the 22nd April, the Appellant paid the appeal fees and filed the appeal. On the hearing of the appeal, the Respondent argued that the appeal was out of time, the fees thereon having been paid fourteen days after the expiration of the statutory period. The Respondent relied on C. A. 184/41 (1941, S. C. J. 507) and argued that the presentation of an application for leave to appeal in *forma pauperis* did not automatically extend the time. The objection was overruled on the ground of long practice. A further point taken by Respondent was that by claiming one year's rent in advance Appellant had waived his claim for eviction.

HELD : As the lease on which the action was based was entered into between the Appellant and the Respondent personally and as the alleged purchase by the Co-operative Society of a share in the property took place almost a year after the rent had become due the District Court erred in ordering the Co-operative Society to be joined.

FOR APPLICANT : Elia.

FOR RESPONDENT : Matussevich.

JUDGMENT.

This is an appeal from the appellate judgment given by the learned President in the Jaffa District Court on appeal from the judgment of the Magistrate's Court. In the Magistrate's Court the present Appellant sued the Respondent on a lease for one year's rent and eviction. The lease was made on the 15th of August, 1939, for three years and the rent was payable in advance each year. The first

year's rent was duly paid ; neither the second nor the third year's rent was paid, in fact no effort was made to do so. The rent for the second year was due on the 15th August, 1940, almost two years ago. In May, 1941, the Appellant brought an action for a year's rent which was due at the beginning of the year and asked for eviction. The learned Magistrate granted both requests and gave judgment in his favour. On appeal to the District Court the learned President, in an extremely long judgment, much too long for the importance of the case, reversed the learned Magistrate and ordered that the Cooperative Society of which the present Respondent claims to be a member should be joined in the proceedings as it was alleged that the Co-operative Society was a part-owner of the premises.

Now, with great respect, it seems that both the learned Judge and the Respondent forgot this vital and important point. The lease on which this action was based was entered into between the Appellant and the Respondent personally and the second year's rent was due nearly eleven months before the alleged purchase by the Cooperative Society of a share in the property. If these two important facts had been borne in mind, we do not think that the learned President could have made the mistake which he did in fact make.

The appeal must be allowed, the judgment of the learned President on appeal set aside and the judgment of the learned Magistrate restored.

None of the cases quoted to us have any bearing on this present case at all, since the action, as we have stated, was based upon a lease.

The Appellant is entitled to his costs on the lower scale both here and in the District Court on appeal there, together with the sum of LP. 10 advocate's attendance fee on the hearing of the appeal in this Court.

Delivered this 27th day of May, 1942.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 34/42.

IN THE APPELLATE TRIBUNAL APPOINTED UNDER SECTION 20(2) OF THE ADVOCATES ORDINANCE, 1938.

BEFORE : Gordon Smith, C. J., Copland and Abdulhadi, JJ.

IN THE APPEAL OF :—

Najeeb Jad. APPELLANT.

v.

The Chairman and Members of the Law Council, Jerusalem. RESPONDENTS.

Advocates — Proceedings under Advocates Ord., Sec. 20 — Advocate struck off the roll after being called upon to exculpate himself, Law Council Rules, Rule 16(1) — No committee appointed, Misc. Appl. 5/40 — Criminal convictions involving by themselves moral turpitude — Powers of appellate Tribunal.

In dismissing an appeal from the decision of the Law Council made under Section 20(1) of the Advocates Ordinance 1938 : —

HELD : 1. (Distinguishing Misc. Appl. 5/40) : Where an advocate has been convicted, on his own plea of guilty or otherwise, of charges which must, by their very nature, involve all the offences mentioned in Section 20(1) of the Advocates Ordinance (*i. e.* disgraceful, fraudulent and unprofessional conduct and moral turpitude) and fails to exculpate himself when called upon to do so, the Law Council may come to the conclusion that there is no necessity to appoint a committee and to rehear the charges.

2. It was clear, by inference, that the Appellate Tribunal had power to confirm the finding of the Law Council, to vary it, quash it or remit it back to the Law Council for further enquiry.

DISTINGUISHED : Misc. Appl. 5/40 (1940, S. C. J. 215).

ANNOTATIONS : See Misc. Appl. 5/40 (*supra*).

FOR APPELLANT : Goitein.

FOR RESPONDENT : Crown Counsel — (Hogan).

ORDER.

This is a case where the advocate appeals to a Tribunal, the appointment of which is prescribed by Section 20(2) of the Advocates Ordinance. In consequence of proceedings before the Law Council, the advocate had been struck off the Roll of Advocates in accordance with the provisions of Section 20(1). The facts were that the advocate had been convicted of four offences : obtaining money by false pre-

tences, stealing by an agent, fraudulent procuration of signature on documents, and a second charge of fraudulent procuration of signature on other documents. On his plea of guilty before the District Court, he was sentenced to six weeks' imprisonment.

On the matter being referred to the Law Council, the Council called on the advocate in accordance with Rule 16(1) of the Rules made under the Law Council Ordinance, to state in writing any grounds upon which he relied to exculpate himself. The Law Council considered these answers by the advocate and came to the conclusion that such answers did not exculpate him, and then, having considered the matter, came to the decision that these offences, *ipso facto,* involved moral turpitude and were sufficient to justify him being struck off the Roll of Advocates. In doing so the Council were evidently of the opinion that the Accused having been charged before a Court, and having been convicted by that Court, there was no necessity for the Council to appoint a sub-committee to enquire into the circumstances of the charges made by the prosecution before the District Court, and to rehear the same. In effect, although there are several grounds of appeal, the substance of the appeal is that the advocate has not had an opportunity, possibly with counsel and possibly with witnesses, of showing to the Committee that these offences of which he had been convicted did not involve moral turpitude on his part.

It has been urged by Mr. Goitein before us that the Council was under an obligation, in accordance with the rules under the Law Council Ordinance, to appoint a committee, to call the advocate before them, and to hear him, possibly with counsel and possibly with witnesses, in respect to this question of moral turpitude.

We agree entirely with the Law Council in its finding, in effect, that charges of this nature, of which a person is found guilty, must necessarily involve disgraceful conduct derogatory to the profession of an advocate, and necessarily involve moral turpitude.

It has been urged that in the only other case which has been before a Tribunal (the case of Mr. Seligman), such confirms the submissions put forward by Mr. Goitein. I would point out that, as is illustrated by this quotation from the judgment, a clear distinction can be made between that case and this case. It states on page 54 : —

> "In this case this procedure was not strictly followed, and the Council considered some aspects of the case before receiving Mr. Seligman's reply and before the Committee had submitted its findings, and decided that the criminal offence of which the Appellant was convicted did not involve moral turpitude. We are also told the Council considered whether there was unprofessional

> conduct, and it apparently came to the conclusion that there was not, as in the result it referred two questions to a committee: (1) was the Appellant's conduct disgraceful; (2) was his conduct derogatory to the profession of an advocate."

Now it is quite clear that those two questions which were so referred, do not necessarily involve moral turpitude arising out of the charges which were considered by the Court which convicted Mr. Seligman, and which were in respect of certain charges dealing with illegal immigration. Although the judgment states that the Advocates Ordinance and the Law Council Ordinance both deal with unprofessional conduct and says — "when the Ordinances are read together", I do not think it necessarily means that the Ordinances must be read together, in all respects.

The judgment goes on after the paragraph that was read and quoted by Mr. Goitein —

> "If this view is accepted the finding of the Committee that the Appellant was guilty of conduct derogatory would be tantamount to a finding that he had been guilty of one or more of the ingredients to which I have referred, but it expressly found that the conduct was not disgraceful — it was never suggested that it was fraudulent, and admittedly the Committee never considered moral turpitude".

So that, it being clear that the facts are so very different in that case to what they are in this one, we are not bound at all by that decision and remarks made in that judgment which, admittedly, are not very clear. I think those remarks were really in the nature of *obita*.

The question we really have to decide is whether in a case of this nature where an advocate has been convicted, on his own plea of guilty or otherwise, of charges which must, in their very nature, involve all the offences which are mentioned in Section 20(1) of the Advocates Ordinance, I think, that the Council was quite right in coming to the conclusion that there was no necessity to rehear those charges. And coming to the question of the finding of fact, in other words, whether the advocate was or was not guilty of the offences with which he was charged by the Law Council, they carried out their obligation by calling on the advocate to offer any further explanations of his conduct he could possibly put forward. That was done. A letter was sent to the advocate and he attempted, at length, to explain his conduct. That explanation is that although he pleaded guilty to these four charges, yet in effect he was not guilty of such charges and was innocent of any acts of disgraceful conduct, professional misconduct or moral turpitude. We cannot see that the Law Council could have

done otherwise, under the circumstances, than to find that those answers did not exculpate the advocate, in view of the facts and circumstances, and that therefore there was no necessity to appoint a committee to enquire again into whether the advocate was or was not guilty of those charges.

The section which authorises this appellate Tribunal does not specify what our rights are, but I think it is clear, anyhow by inference, that we would have power to confirm the finding of the Law Council, to vary it, quash it or remit it back to the Law Council for further enquiry.

Under the circumstances we find that there is no necessity to come to any other decision than that the decision of the Law Council must be confirmed.

The application is therefore dismissed.

Given this 21st day of May, 1942.

Chief Justice.

HIGH COURT No. 36/42.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :—

The Registrar of Trade Marks. PETITIONER.

v.

1. Trupha Limited,
2. M. Cholodny. RESPONDENTS.

Trade Marks — Reference by Registrar of Trade Marks to decide which of two resembling marks should be registered — "Iodoral" and "Iodosal Trupha" — Test to be applied in determining whether marks closely resembling each other — No likelihood of confusion.

In deciding an application for the determination of the rights of Respondents in respect of disputed trade marks : —

HELD : In the opinion of the High Court, and that was the test to be applied, there was not, in the circumstances in which the preparations in question were supplied, such a resemblance between the two marks as would lead to confusion in the mind of any reasonable person. Both marks should, therefore, be registered.

ANNOTATIONS :

1. See, however, the rules of comparison between two trade marks as laid down in English authorities : Parker, J. in Pianotist Co., Ltd., 23 R. P. C. 774 (quoted in H. C. 84/36 (P. P. 7.iii.37, C. of J. 1934—6, 823)) and Lord Esher in the "Taendstikker" case, 3 R. P. C. 54, both quoted in Kerly, On Trade Marks, 6th ed., pp. 262 and 272. *Cf.* also H. C. 96/35 (P. P. 10.iv.36, C. of J. 1934—6, 813) — "Borsalino" and "Bolsarino" ; H. C. 24/36 (P. P. 19.xi.36) — "Sherfil" and "Persil" ; H. C. 22/37 (1937, S. C. J. 427) — "Artex" and "Aertex".

2. Palestinian authorities on Trade Marks generally are collated in the annotations to H. C. 69/38 (1939, S. C. J. 126). See also H. C. 18/39 (*ibid.*, p. 385), H. C. 68 & 71/41 (1941, S. C. J. 387) and H. C. 8 & 9/42 (*ante*, p. 196).

PETITIONER : Absent — served.

FOR RESPONDENTS : No. 1 — Rand.
No. 2 — Seligsohn.

ORDER.

This is a reference by the Registrar of Trade Marks to the High Court to determine which of two marks put forward for registration should be registered, the Registrar being of opinion that the marks very closely resemble one another. The marks are in connection with a preparation containing iodine, one is 'Iodoral' and the other is 'Iodosal Trupha'.

The first point for decision is whether the marks do so resemble one another as to be likely to cause confusion, and the second is, if they would so cause confusion, then which of the two has the prior right to registration. It is stated that both these preparations are only supplied on the prescription of a doctor. One of the arguments of the second Respondent is that, owing to the bad handwriting of doctors, confusion is likely to arise in the mind of a chemist who is called upon to supply one of these particular preparations. All we can say is, if such confusion would occur in these two names, Iodoral and Iodosal Trupha, with a pharmacist, then pharmacists must be more stupid and unintelligent than one has hitherto supposed them to be. Speaking for ourselves, and that is the test the Court has to apply, we cannot see there is any likelihood of confusion. If a pharmacist is presented with a prescription which he cannot read, then, of course, it is his duty to telephone to the physician who gave the prescription and find out exactly what he intended to prescribe. It is not his duty to guess which of the two is to be supplied. As we have said, in our opinion, in the circumstances in which these preparations are supplied, there is not such a resemblance between the two that any confusion

should arise in the mind of any reasonable person. That being so, the second question of priority of user does not in fact arise, though if it had arisen the difference in dates of user is really too small to be taken into account.

In the result we order that both marks should be registered by the Registrar of Trade Marks, and that answers the Registrar's question.

The first Respondent is entitled to costs, together with a sum of LP. 10 advocate's attendance fee at the hearing of this reference.

Delivered this 15th day of May, 1942.

British Puisne Judge.

CIVIL APPEAL No. 23/42.

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

BEFORE : Gordon Smith, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Eva Laster & 3 others. — APPELLANTS.

v.

Nissan Rutman. — RESPONDENT.

Guarantee — Principal debtor offering final settlement and creditor agreeing subject to offer being strictly complied with — Whether English law or Mejelle applies — Guarantee not discharged as surety not prejudiced — Interest.

In allowing an appeal from the judgment of the District Court of Haifa dated 30.1.42, in Civil Case No. 79/39 : —

HELD : As the surety was in no way prejudiced by the negotiations between the creditor and the principal debtor it was immaterial whether English law or the *Mejelle* applied and judgment had to be given against the guarantor.

ANNOTATIONS : See C. A. 162/41 (1941, S. C. J. 620) and notes 2 and 6.

FOR APPELLANTS : Klebanoff.

FOR RESPONDENT : Kaisermann.

JUDGMENT.

This is an appeal against the decision of the District Court dated 30th January, 1942. The claim against the Defendant, that is the

Respondent, was on a guarantee in respect of a mortgage for an amount not exceeding LP. 900. There were several mortgagees and the position was somewhat involved. Proceedings had been taken in respect of some of the mortgages, and the statement of claim in this action claimed the sum of LP. 900 on this guarantee in favour of the representatives of the Plaintiff. It was held by the District Court in paragraph 19 of the judgment that under English Law the act of the creditor as in this case would obviously release the guarantor from his liability, and in the following paragraph the judgment discusses the question of whether the English law or English principles of guarantee applied or whether the relevant articles of the *Mejelle* applied.

The whole question turns on the two letters which were attached as exhibits. The one from the principal debtor dated 31st October, 1940, is a certain offer in the following terms :

> "...I therefore propose to you by way of compromise to pay as a final settlement of the aforesaid debts (that is to say of the said two mortgages and of the said guarantee) until 15.12.40 the sum of 1,900 Pounds cash.
>
> Provided that at the time and in consideration of the said payment you will officially release the said mortgages and will officially transfer them to whom I may desire and also that you will officially and legally discharge the guarantee of Rutman and will finally discontinue the action now heard against the aforesaid Mr. Rutman".

on the same day the reply by Eva Laster came acknowledging the offer, and she said in effect that if he would comply with and carry out the offer, she would accept it, and that she would accept the sum of LP. 1,900 cash as a final and complete discharge of all debts due from him upon the two mortgages and upon the guarantee of Mr. Rutman. And then it goes on to say :

> "And provided that it is clear and understood that your offer contained in your letter to me and this my letter to you of today's date shall not be deemed as binding upon me and shall not be deemed an extension and shall in no way affect the guarantee of Mr. N. Rutman ; and the acceptance on my part of your offer shall be confirmed only upon receipt by me of the said amount on the above date".

It is not disputed that that sum of LP. 1,900 has never been paid, and in her acceptance she further went on to say :

> "And if the said date, 15.12.40, will pass and your offer not be actually carried into effect, your offer will thereby be immediately revoked and I will not agree to any offers whatsoever and will continue the legal proceedings against you and against Mr. N.

Rutman, the guarantor, without any delay, for the whole amount of the debts for principal, interests, expenses and advocate's fees".

It is clear that there was a firm offer and acceptance subject to conditions, the main condition being payment of the money that was offered on a specified date. That sum was not paid and the whole offer and the provisional acceptance of it became abrogated in terms of the acceptance. The matter is, therefore, dependent on the interpretation put upon that offer and that provisional acceptance. It has been argued for the Respondent that the English Law applies and that on the English Law those negotiations prejudiced the position of the surety. On the other hand, it is submitted that the *Mejelle* applies and that there is nothing in the *Mejelle* which would abrogate the rights against the surety on these negotiations. It seems to us that it is really immaterial which law applies ; under both laws, if this offer and acceptance did not prejudice the surety then the guarantee still subsisted and he is liable thereunder. We cannot see that this surety was in any way prejudiced as regards his liability on his guarantee. In fact, if the offer had been fulfilled and the money had been paid he would have been relieved from his liability under the guarantee. The fact that that offer was not fulfilled cannot, in our view, have prejudiced the surety. His complaint is that if he had known of it he might have made a better offer, I assume, or an offer more advantageous to himself in regard to liquidating the two mortgages. I cannot see that that constitutes an alteration in the terms of his guarantee. As regards the terms of the guarantee he could, at any time, make negotiations in respect of the mortgages. Such negotiations would be entirely separate and apart from the terms of the guarantee or his undertakings under the guarantee.

We therefore find that the District Court erred in this respect and that the Court should have given judgment for the Appellant in the sum of LP. 900 which sum, it is admitted, is due under the guarantee.

The decision of the District Court will therefore be set aside and judgment will be entered for the Appellant in the sum of LP. 900, together with costs here and below including advocate's fee of the hearing in this Court of LP. 15. We make no order at all as to interest.

Delivered this 19th day of May, 1942.

Chief Justice.

CRIMINAL APPEAL No. 79/42.

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

BEFORE : Copland, Edwards and Khayat, JJ.

IN THE APPLICATION OF :—

Muhammad Almad el Haj Abdul Kader Irfa'ieh. APPLICANT.

v.

The Attorney General. RESPONDENT.

Killing of animals, C. C. O., Sec. 325 — Conviction of one out of three accused — Benefit of doubt.

In refusing an application for leave to appeal from the judgment of the District Court of Jerusalem dated 21st May, 1942, in Felony No. 66/42, whereby Applicant was convicted of wilful and unlawful killing of animals contrary to section 325 of the Criminal Code Ordinance, 1936, and sentenced to 9 months' imprisonment :—

HELD : The Applicant had not been convicted on the same evidence on which his co-accused had been acquitted as the latter had produced *alibi* evidence and had, therefore, been given the benefit of the doubt.

ANNOTATIONS :

1. *Cf.* CR. A. 46/42 (*ante*, p. 207) and note.
2. On the benefit of the doubt see CR. A. 3/41 (1941, S. C. J. 10) and note 2.

FOR APPLICANT : Kamleh.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

The Applicant was tried before the District Court of Jerusalem on a charge under Section 325 of the Criminal Code Ordinance, with the wilful and unlawful killing of animals, in this case cows. Two other persons who were charged at the same time were acquitted. The Applicant has argued that he was convicted on the same evidence on which these other two persons were acquitted. That, of course, is not so. The other two accused persons produced *alibi* evidence in their defence and the Court of trial said, although they were not very impressed by that evidence, that they thought that it was safer to give them the benefit of the doubt. The present Applicant was not in

the fortunate position of being able to put up a shaky *alibi.* For that reason this Court sees no reason to interfere with the judgment of the District Court. The application for leave to appeal must be refused.

Delivered this 15th day of June, 1942.

British Puisne Judge.

HIGH COURT No. 49/42.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Issa Elias Salman & 4 others. PETITIONERS.

v.

1. Chief Execution Officer, District Court, Jerusalem,
2. Joseph P. Albina. RESPONDENTS.

Sale of mortgage — Claim that area of land wrongly advertised — Failure to show due diligence — Mortgagee consenting to amend notice of sale.

In discharging a rule *nisi* issued on 18.5.42 directed to the first Respondent calling upon him to show cause why his order dated 17.4.1942, in Execution file No. 390/40, District Court, Jerusalem, should not be set aside : —

HELD : 1. The order *nisi* had to be discharged as the Petitioners had failed to show due diligence in bringing the matter complained of to the notice of the first Respondent.

2. In accordance with the second Respondent's suggestion the notice of sale should be amended to show the extent of the area as estimated by the Petitioners.

ANNOTATIONS : See H. C. 28/42 (*ante*, p. 322) and note 2.

FOR PETITIONERS : Elia.

FOR RESPONDENTS : No. 1 — absent — served.
No. 2 — Marein.

ORDER.

After hearing the various arguments of the parties, this application seems to be out of time. The mortgage debt fell due in 1935, application for sale of the mortgaged property was lodged in June, 1940 ;

service was duly effected ; parties were heard and possession was taken in December, 1940. The first publication was in July, 1941. It was not until December, 1941, that it was claimed that the area, as shown in the notice, was wrong. Parties when they apply for the discretionary exercise of the jurisdiction of this Court must show due diligence. In this case no diligence whatever has been shown by the Petitioner in bringing to the notice of the Chief Execution Officer the matter complained of. The Respondent, however, very fairly has repeated his offer which was made some considerable time ago, that the notice of sale should be amended to show what the area as estimated by the mortgagor is.

We therefore discharge the rule, but the notice of sale must be amended to show that the registered area according to the *Kushan* in 6 *dunams* 800 *pics* but that the area estimated by the mortgagors is 20 metric *dunams* 710 metres.

The second Respondent is entitled to his costs which we fix at an inclusive sum of LP. 5.

Delivered this 29th day of May, 1942.

British Puisne Judge.

CIVIL APPEAL No. 31/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Uliyan Khalaf Kirrit of Gaza. APPELLANT.

v.

Amneh, bint Haj Hassan el Ajra, widow of the late Khalaf Kirrit of Gaza. RESPONDENT.

Onus of proof — Action for return of share in purchase price — Finding by Magistrate that document acknowledging receipt of money was signed by Respondent — Defence that money not received — Onus to prove that money was not received is on person having signed the receipt.

In allowing an appeal from the judgment of the District Court of Jaffa in its appellate capacity, dated 20.1.42, in Civil Appeal No. 86/41, and in remitting the case to the Magistrate :—

HELD : As the Magistrate had found that the thumb-print on the document acknowledging receipt of the money was that of the Respondent, it followed that the onus was upon the Respondent to prove that she had not in fact received the money.

ANNOTATIONS : *Cf.*, on misdirection as to the onus of proof, C. A. 206/38 (1938, 2 S.C.J. 155), H.C. 45/41 (1941, S.C.J. 301) and P.C. 21/40 (*ibid.*, p. 334, an pp. 337—8).

FOR APPELLANT : Elia.

FOR RESPONDENT : Barbari.

JUDGMENT.

In this case the Plaintiff (Appellant) claimed the sum of LP. 75, in reliance on a document which he alleged was signed by the Respondent, stating that she (the Respondent) had received the sum of LP. 300 (of which this LP. 75 represents the Appellant's share) as the purchase price of certain property which she undertook to sell to the other parties to the agreement. It is not disputed that the property mentioned in the agreement was in fact sold to somebody else.

There were two issues of fact. First, whether the thumb-print, which was alleged to be that of the Respondent, was in fact that of the Respondent. On that issue the finding of the Court was in favour of the Appellant. The learned Magistrate found, and there was clear evidence upon which he could so find, that the Respondent put her thumb-print on the document. Secondly the Respondent alleged in the alternative that there was no consideration in that she never received the money in question. That, in my opinion, was clearly a matter for her to prove and it was for her to satisfy the learned Magistrate that the money, in fact, had not been paid. She gave evidence herself and certain evidence was called on her behalf and as a result of that evidence the learned Magistrate said :

> "Whereas the Plaintiff (Appellant) did not prove that he paid the Defendant the sum in claim, I dismiss the case and order the Plaintiff to pay the costs, fees and LP. 10 advocate's fees".

If we look at the judgment of the appeal Court on this matter they say :

> "We are of opinion that the Magistrate rightly dismissed the case of the Appellant on the ground that the existence of consideration for the deed sued upon before him was not proved".

In my opinion, both the learned Magistrate and District Court erred in law in this matter, both Courts seeming to be under the impression that the onus was upon the Appellant to prove that the money had been

paid whereas, in fact, the onus was on the Respondent to prove that the money had not been paid.

In view of that, Mr. Elia asks us to give judgment straightaway for his client, and, speaking for myself, I feel considerable doubt whether that would not be the correct course. However, one does feel in this case that the learned Magistrate may merely have confused himself on this matter and that, had the true issue been presented to him, he might have made a more positive finding. I therefore consider that it would be unfortunate to decide the case on a point of this nature, having regard to the whole trend of the learned Magistrate's judgment. I therefore propose to remit the case to him to enable him to make a finding of fact on the second relevant issue, namely, whether the Respondent has satisfied him that the money in question was not paid ; the onus, I repeat, being in my opinion clearly upon the Respondent to satisfy the Court on this point. Both parties to be at liberty to call such evidence as admissible in law on this matter.

Costs will be in the cause and the ultimately successful party will receive in respect of this appeal costs on the lower scale, to include a sum of LP. 10 for advocate's attendance fee.

Delivered this 27th day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 67/42.

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

BEFORE : Gordon Smith, C. J. and Rose, J.

IN THE APPEAL OF :—

1. Sadiq Ismail el Abed,
2. Rachid Ismail el Abed,
3. Kamil Khalil el Abed. APPELLANTS.

v.

Fatina Abed el Ubeid. RESPONDENT.

Land Settlement — Settlement Officer's findings of fact not interfered with.

In dismissing an appeal from the judgment of the Land Settlement Officer, Jaffa Settlement Area, dated the 16th of March, 1942, in Case No. 210/Sheikh Muwannis :—

HELD : The Settlement Officer's findings were based on evidence and would not be interfered with.

ANNOTATIONS : *Cf.* C. A. 251/41 (*ante*, p. 39) and note 1.

FOR APPELLANTS : Abcarius.

FOR RESPONDENT : Cattan.

JUDGMENT.

This appeal must be dismissed. The only point raised is one of a matter of fact, with which the Settlement Officer has dealt very clearly indeed in paragraph 5 of his judgment. He puts his finger on the point and says :

> "The real issue is as to whether there was any agreement among some registered owners as to the division of lands and the grouping of shares in defined parcels and in particular in this parcel some fifteen years ago whereby the Plaintiff was to have four out of nine shares in this land in dispute. I have carefully considered all the evidence and have come to the conclusion that about fifteen years ago there was an agreement whereby the Plaintiff was to have four out of nine shares in this parcel, *etc.*".

Earlier in his judgment he discusses and assesses the value of the evidence given by both witnesses for the Plaintiff and the Defendant.

It is entirely a question of fact, and it is quite impossible for this Court, sitting as a Court of Appeal, to say that the Settlement Officer was wrong in coming to the decision he did. There was evidence and a certain amount of corroboration, but one cannot expect precise evidence in matters which have taken place over fifteen years ago.

Actually it has been a somewhat pleasing judgment by a Settlement Officer to go through, compared with some of those we got, and I think that the whole matter has been very clearly stated and very lucidly dealt with. He gave an admirable judgment, which has facilitated the task of the Court of Appeal considerably.

The appeal must be dismissed with costs on the lower scale to include LP. 15 advocate's fee.

Delivered this 18th day of June, 1942.

Chief Justice.

CIVIL APPEAL No. 10/42.

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

BEFORE : Copland and Edwards, JJ.

IN THE APPEAL OF :—

1. Muhammad Ra'afat Dirhalli,
2. Hashem Dirhalli. APPELLANTS.

v.

Hassan Haj Ibrahim Dirhalli & 4 others. RESPONDENTS.

Heirs — Mortgage debt wholly repaid by some heirs — Action for recovery of other heirs' shares — Effect of admission, Mejelle, Arts. 78 and 79 — Payment of share of mortgage debt not releasing particular proportionate share of mortgage — Effect of excess payment.

In dismissing an appeal from the judgment of the District Court of Jaffa in its appellate capacity, dated 8.11.41, in Civil Appeal No. 59/41 :—

HELD : As the Respondents had to pay the whole amount due in order to discharge the mortgage they were entitled to recover from the Appellants the proportionate amount. Had the Respondents paid more than the amount due under the mortgage, the Appellants would only be liable for the amount less the excess.

ANNOTATIONS : *Cf.* H. C. 19/29 (1, P.L.R. 382) ; see also H. C. 50/41 (1941, S.C.J. 473).

FOR APPELLANTS : Elia.

FOR RESPONDENTS : Cattan.

JUDGMENT.

This is an appeal by two of the heirs of one Dirhalli against the Respondents, five others of the heirs. The matter came before the Magistrate who found that, as the sum paid by the Respondents to the Anglo-Palestine Bank had not been paid with the consent of the Appellants, the proportionate share of the payment could not be recovered from the Appellants. The case was taken on appeal to the learned President District Court and the learned President reversed the Magistrate on the line taken by him and sent the case back to the learned Magistrate to find out whether the amount paid in settlement was or was not in excess of the amount due to the bank. If it was not in excess the learned Judge directed that the Magistrate should give judgment against each of the Appellants in respect of his proportionate

share. On appeal here the arguments used by the learned Magistrate have been stressed by the Appellants, that according to Articles 78 and 79 of the *Mejelle* the Appellants are not bound by any admission made by anyone other than themselves ; that the Respondents were not their agents, and that the money was not paid on their request. We think, however, that the judgment given by the learned President is correct.

It is not disputed that payment of a share only of a mortgage debt does not release that particular proportionate share of the mortgage itself. It was essential for the Respondents to get the mortgage released and, to do so, they had to pay the whole amount due. If the amount paid by the Respondents is not in excess of the amount actually due to the bank, then there is no doubt that the Appellants have benefited from the settlement and have no cause for complaint. If, of course, the amount paid *is* in excess then they will only be liable for the amount less the excess.

For these reasons we think that the learned President came to a correct decision and the appeal must be dismissed.

The Respondents are entitled to their costs on the lower scale to include the sum of LP. 10 advocate's fee for attending the hearing of this appeal.

Delivered this 21st day of April, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 57/42.

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

BEFORE : Copland, Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Fadl Eddin Muhammad Amin Muhammad Sirhan. RESPONDENT.

Criminal Procedure — Summary trial in District Court for bribery, C. C. O., Secs. 106 *and* 109 *— Accused acquitted on disagreement of judges on question of corroboration, CR. A.* 77/40 *— Whether appeal lies from acquittal in summary procedure, Magistrates' Courts Jurisdiction Ord., Sec.* 13., *Criminal Procedure (T. U. I.) Ord., Sec.* 67 *—*

Attorney General not entitled to appeal where Trial Judges disagreed on questions of fact — Effect of disagreement of Judges, District Courts (Summary Trials) Rules, Rule 21.

In dismissing an appeal from the judgment of the District Court of Jaffa, sitting at Gaza, dated 11.2.42, in Misd. No. 260/41, whereby the Respondent was acquitted of offences contrary to sections 106(a) and 109 of the Criminal Code Ordinance, 1936 :—

HELD : 1. (Copland, J. *dissentiente*) : The Attorney General was entitled to appeal from an acquittal in a summary trial in the District Court.

2. As the District Court judges had disagreed upon the facts and had not made any findings of fact, the Attorney General was not entitled to appeal.

3. Where there was a disagreement between the judges in a summary trial in the District Court the Accused had to be acquitted.

MENTIONED : CR. A. 77/40 (1940, S. C. J. 257).

ANNOTATIONS :

1. On corroboration in cases of official corruption see CR. A. 77/40 (*supra*) and CR. A. 108/41 (1941, S. C. J. 416). *Cf.* CR. A. 60/42 (*ante*, p. 285).

2. See, on the first point, Adm. 2/40 (1941, S. C. J. 503).

3. On the second point, *vide* CR. A. 111/41 (1941, S. C. J. 378) and note 3 ; see also CR. A. 82/42 (*ante*, p. 312).

FOR APPELLANT : Crown Counsel — (Rigby).

FOR RESPONDENT : Cattan.

JUDGMENT.

This is an appeal by the Attorney General against the acquittal of the Respondent owing to the disagreement of the two judges who tried the case. The Respondent was tried summarily before the District Court composed of the Relieving President, Judge Bodilly, and Judge Daoudi, on a charge of corruptly accepting a bribe and also receiving property or benefit contrary to Section 109 of the Criminal Code.

The principal witness against the Respondent was the man who alleged that he had given the bribe. This man, it is common ground, was an accomplice and therefore, his evidence needed corroboration ; corroboration, that is to say, as to the illegal motive which prompted the payment alleged to have been made by him. In the District Court the two Judges disagreed — the learned Relieving President thought that there was sufficient corroboration upon the finding of the marked

money on the Respondent, and the demeanour of the Respondent when he was searched, and the general evidence for the prosecution, whatever that omnibus phrase may mean. Judge Daoudi, if one reads his judgment, apparently disbelieved the evidence of the accomplice, Haj Sadik, and he then goes on to say that in any case, referring to a Criminal Appeal heard in this Court, No. 77/40, Elias Bawab *v.* Attorney-General, 7 P.L.R. p. 438, there was not sufficient corroboration in this case on which to convict the Respondent.

For the Respondent it has been argued, first of all, that no appeal lies from an acquittal in such circumstances. First, because under Section 13 of the Magistrates' Courts Jurisdiction Ordinance, 1939, an appeal can only be made by an accused person. Section 13 reads as follows :

> "Notwithstanding anything contained in section 3 of the Criminal Procedure (Trial Upon Information) Ordinance, where any person has been tried summarily by a District Court, the provisions of Sections 63, 65 to 68 inclusive and 70 to 73 inclusive of that Ordinance shall apply *mutatis mutandis* to such person and any appeal by him as though he had been tried by a District Court upon information".

The argument is that this section gives a right of appeal only to the person tried summarily. Speaking for myself, I think that that argument is sound. My two brethren, however, hold the contrary view and hold that since section 67, which gives a right of appeal by the Attorney-General, is applied to summary trials, that application must be given effect to and, therefore, an appeal under Section 13 does lie by the Attorney-General. This point therefore fails.

The second point is that the provisions of Section 67 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36 cannot apply to this case. Section 67(1)(b) gives the right to the Attorney-General to appeal on the ground that the law was wrongly applied to the facts. Now, in this case, the two learned Judges in the Court below did not agree upon the facts and there are no findings of fact made by the Court. The Court is unanimously of opinion that, in such a case as this, an appeal does not lie, but we would go on to say that if the two Judges had agreed upon the findings of fact and that they then had disagreed upon the law as applied to those facts, then an appeal by the Attorney-General might lie. That really disposes of this appeal, since whether there was or was not, in law, corroboration of the evidence of the accomplice, is immaterial. By Rule 21 of the District Courts (Summary Trials) Rules, 1938, if there is a disagreement between a Court composed of more than one judge the Accused shall be acquitted. In this case there was a disagreement on the facts between the two

learned Judges of the Court below and applying Rule 21, the District Court acquitted him.

For these reasons the Court thinks that this appeal fails and must be dismissed.

Delivered this 29th day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 71/42.

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

BEFORE : Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Salmeh bint Salameh Ibn Salem Abu Naj'i. APPELLANT.

v.

Salman Abu 'Azra of Arab El Tarabin. RESPONDENT.

Magistrates' Courts — Value of subject matter in excess of LP. 150.— Evidence of value — Expert evidence not preferred — Weight of evidence — Credibility.

In dismissing an appeal from the judgment of the Magistrate's Court of Beersheba, sitting as a Land Court, dated 15.4.42, in Land Case No. 61/42 :—

HELD : There is no principle of law or practice that the evidence of an expert must be, or should be, accepted by a trial court in preference to that of other persons.

ANNOTATIONS : *Cf.* C. A. 74/41 (1941, S. C. J. 270).

FOR APPELLANT : S. Saleh.

FOR RESPONDENT : W. Salah.

JUDGMENT.

This is an appeal from a decision of the Magistrate's Court Beersheba sitting as a Land Court. The sole point for consideration is whether the Magistrate was right in coming to the conclusion that he had no jurisdiction to try the case as the value of the property concerned exceeded LP. 150. It appears that the Plaintiff-Appellant called an expert, a land valuer, who said that the value of the land was LP. 148. The Defendant-Respondent called three persons who did not profess to be experts, but were persons living in the neighbourhood who stated

that they had practical knowledge of the value of that and neighbouring land, and that the value of the land in question was substantially in excess of LP. 150. The Magistrate accepted their evidence and the Appellant now asks us to say that he was wrong in so doing because, as a matter of law or at any rate of practice, the evidence of an expert should be accepted in preference to that of persons who are not experts. There is, so far as I am aware, no principle of law or practice that the evidence of an expert must be, or should be, accepted by a trial Court in preference to that of other persons. The fact that a man is an expert is an element that the trial Court will, no doubt, take into consideration in weighing his evidence, but the degree of credibility attaching to the evidence of an expert, as indeed of any other, witness must remain a matter for the Court of trial. In this case there was clearly evidence which, if the Magistrate believed it, entitled him to come to the conclusion that the value of the land was in excess of LP. 150.

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

Delivered this 17th day of June, 1942.

British Puisne Judge.

CIVIL APPEAL No. 66/42.

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

BEFORE : Gordon Smith, C. J. and Rose, J.

IN THE APPEAL OF :—

Youssef and Jad Makhoul Nasr. APPELLANTS.

v.

Eugenie, widow of the late Maroun Nasr. RESPONDENT.

Personal Law, P. O. in C., Art. 47 — District Court to find what personal law is and to apply it.

In allowing an appeal from the judgment of the District Court of Haifa in Civil Case No. 76/42, dated the 12th of April, 1942, and in remitting the case to the District Court :—

HELD : The case would be remitted to the District Court to find what the personal law of the parties is and to apply the same.

FOR APPELLANTS : Weinshall.

FOR RESPONDENT : Sahyoun.

JUDGMENT.

The Civil Courts in this country are given jurisdiction under Article 47 of the Palestine Order in Council to deal in matters of personal status subject to the application of the personal law of the parties.

In this appeal there is no evidence to show what is the personal law of the parties. The appeal will, therefore, be allowed and the case remitted to the District Court to find what is the personal law of the parties and to apply the same. Costs will be costs in the cause.

Given this 24th day of June, 1942.

Chief Justice.

CIVIL APPEAL No. 60/42.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Mizrahi Bank Ltd. Tel-Aviv. — APPELLANT.

v.

1. Alexander Tiraspolsky,
2. Hanna Gezelter. — RESPONDENTS.

Sale of land — Breach of contract — Readiness of vendor to transfer — Trifling diminution of area — Mejelle, Art. 226, C. A. 261/40 — Absence of misrepresentation — Vendor in position to fulfil substance of contract — Finding of fact unsupported by evidence — Exercise of option under the Mejelle — Measure of proof of readiness and willingness — Assessment of damages.

In allowing an appeal from the judgment of the District Court of Tel-Aviv dated 31.3.42 in Civil Case No. 254/41 whereby Appellant's counter-claim was dismissed, and in remitting the case to the District Court to assess the damage :—

HELD : 1. (Distinguishing C. A. 261/40) : The diminution in area was trifling and there had been no misrepresentation at the time of entering the contract that the vendor was in possession of the area specified.

2. The vendor was in a position, at all material times, to fulfil the substance of its contract.

3. If a party to a contract wishes to take advantage of the option provided by article 226 of the *Mejelle*, it is necessary for him to manifest the exercise of the option by some act. In this case, the exercise of the option was not manifested.

4. The degree of proof required to satisfy a Court that a party is ready and willing to perform his part of the contract varies according to the circumstances of each particular case. That contention had been established by the Appellant.

DISTINGUISHED : C. A. 261/40 (1941, S. C. J. 36).

ANNOTATIONS :

1. See, on Article 226 of the *Mejelle*, note 6 to C. A. 261/40 (*supra*).

2. On readiness and willingness to complete, *cf.* C. A. 85/40 (1940, S. C. J. 474) and note 3, C. A. 261/40 (*supra*) and C. A. 240/40 (1941, S. C. J. 140).

FOR APPELLANT : Olshan by delegation.

FOR RESPONDENTS : Zakheim.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv. By an agreement in writing dated 21st October, 1934, the Respondents agreed to buy a certain plot of land from the Appellant, one of the terms of the agreement being that payment should be made by a series of promissory notes, the final note maturing on the 21st of October, 1937. On the 21st June, 1936, the Respondents failed in their payments, no reason apparently being put forward except financial embarrassment. The Appellant appears to have treated the matter with lenience and took no positive action until the 18th of December, 1940, when it wrote a letter to the Respondents (Exhibit P/3), stating that it regarded the Respondents as having defaulted under the agreement and that the contract was, therefore, cancelled. The Appellant further stated that it regarded itself as free to sell the land to a third party.

No reply was received to this letter and on the 10th June, 1941, the Appellant wrote a further letter (Exhibit P/4) stating that it had, in fact, sold the plot of land in question. It was not until after the receipt of this letter that the Respondents raised the point that the Appellant was also in breach in that it had never been in a position to transfer the full area of land contemplated in the agreement.

The District Court found — and there was no appeal against this finding — that the Respondents were entitled to the return of the money which they had paid on account of the purchase price. The Court further held, however, that the Appellant was also in breach and was therefore not entitled to recover damages on its counter-claim resulting from the Respondents' breach of the contract. In fact — and this is common ground between the parties — the diminution in area was of a trifling, indeed of a purely technical, nature due to the

widening of the road by the Municipality of Tel-Aviv, probably in its capacity as the Town Planning Commission. The Respondents, however, rely upon article 226 of the *Mejelle* and Civil Appeal 261/40, Vol. 8 P.L.R. 1941 at page 71, but it seems to me that the present case can be distinguished on two grounds. First, in the present case there was no misrepresentation in the first instance, in that at the time of the entering into the contract the Appellant was in possession of the area specified. Secondly, in the present case the Appellant was in a position, at all material times, to fulfil the substance of its contract. It is true that the District Court made the following finding on this matter :

> "The contention of the Defendant that it was possible for him to increase the area of the plot carries no substance because the parcellation had already been approved and no amendments could have been made."

This finding, however, is clearly contrary to the evidence of Izhak Karzisky and Maximilian Steinhartz, whose evidence was the only evidence adduced on the matter in question and remained substantially unchallenged. Further, if a party to a contract wishes to take advantage of the option provided by article 226 of the *Mejelle,* it is, in my opinion, necessary for him to manifest the exercise of his option by some act. In this case the exercise of the option was never manifested in any such manner, and it is, in fact, quite obvious from the course of the proceedings that the Respondents only raised this point as to the diminution of area as a pure after-thought.

I am therefore of opinion that the District Court erred in coming to the conclusion that the Appellant committed a breach of the contract.

In order, however, to be entitled to recover damages for any breach on the part of the Respondents, the Appellant must show that it was ready and willing at all material times to carry out its own obligations under the contract. As Mr. Olshan, counsel for the Appellant, pointed out, the degree of proof required to satisfy a Court that a party is ready and willing to perform his part of the contract varies according to the circumstances of each particular case, and in this case I agree with his contention that the Appellant succeeded in establishing that it was ready and willing to perform its part of the contract up to the 18th December, 1940, when it notified the Respondents that it regarded the contract as being at an end on account of the Respondents' breach.

It follows, therefore, that, in my opinion, the Appellant is entitled to recover damages for breach of contract in respect of any loss which it can prove to have flowed from the Respondents' breach.

The appeal is therefore allowed and the matter remitted to the

District Court to assess the damages, if any, that the Appellant has suffered. The costs of this appeal will be in the cause and on the lower scale, and will include the sum of LP. 15 for advocate's attendance fee to the ultimately successful party.

Delivered this 16th day of June, 1942.

British Puisne Judge.

CIVIL APPEAL No. 70/42.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

Dr. Pinhas Weil. — APPELLANT.

v.

Lutfi Boulos el Hadad. — RESPONDENT.

Findings of fact — Weight of evidence — Whether a piece of land falls within a particular kushan or not, a question of fact.

In dismissing an appeal from the judgment of the Magistrate's Court of Safad, sitting as a Land Court, dated 12th April, 1942, in Land Case No. 278/41 :—

HELD : The question of whether or not a particular piece of land falls within a particular *Kushan* is eminently one of fact for the Trial Court.

ANNOTATIONS : Compare C. A. 95, 96, 97 & 138/40 (1940, S.C.J. 294) and note 1, C.A. 188/41 (1941, S.C.J. 605), C. A. 145/41 (*ibid.*, p. 651) and C.A. 251/41 (*ante*, p. 39).

FOR APPELLANT : E. Gavison.

FOR RESPONDENT : Cattan.

JUDGMENT.

Rose, J. : This is an appeal from a judgment of the Magistrate at Safad sitting as a Land Court. The Appellant confines himself quite properly to one main point which is that the finding of fact of the Magistrate that the road in dispute belonged to the Plaintiff was not supported by the evidence. The facts are sufficiently set out in the judgment of the Magistrate and need not be referred to here in any detail.

It may be that the evidence as to the ownership of this road, the so-called private road, is slight, but it has to be remembered that the events covered by this case go back for a period of at least 30 years and the plans which were produced to the Court are palpably incomplete and unreliable. As has so often been said in this Court as regards appeals from Settlement Officers, the question of whether or not a particular piece of land falls within a particular *kushan* is eminently one of fact for the Trial Court, and we are most reluctant to interfere with a finding on such a matter unless we are satisfied that it is absolutely unjustifiable. In this case I see no reason to interfere with the finding of the Magistrate, and I come to this conclusion with the less reluctance in that it seems to be undisputed that the Respondent has constructed this road at his own expense. Further it appears from the evidence that, as long ago as some 17 or 18 years, there was actually a conversation between the Plaintiff or his representative and the then representative of the Appellant in which it was discussed as to whether this road should be paved to a width of two or three metres, and it appears that as a result of representations on behalf of the Appellant the width was limited to two metres, for the reason that otherwise it would encroach upon the Appellant's ground. That, to my mind, seems to me to be conclusive on the merits of this dispute.

If, therefore, the Magistrate was right in finding that the Respondent was the owner of the road in question, the matter of the screen becomes immaterial.

For these reasons the appeal is dismissed with costs on the lower scale to include the sum of LP 10 for advocate's attendance fee.

Delivered this 19th day of June, 1942.

British Puisne Judge.

Copland, J. : I entirely agree. The appeal has no merits whatsoever. It is a purely technical one. The less said about it the better. It is dismissed.

British Puisne Judge.

CRIMINAL APPEAL No. 48/42.

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

BEFORE : Gordon Smith, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Rabbi Itzhak Meir Levin of Jerusalem. RESPONDENT.

Criminal Procedure — Notice of appeal not signed by Attorney General personally, Criminal Procedure (T. U. I.) Ord., Sec. 67 as amended, CR. A. 18/38 — Established practice — Offence against Defence (Finance) Regulations, Reg. 4C(1)(b) — Meaning of "payment" in the regulation — Telegram as evidence of sender's residence, Post Office Ord., Sec. 52 — Extenuating circumstances — Principles governing submission of "no case to answer", Criminal Procedure (T. U. I.) Ord., Sec. 39, Rex v. Bennett, Rex v. Abraham George, Rex v. White.

In allowing an appeal from the judgment of the District Court of Jerusalem, in Misdemeanour No. 386/41, dated the 20th day of February, 1942, whereby the Respondent was acquitted of offences contrary to Regulation 4C(1)(b) of the Defence (Finance) Regulations, 1940, as amended, and in remitting the case to the District Court :—

HELD : 1. (Referring to CR. A. 18/38) : The notice of appeal had been properly signed by Crown Counsel in the name of the Attorney General.

2. The word "payment" in Regulation 4C(1)(b) of the Defence (Finance) Regulations could not be interpreted as meaning only payments out of an accused person's own funds.

3. The fact that a person sent a telegram from New York raised the presumption that such person was resident in the United States of America.

4. In the circumstances, in the event of conviction, a nominal penalty would meet the case.

(Per Gordon Smith, C. J.) :

5. The prosecution had to make out a *prima facie* case which the defence should be required to answer, *i. e.* evidence in proof of the charge as laid.

6. At the close of the prosecution case the Court had not to consider the weight of the evidence or the credibility of the witnesses, but only, whether there was any evidence or not, "any evidence" not meaning a mere *scintilla* of evidence. In the presence of such evidence, the Court should call for the defence.

7. (Referring to Rex *v.* Bennett, Rex *v.* Abraham George, Rex *v.* White) : Where there is no evidence at all on a material point which is essential in proving the case for the prosecution, Counsel for the accused should submit that there is no case to answer, and if the Court agree with the submission, then it should stop the case and acquit the accused, and even without such a submission the Court could do so, on its own motion.

8. The submission of "no case to answer" should be made at the close of the case for the prosecution and before the accused is asked whether he desires to make a statement or give evidence in the witness box.

9. At that stage Counsel for the defence should not make a speech on behalf of the accused or address the Court on the evidence already given, but only draw the attention of the Court to the absence of such evidence as is necessary to secure a conviction and submit that there is no case to answer.

10. In exceptional circumstances Counsel should be permitted, at the close of the case for the prosecution, to consult his client in the dock and advise him as to whether to give evidence or not, with the subsequent liability to cross-examination.

REFERRED TO : CR. A. 18/38 (1938, 1 S.C.J. 156) ; Rex *v.* J. Bennett, 8 CR.A.R. 11 ; Rex *v.* Abraham George, 1 CR.A.R. 170 ; Rex *v.* White, 13 CR.A.R. 211.

ANNOTATIONS :

1. On the first point see, in addition to CR.A. 18/38 (*supra*), CR.A. 119/41 (1941, S.C.J. 559, on pp. 563—4) and last sentence of note 5 thereto.

2. On the third point *cf.* C. A. 98/41 (1941, S.C.J. 247).

3. See, on the fourth point, CR.A. 138/41 (1941, S.C.J. 641) and note.

4. On the submission of "no case to answer" *vide* CR. A. 36/40 (1940, S.C.J. 155) and note, CR.A. 23/41 (1941, S.C.J. 99), CR.A. 54/41 (*ibid.* p. 185) and CR.A. 136/41 (*ibid.*, p. 631).

FOR APPELLANT : Crown Counsel — (Hogan).

FOR RESPONDENT : Eliash and Olshan.

JUDGMENT.

Rose, J. : This is an appeal by the Attorney General from a judgment of the District Court of Jerusalem.

Mr. Eliash for the Respondent raises a preliminary point that no proper appeal is before this Court because under section 67 of the Criminal Procedure (Trial Upon Information) Ordinance only the Attorney General himself can sign the notice of appeal. In Criminal Appeal No. 18/38, P. L. R. 1938, at page 183, this Court held that a duly authorized representative of the Attorney General can properly sign a Criminal Appeal, and since that decision there have been nu-

merous appeals by the Attorney General signed by learned Crown Counsel. Mr. Eliash argues that owing to subsequent amendments of the Ordinance in 1939, the inference should now be drawn that only the Attorney General may so sign. It is an established practice of Appellate Courts to be most reluctant so to construe a statute as to imply that the consistent practice of the Courts for some substantial period has been incorrect. In the present instance, following this practice, we prefer to hold that the legislature may have expressed its intention in a slovenly manner rather than that by the amendments referred to the right of a representative of the Attorney General to sign appeals has been abrogated. We think, therefore, that there is no substance in this preliminary point.

The Respondent was charged on two counts with making payments to certain persons on behalf of a person resident outside the sterling area, *contra* regulation 4C(1)(b) of the Defence (Finance) Regulations, 1940, as amended. At the material date the relevant part of the regulation read as follows :—

> "subject to any exemption which may be granted by order of the High Commissioner, no person shall, except with permission granted by or on behalf of the High Commissioner, make any payment to or by the order or on behalf of any person resident outside the sterling area".

It appears that on the 24th April, a telegram was sent to the Respondent by one Goldman from New York instructing him to make certain charitable disbursements on Goldman's behalf. Two of the recipients were Rabbi Weingarten and Rabbi Twersky and there is evidence that on the 29th of April, 1941, and on a day unknown between the 28th April and the 25th of June, 1941, payments were made to these persons as alleged in the first and second counts respectively.

Mr. Eliash argued that for the purpose of this regulation the word 'payment' must mean payment out of an accused person's own funds. We see no reason so to limit the natural meaning of the word, and, as we have already said, we consider that there was *prima facie* evidence of payment as alleged in the Information.

It is not disputed that at the material date the Respondent could not claim the benefit of any exemption and had not obtained the permission of the High Commissioner to make the payments in question. It is urged, however, that the prosecution failed to show that Goldman was resident outside the sterling area. The question as to whether or not a person is resident in a certain place depends upon the particular facts and is often a question of difficulty. The only matter which

we have to decide at this stage is whether the prosecution has adduced *prima facie* evidence of residence outside the sterling area. By reason of section 52 of the Post Office Ordinance (Cap. 115 of the revised Edition) the telegram itself raises the presumption that it was signed and delivered for transmission by Goldman and, after some hesitation, we are of opinion that the fact of Goldman's having sent a telegram from New York giving these detailed instructions to the Respondent for the disposal of these substantial funds raises the presumption that he was resident in the U. S. A. within the meaning of this regulation. That being so, we are of opinion that the trial Court was wrong in holding by a majority that the prosecution had failed to establish a *prima facie* case. The matter must, therefore, be remitted to them to complete and determine according to law.

We would add that we are informed that the Respondent has since received the necessary permission from the High Commissioner to engage in similar transactions in the future. If this information is correct and having regard to the fact that, prior to the passing of the relevant amendment only a few weeks before the alleged payments complained of, he had disposed in similar circumstances of substantial sums of money without contravening any regulation, the trial Court may well come to the conclusion, in the event of an ultimate conviction, that a nominal penalty will meet the case.

Delivered this 23rd day of April, 1942.

British Puisne Judge.

Gordon Smith, C. J.: I concur in the judgment given by my brother Rose on the merits of this case, and I propose only to deal with a suggestion by Counsel that it would be advantageous for this Court to make some authoritative ruling as to a submission by Counsel that there is no case to answer. The procedure to be adopted at the close of the case for the prosecution is that laid down in Section 39 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36, but, unfortunately, the Ordinance is entirely silent on this point or as to at which stage of the proceedings such a submission might be made. Neither does there appear to be any reported case dealing with the point, although this Court has, on various occasions, remitted cases to the District Court to call on and hear the defence, as in the case now before us. It may be that the oft quoted rule, that it is the duty of the prosecution to prove the case against the accused is misapplied at times and in this respect, as this is a matter for consideration by the Court at the conclusion of the whole case and before delivering its verdict.

The general rule is, however, that there must be a *prima facie* case put forward by the prosecution and which the defence should be required to answer. The difficulty is, what amounts to a *prima facie* case ? This, in my view, means that there must be evidence in proof of the charge as laid. It may be that such evidence may be of a slender nature or that there are essential elements in a charge, on which there must be substantial evidence and if there is no such evidence, then there is no case to answer. For example, in a case of larceny or theft of goods, there must be evidence that the goods have been stolen, and similarly in a case of unlawful possession of stolen goods ; in a case of false pretences, there must be evidence of the false pretence, and so on. Again, there may be some evidence but very slender evidence of necessary identification.

But, it is not at this stage that the Court has to consider either the weight of such evidence, or the credibility of the witnesses giving the evidence ; what it has to consider is whether there is any evidence or not, and by "any evidence" I do not mean a mere *scintilla* of evidence. If, therefore, the Court considers that there is evidence on these or other essential points, then the defence should be called upon.

The matter is somewhat simplified here in that Judges are also judges of fact as well as of law, and act in the dual capacity of Judge and Jury. It has been held in England, Criminal Appeal Reports, Vol. 8, p. 11, *re* J. Bennett, that in 'near the line cases' it is better to leave the case to the Jury, but that when there is no evidence, then the case should be withdrawn from the Jury. It has also been held, *vide* C. A. R., Vol I, p. 170, *re* Abraham George, that at the close of the case for the Prosecution a Judge is not, in law, bound to withdraw a case from the Jury, if the point is not submitted to him, although he may do so on his own initiative. If the defence elects to call evidence, then the Court looks at the case as a whole. In the case of *re* White, C. A. R., Vol. 13, p. 211, Mr. Justice Darling said, "At the end of the case for the prosecution, counsel for the defence ought to have submitted that there was no case to go to the Jury, and if he had done so, it would have been the duty of the Judge to give effect to the submission. There was no evidence," *etc. etc.*

From the foregoing it may, therefore, be adduced that where there is no evidence at all on a material point which is essential in proving the case for the prosecution, counsel for the accused should submit that there is no case to answer, and if the Court agrees with such submission, then it should stop the case and acquit the accused, and even without such a submission, the Court can do so, on its own initiative.

Another point has also arisen, namely, as to when this submission should be made, but it is clear from the foregoing and from Section 39 (*supra*) that it should be made at the close of the case for the Prosecution and before the accused is asked whether he desires to make a statement or give evidence in the witness box.

Further, it is not expected nor is it desirable that Counsel for the defence should make a speech on the accused's behalf or address the Court on the evidence already given. As I have said, it is not at that stage that consideration is given to the weight of evidence, and it is quite sufficient for Counsel merely to draw the attention of the Court to the entire absence of such evidence as is necessary to secure the conviction of the accused and submit that there is no case to answer.

I would also observe that not only here but elsewhere have I been asked, at the close of the case for the Prosecution, to permit Counsel to consult his client in the dock and advise him on the point as to whether he should or should not go into the witness box, with the subsequent liability to cross examination. Normally this should not be necessary, and it is only in unusual circumstances that such a contingency might arise, as presumably Counsel has already interviewed his client and advised him thereon. I might perhaps observe that, so it has been said, the late Marshall Hall always required his client previously to state in writing, whether he desired to give evidence in the witness box or not. Admittedly, many accused have, by their own evidence convicted themselves, and no doubt will continue to do so.

I trust that these remarks may be of some help and assistance in the future, both to members of the Bar and the Bench.

Delivered this 23rd day of April, 1942.

Chief Justice.

MISCELLANEOUS APPLICATION No. 36/42.

IN THE APPELLATE TRIBUNAL APPOINTED UNDER SECTION 20(2) OF THE ADVOCATES ORDINANCE, 1938.

BEFORE : Gordon Smith, C. J., Copland and Abdulhadi, JJ.

IN THE APPEAL OF :—

Zaki Sa'ad. APPELLANT.

v.

Chairman and Members of the Law Council, Jerusalem. RESPONDENTS.

Advocates — Striking of advocate off the roll, Misc. Appl. 34/42 — Termination of appointment of Law Council after three years, Law Council Ord., Sec. 3(4) — Notice re-appointing Law Council with retrospective effect — No validation of actions during intervening period — Delay — Costs.

In allowing an appeal under section 20 of the Advocates Ordinance, 1938, from the decision and recommendation of the Law Council, dated 28th day of April, 1942 :—

HELD : At the date of the decision recommending the striking off of Appellant from the Roll of Advocates there was no Law Council in existence and as the notice reappointing the Council with retroactive effect contained no validation of the actions of the Council in the intervening period it followed that the proceedings in question were a nullity.

REFERRED TO : Misc. Appl. 34/42 (*ante*, p. 332).

ANNOTATIONS : *Cf.* Misc. Appl. 34/42 (*supra*) and note.

FOR APPELLANT : Goitein.

FOR RESPONDENT : Crown Counsel — (Hogan).

ORDER.

On the facts of this case there is nothing to distinguish it from the facts in the previous application we had, Misc. No. 34/42, in connection with Najeeb Jad, except this one point which has been raised as to the constitution of the Council. On those other facts, we do not propose to repeat what we have already said in the previous judgment. As regards the point that has now been taken in this case which was not taken in the previous case, this, as I have said, raises the question of the constitution of the Council. The Council was appointed in 1938, and in accordance with Section 3(4), the period of that appointment is for three years. But it provides that the members are eligible for reappointment on the expiration of the terms of their appointment. Therefore, the appointment, in effect, of the first Council under this Ordinance terminated in November, 1941, after which date there was in the absence of any further appointments no Council. A notice was published in the Gazette of 7th June, 1942, page 970, appointing the Council retrospectively to the date of the expiration of the period of three years, to November 1941. But as I have said, at the date of the decision there was no Council and there is nothing in that notice which validates any of the actions of the Council in the intervening period. It is, we think, most unfortunate as regards the decision of the Council and possibly a little hard, but the saying is that hard cases

make bad law and we feel that if we support the action in this respect we should be making bad law. The result is, therefore, that the proceedings in connection with the striking off of this advocate from the Roll are a nullity. It will be for the Council to decide whether they take fresh action or not, and in this connection we must draw attention to the fact that this advocate was convicted, served a sentence of three months and then continued to practise for another 21 months before any action was taken to strike him off the Roll. We think that there was undue delay in taking the necessary steps.

No order as to costs.

Given this 12th day of June, 1942.

Chief Justice.

CIVIL APPEAL No. 39/42.

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

BEFORE : Gordon Smith, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Ibrahim Adham Abu el Huda ed Farouqi in his capacity as Mutawalli of Waqf Abu el Huda and his two sons. APPELLANTS.

v.

Salim Mohammad el Masri. RESPONDENT.

Expropriation of land — Dispute as to apportionment of compensation paid into Court — Proper party to be sued — Findings of fact — No interest on compensation for damage.

In dismissing an appeal from the judgment of the District Court of Jaffa, in Civil Case No. 24/41, dated 14.2.1942, and in varying the judgment of the Court below :—

HELD : 1. The right course for the expropriator was to pay the compensation into Court and for the parties to apply thereto to settle their disputes as to the apportionment of the amount.

2. The findings of fact made by the Court below were based upon evidence and would not be interfered with.

3. The District Court erred in awarding interest as from the date of action on the amount of compensation awarded to the Respondent.

ANNOTATIONS :

1. Compare C. A. 57/41 (1941, S. C. J. 207) and note 1.
2. See, on the last point, C. A. 116/41 (*ante*, p. 293) and note 5.

FOR APPELLANTS : Dajani.

FOR RESPONDENT : 'Akel.

JUDGMENT.

We need not hear you Amin Eff.

Counsel for the Appellant has raised three points in this appeal. First that the Appellant is not a party to the action, in that the Respondent should have sued the Municipality who expropriated the land. Second that he was paid LP. 70.— for the value of the trees and the Respondent is entitled only to half this amount. Finally that the amount awarded by the District Court to the Respondent includes compensation for damage for which no interest thereon could be adjudged.

There is nothing in these points. The right course for the Municipality to follow in these proceedings was to pay the amount of the compensation into Court, to which the parties could go to settle or decide their disputes as to its apportionment. The second point raises purely questions of fact which is entirely for the lower Court. Both parties tendered evidence and the Court did not believe a good bit of it. The Court said that both parties were of no help and it arrived at its conclusion by carefully sifting the evidence and by inference from the surrounding circumstances. We do not propose to interfere with its finding.

As regards the interest we agree that the lower Court erred in giving interest as from the date of action. The judgment of the lower Court will, therefore, be varied in this respect, otherwise the appeal is dismissed and the judgment of the District Court is confirmed. The Respondent will get his costs on the lower scale to include the sum of LP. 10 advocate's attendance fee.

Delivered this 27th day of April, 1942.

Chief Justice.

CRIMINAL APPEAL No. 54/42.

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

BEFORE : Rose, Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Shukri Hanna el Nihi,
2. Tewfiq Elias Salman. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Criminal Procedure — Conviction by majority judgment — Confession of two Accused accepted while that of third Accused rejected — Corroboration of evidence of accomplice — Sentence in case of previous conviction.

In refusing an application for leave to appeal and in dismissing an appeal from the judgment of the District Court of Jerusalem, dated 25.3.1942, in Felony No. 348/41, whereby by majority the Accused were convicted of burglary contrary to Section 295(a) of the Criminal Code Ordinance, 1936, and sentenced the 1st Appellant to one year's imprisonment and the 2nd Appellant to 18 months' imprisonment :—

HELD : 1. Where there was a disagreement between the judges of the Trial Court the Court of Criminal Appeal had to have regard to the majority judgment (which was the effective judgment) and to apply the same tests to that judgment as if there had been no disagreement.

2. There was no reason, in principle, why a Trial Court should not believe that the confession of one Accused was improperly, and that of another properly taken.

3. The evidence of the accomplice was sufficiently corroborated.

4. The District Court was justified in giving the second Appellant a more severe sentence on account of his recent previous conviction for shop-breaking.

ANNOTATIONS :

1. See, on majority decisions in criminal cases, CR. A. 18/42 (*ante*, p. 171, on pp. 174—5) and note 1.

2. On confessions *vide* CR. A. 26/42 (*ante*, p. 185) and note 1.

3. On the third point *cf.* note 2 to CR. A. 39/42 (*ante*, p. 224).

4. See, on the last point, CR. A. 49/42 (*ante*, p. 228) and note 2.

FOR APPELLANTS : Abedrabbo.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, convicting the two Appellants of burglary *contra* section 295(a) of the Criminal Code Ordinance. The matter is perhaps rendered a little difficult in that there was a disagreement amongst the members of the Trial Court, the presiding Judge being in favour of acquitting the two Appellants. The duty of an appellate Court, however, in such a case is, in our opinion, quite clear, namely, to have regard to the judgment of the majority of the Court (which is the effective judgment) and to apply precisely the same tests to that judgment as it would do if there were no disagreement. We have to consider, therefore, whether there was sufficient evidence to justify the finding of the majority judgment that these two Appellants were guilty of the offence with which they were charged.

With regard to the first Appellant the case for the prosecution depended upon three matters. First, there was an alleged confession. Secondly, there was the evidence of an accomplice which, if believed, directly implicated the first Accused and thirdly there was the evidence of a police officer that he found three rings which were identified as being part of the stolen property, these rings being actually taken from a hiding place and handed over to him by the first Appellant.

Counsel for this Appellant contends that the confession was improperly obtained and was not free and voluntary and he argues that as one of the Accused, the second Accused, was acquitted on the ground that the Court was not satisfied that his confession was free and voluntary, it was unreasonable in respect of the other two Accused to hold that their confessions were free and voluntary. That seems to us to be entirely a question of fact for the Trial Court. There is no reason, in principle, why a Trial Court should not believe that the confession of one Accused was improperly taken and that of another was properly taken. It is purely a question of fact. It is true that the learned President took an opposite view but that cannot affect the position, as the majority found that it was free and voluntary.

We have, therefore, the clear evidence of the accomplice, which is sufficiently corroborated by the finding of the rings and the confession, and we think that there is no reason to interfere with the conviction of the first Appellant.

With regard to the second Appellant, the evidence is substantially the same except that these rings were not found in his possession and

were not handed by him to the police officer concerned. There was, however, in our opinion, sufficient corroboration of the accomplice's evidence, and there were also matters extraneous to the confession which tended to show that it was true. That being so, we think that with regard to the second Appellant also there is no reason to interfere with the conviction.

As to sentence, the first Appellant was sentenced to one year's imprisonment and we cannot say that a sentence of one year for burglary is excessive. The second Appellant was sentenced to eighteen months' imprisonment. He was presumably treated more severely because he had had a recent previous conviction for shop-breaking. We cannot say, in the light of these circumstances, that the Court was wrong in giving him an additional six months' imprisonment.

Both appeals are, therefore, dismissed and the convictions and sentences confirmed. The sentences will run from the date of conviction.

Delivered this 23rd day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 14/42.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Estate of the late Anton Michael Malak, through the Administrator of the Estate, Advocate Soubhi el Ayyoubi. APPELLANT.

v.

1. Gabriel Mikhael Malak,
2. Giulia Mikhael Malak, wife of Issa el Sawabini,
3. Hilaneh Michael Malak,

in their capacity as heirs of the Estate of the late Khalil Malak. RESPONDENTS.

Promissory notes — Action by administrator of payee's estate against maker's heirs — Defence that bill an accomodation bill subsequently exchanged for another bill — Onus of proof — Finding of Court below supported by evidence — Costs.

In dismissing an appeal from the judgment of the District Court of Jaffa, in Civil Case No. 195/40, dated 23.12.1941, whereby Appellant's claim against Respondents was dismissed :—

HELD : 1. The Respondents had discharged the onus which was upon them to prove that the note was an accomodation note given without consideration.

2. (*Obiter*) : The action could have been dismissed on the ground that the note in question had been replaced by a second note which was not in the Appellant's hands.

3. The costs of the appeal should be paid out of the estate.

ANNOTATIONS :

1. See, on the first point, C. A. 31/42 (*ante*, p. 342) and note.
2. On the last point compare H. C. 17/42 (*ante*, p. 107) and note 2.

FOR APPELLANT : Gorodissky.

FOR RESPONDENTS : Malak and Beiruti.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa, whereby a claim for LP. 500 based on a promissory note was dismissed. In the Court below the following issues were framed by consent of the parties' advocates :—

1. Is the bill sued upon an accomodation bill held by the deceased without consideration ?
2. Did Antoine Michel Malak obtain another bill in similar terms and amount as the bill sued upon ?
3. Was the second bill given in discharge of the bill sued upon or not ?

The trial Court after hearing evidence held that the bill sued upon was an accomodation bill and that it was given without consideration and that A. Michel Malak, whose administrator is the present Appellant, obtained another bill in similar terms and amount and that the second bill was given in exchange for the first. The Appellant's advocate has argued before us that the onus was on the Respondents to prove lack of consideration. This, of course, is perfectly true and is a statement of the law which cannot be contested ; but the Court below did in fact hear a considerable amount of evidence. The fact that A. Malak and the maker of the note, Khalil Malak, died in the year 1937 made it impossible to bring direct evidence one way or the other. The Court below was, therefore, perfectly entitled to draw inferences from the evidence. There was ample evidence that Khalil and Anton were brothers who used to have business relations of this nature. The evidence of the witness Amin Shabab Eddin

showed that the two brothers used to help each other in discounting accomodation bills. This witness says that he never saw either of them paying the other any sums of money. There was a very significant fact, namely, that the bill made on the 15th of April, was given on the very day on which the bill made on the 9th December, 1936, fell due.

Now, there was ample evidence that the late Anton was a good business man and that whenever he had any commercial transactions these transactions were entered in his books, and all accounts over LP. 20.— were paid by cheque. The advocate for the first Respondent, Mr. Peter Malak, has argued before us that it is incredible that if the late Anton had given such a large sum as LP. 500 some entry of it would not have been found in his books, or in his bank-account. The only entry made seems to have been in a small book as testified by the witness, Subhi Eff. el Ayyoubi. The Court below considered that the note issued was replaced by another note, namely note B, and that this note was not in the hands of the Plaintiffs but was in the hands of the Banco Di Roma, and the Court below felt that they could have dismissed the case on that ground alone, as they considered that the second note took the place of the first one. We think that there is substance in this reasoning. On the whole, we think that there was ample evidence to entitle the Court below to find as a fact that the bill sued upon was an accomodation bill and that there was no consideration. Mr. Gorodissky, the Appellant's advocate, has argued that it was not for him to bring any rebutting evidence because he contended that Respondents in the Court below had not proved lack of consideration or that it was an accomodation bill and that, the onus being on them, they should have failed. It is here that we differ from Mr. Gorodissky, because we think that there was ample evidence. We do not consider that we are entitled to interfere with the findings of fact of the Court below.

We, accordingly, dismiss the appeal with costs to be taxed on the lower scale to include advocate's attendance fee of LP. 7.500 to each of the two advocates, but we order that the costs be paid by the estate of the late Anton Malak and not (as asked for by the Respondent's advocate) by the administrator in person.

Delivered this 10th day of March, 1942.

British Puisne Judge.

CIVIL APPEAL No. 117/40.

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

BEFORE : Gordon Smith, C. J. and Rose, J.

IN THE APPEAL OF :—

Agudath Batey Yetomim Veyetomoth. APPELLANT.

v.

The Attorney General & 4 ors. RESPONDENTS.

AND BETWEEN :—

Agudath Batey Yetomim Veyetomoth. APPELLANT.

v.

The Attorney General & 4 ors. RESPONDENTS.

Charitable trust of miri land — Previous proceedings, C. A. 164/35 — Absence of provision allowing the decision of preliminary issues of law, C. A. 117/40 — Legislation regarding miri land and charitable trusts, Charitable Trusts Ord., Secs. 37 and 43, Disposal Law, Arts. 8 and 9, Ottoman Land Code, Art. 121, Land Transfer Ord., Sec. 2 Palestine (Am.) O. in C., 1933, Art. 2 — Authorities on the question, P. C. 69/30, H. C. 77/31, P. C. 1/35, C. A. 189/37 — No charitable trust of miri land.

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 7th of May, 1940, in Civil Cases Nos. 282/37 and 74/38 (consolidated by order of the Supreme Court dated 7th April, 1941) :—

HELD : (Referring to C. A. 164/35, P. C. 69/30, P. C. 1/35 ; following H. C. 77/31, C. A. 189/37) : There cannot be a dedication of *miri* land for the purposes of a charitable trust either by a devise by will or by any act *inter vivos*, as *miri* land cannot be the subject of a charitable trust.

REFERRED TO : C.A. 164/35 (not reported) ; C. A. 117/40 (1941, S.C.J. 343) ; P.C. 69/30 (1, L.R.P. 665, C. of J. 1587) ; P.C. 1/35 (2, L.R.P. 390, C. of J. 1934—6, 331, P.P. 22.i.36).

FOLLOWED : H. C. 77/31 (1, L.R.P. 735, C. of J. 1813) ; C. A. 189/37 (2, Ct.L.R. 209).

FOR APPELLANT : Eliash and Scharf.

FOR RESPONDENTS : No. 1 — Crown Counsel — (Hogan).
No. 2(b)—(h) — Smoira and Bar-Shira.
No. 5 — Shapiro.
Nos. 3 & 4 — No appearance.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv, dated 7th May, 1940, and is the second occasion on which this matter has been before this Court, as hereinafter appears. Just as legislation by reference only leads to confusion, so judgment by reference to other judgments and proceedings may lead to confusion, and I, therefore, make no apology for setting out at length extracts from other proceedings and from legislation.

There were previous other proceedings, culminating in a judgment of this Court in Civil Appeal No. 164/35, from which it appears that Isaac Leib Bluvstein, hereinafter referred to as the testator, died on the 13th of January, 1924, having made his will in 1922, and to which subsequent additions were made. This action was in respect of confirmation of the will, succession, administration and distribution of the estate. Various facts are set out in this judgment and deal with other transactions concerning the property. We are only concerned in this present case with plots 311 and 312, situate in Tel-Aviv, and in paragraph 13 of the judgment in this Civil Appeal No. 164/35 reference is made to these two plots. This paragraph reads as follows :—

> "The testator possessed other immovable property in Mazeh Street, Tel-Aviv. This property was registered in the name of one Levontin, but there is no dispute as to the fact that it belonged to the testator. It was of the *miri* category and by the law of Palestine it could not be disposed of by will. In spite of this the testator created a *waqf* with respect to it. This disposition was therefore also invalid."
> "In the judgment to which I have referred, the Chief Rabbinate declared this to be a valid *waqf*. I have already held that this declaration was a matter outside its jurisdiction, and that it must be regarded as a nullity. The disposition of the *miri* property was invalid, and this property also is at the disposal of the heirs of the deseased."

It will be seen from this judgment that not only was the disposition made by the testator of his *mulk* propery invalid, but also that of the *miri* property, and his endeavour to create a charitable trust of these properties was held to be invalid. The judgment goes on to say that therefore there was an intestacy with respect to both classes of property. The judgment also set out how the property of the testator was to devolve and be administered.

In the action now before us there has been a consolidation, for various reasons, of the two cases in the District Court, namely Civil Cases 282/37 and 74/38, but it comes before us as being one appeal.

In the judgment dated 7th of May, 1940, before the District Court,

the point for decision was whether or not a trust of *miri* land could be created under Section 37 of the Charitable Trusts Ordinance, and it goes on to deal with the point and states :—

> "It makes no difference in our opinion whether it is by a devise by will or made in any other manner in the life-time of the dedicator. ..... In our opinion the Ottoman Law would not permit a charitable trust of *Miri* land, and in our opinion the Charitable Trusts Ordinance has not altered that law but merely made provision for the creation and regulation of such trusts".

That judgment came before this Court on appeal on the 6th of May, 1941, and the Court stated as regards that proposition by the District Court :—

> "If that is right it may dispose of the matter, but if it is not, there are no findings upon which we can dispose of it. It is clear that Rule 205 was not complied with."
>
> "The case must go back to the District Court for findings of fact as to what the late Issac Leib Bluvstein, who is said to have created the alleged trust, actually did in relation to the property concerned, and any other findings of fact raised by the issues or desired by the parties."

Consequently the matter went back to the District Court, and we have the findings of fact made by the District Court, dated the 16th of January, 1942. No attempt was made by the District Court to come to any findings on the question of law raised, and objections to these findings of fact have been filed by various Respondents and the Appellant.

When the appeal was argued before us it was agreed that we should take the point of law first as a preliminary issue. It is unfortunate, in our view, that there is no provision for the hearing and decision of a preliminary issue on a point of law which may decide a whole cause or matter. This preliminary point is taken on the assumption that a trust in favour of a charity was in fact created by the testator, on which point the District Court made the findings of fact, but we are not concerned at the moment with these findings of fact. The point which we have to decide is whether a trust, consisting of *miri* land, in favour of a charity, can be created, *inter vivos,* in view of Article 8 of the Provisional Law Regulating the Right to Dispose of Immovable Property, and also in view of Article 121 of the Ottoman Land Code of the 21st April, 1858. I quote these two articles from the commentary by Mr. R. C. Tute, and they read as follows :—

Article 8 reads :—

> "*Mirie* land owned by virtue of a formal title-deed cannot be constituted *waqf* or left by legacy unless the State confers the absolute ownership by Imperial *mulknamé* according to *Sharia* Law."

Article 121 reads :—

> "No one can dedicate land in his possession by title-deed to any object without being previously invested by Imperial patent (*mulk-namé*) with the full ownership of the land."

The explanatory note by Mr. Tute reads as follows :—

> "This article renders the dedication of *Quasi Mulk* land as well as ordinary *Mirie* land illegal. But the Code contemplates the possibility of a dedication of the *mulk* accretions on *Quasi Mulk* without the land (*Vide* arts. 69 and 90). The provisional Law of Disposal of 1329 (art. 8) has put a stop to the latter possibility also."

Dr. Eliash argued first of all that a trust of *miri* land can be created *ab initio,* and alternatively (b), the fact that a trust exists can be recognized and legalized under Section 37 of the Charitable Trusts Ordinance, Cap. 14. This section reads as follows :—

> "(1) Notwithstanding anything in this Ordinance, if the court is of opinion upon the evidence of documents laid before it or of proved custom that any property in Palestine is held by the owner thereof under an obligation that the use of such property and the proceeds and income thereof shall be devoted to charitable purposes, the court may declare such property to be held in trust for the purpose of this Ordinance and the provisions of this Ordinance shall apply thereto as though the trust had been created in accordance therewith :
>
> Provided that where the trust was created under foreign law the court shall, in exercising jurisdiction with reference thereto, apply the law under which it was created so far as such law is not contrary to the public policy of Palestine or to the policy of this Ordinance.
>
> (2) In dealing with any property alleged to be subject to a charitable trust, the court shall not be debarred from exercising any of its powers by the absence of evidence of the former constitution of the trust if it shall be of opinion in all the circumstances of the case that the trust in fact exists or ought to be deemed to exist."

The only other relevant section in this Ordinance is the latter part of Section 43, which is to the effect that nothing in the Ordinance shall be construed to validate a devise of *miri* land for charitable purposes.

Dr. Eliash admitted that you cannot devise *miri* land at all, and as I have illustrated from the judgment in Civil Appeal 164/35, *a fortiori,* you cannot have a devise of *miri* land for charitable trust. But, says Dr. Eliash, you can have a charitable trust of *miri* land created in or during the life-time of a testator, who may supplement the charitable trust created during his life-time by his will. He, therefore, argues that such a trust having been created by the testator in his life-time in respect of *miri* land, an application can be made under Section 37,

quoted above, to regularize this trust already created and put it on a sound basis. But in my opinion this argument by Dr. Eliash appears to beg the question, which is — can you have a charitable trust of *miri* land at all ? He submitted that this was quite feasible, and that although the tenure of *miri* land cannot be changed to *mulk*, and that *miri* land must always remain *miri* as regards this tenure, yet you can have a charitable trust of buildings erected upon such land, as such charitable trust does not affect the actual tenure and the land remains *miri*. He stated that there were many charitable trusts in existence in Palestine, such as hospitals, schools and homes, erected on *miri* land. But there was no evidence before us and no authority quoted to substantiate this fact.

In support of his argument Dr. Eliash quoted various decisions, which I have examined closely.

In Privy Council Appeal No. 69/1930 to be found at p. 665 of the Palestine Law Reports, Vol. I (1920—1933) there is no mention whatsoever of the point now in issue, nor any mention of *miri* land. In High Court No. 77/1931 reported in the same volume of the Palestine Law Reports, at p. 735, it was held that the doctrine of private trusts had not been introduced into the law of Palestine, certain sections of the Companies Ordinance and Partnership Ordinance notwithstanding. It was an application for an order directed to the Director of Lands to show cause why he should refuse to register a disposition in the nature of a private trust. The last paragraph of the Chief Justice's judgment reads as follows :—

> "Further, the question arises that the land we are concerned with here is *Miri*, which cannot be made *Waqf*. Since a charitable trust cannot be constituted in respect of this particular type of land, even if Petitioner were correct as to the introduction of the theory of private trusts, it appears to me that he would fail, as such trust could not be created in respect of land of this nature."

Dr. Eliash argued that this was merely *obiter*, but it appears to me to be one of the main grounds for the judgment.

Similarly the judgment of Lord Atkin in Privy Council Appeal No. 1 of 1935, P. L. R. Vol. 2 (1934—35) at p. 394, referring to Article 46, has very little bearing on the point (if any).

On the other hand, Mr. Rigby referred to Civil Appeal 189/37, Ct. L. R. Vol. 2, p. 209 at p. 212, and also to the Preamble to Cap. 14, and it is clear from this case that *miri* land as such cannot lawfully become *waqf* and that it cannot legally be registered as *waqf*.

In the Land Transfer Ordinance, Cap. 81, land is defined as including houses, buildings and things permanently fixed on the land. In every

other Ordinance dealing with land matters and in which land is defined, the definition is to a similar effect. Although land is described and classified in the Ottoman Land Laws in detail, yet I have been unable to find a definition of land, but Article 9 of the Provisional Code appears to contemplate that there cannot be separate ownership of land and buildings erected thereon.

The only other piece of legislation I would refer to is the Palestine (Amendment) Order-in-Council, 1933, under which the power vested by the *Sharia* Law in the Sultan to convert land of the *miri* category to land of the *mulk* category was vested in the High Commissioner, and reference to the Palestine *Gazette* will show that such power is often exercised by the High Commissioner.

The points submitted by Dr. Eliash, and his arguments in support, are ingenious, but, as I have endeavoured to show, there is neither legislation nor any decided case which he can produce which support such submission or arguments, and in the absence of the same we are bound to reject such theories. In fact, both the legislation and the decided cases are entirely to the contrary.

The Court holds, therefore, there cannot be a dedication of *miri* land for the purposes of a charitable trust either by a devise by will or by any act *inter vivos*, as *miri* land cannot be the subject of a charitable trust.

The appeal is dismissed with costs on the lower scale, LP. 15 advocate's attendance fee to Dr. Smoira for each attendance and LP. 10 to Mr. Shapiro for each attendance. No costs to the Attorney General.

Delivered this 30th day of April, 1942.

Chief Justice.

CRIMINAL APPEAL No. 91/42.

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

BEFORE: Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Naser Yousef Mansour. APPELLANT.

v.

The Attorney General. RESPONDENT.

Confessions — Accused confronted with person whom he had previously declared to be the murderer — Confession — Caution administered sub-

sequently and detailed statement taken — Judges' Rules, Rule 8 — Invitation to reply — Effect of reception of inadmissible evidence, CR. A. 14/42 — Statement of Accused to Magistrate, Criminal Procedure (T. U. I.) Ord., Sec. 15(6) and (7) — Proper course to be taken where Accused unrepresented.

In allowing an appeal from the judgment of the Criminal Assize Court, sitting at Haifa, dated the 5th day of June, 1942, in Criminal Assize Case No. 25/42, whereby the Appellant was convicted of murder contrary to section 214 of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. The confrontation of the Appellant with the other Accused followed by the words "There is the man you said committed the murder" was tantamount to an invitation to reply ; the subsequent caution did not affect the position and the confession was, therefore, inadmissible as not having been made freely and voluntarily.

2. (Distinguishing CR. A. 14/42) : The confession to the Police was, according to the judgment of the Trial Court, the peg upon which the remainder of the case for the prosecution hung and its reception was, therefore, fatal to the conviction.

3. The statement to the Magistrate was admissible in evidence even although no caution had been administered ; the better practice, however, when the Accused is not represented is for the Magistrate to administer a caution and where this is not done a Court of trial should be slow to attach weight to any such statement.

DISTINGUISHED : CR. A. 14/42 (*ante*, p. 109).

ANNOTATIONS :

1. The Judges' Rules are set out and explained in Archbold, Criminal Pleading, Evidence and Practice, 13th ed., *pp.* 398 *seq.*

2. On confessions generally see CR. A. 26/42 (*ante*, p. 185) and note 1.

3. On the effect of evidence being wrongly admitted see, in addition to CR. A. 14/42 (*supra*), CR. A. 77/41 (1941, S. C. J. 317) and note 2.

4. See, on the effect of the accused being unrepresented, CR. A. 33/41 (1941, S. C. J. 153) and note 2.

FOR APPELLANT : Atalla.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize, sitting at Haifa, convicting the Accused of murder. The case for the prosecution, as the trial Court pointed out in its judgment, depended in the main upon two statements by the Accused, one having been made to the Police and the other to the Magistrate before whom the Accused appeared on an application for remand.

To deal first with the alleged confession to the Police. The trial

Court appreciated that the matter was not free from difficulty, but came to the conclusion that the statement was admissible. It appears that when this statement was made the Accused had already been charged wih this murder, as also had a second man, one Abdallah Fayez el Hassan. The Accused had previously made a statement to the Police in which he said that Abdallah Fayez el Hassan had committed the murder.

In considering whether a statement made to the Police by a person in custody is free and voluntary, it is useful to have regard to the Judges' Rules, which were formulated many years ago by His Majesty's Judges in England for the guidance of the Police themselves and the Courts, and which it is the practice of the Courts of Palestine to follow.

Rule 8 of the Judges' Rules reads 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 statement 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."

In the present case the statement under consideration followed immediately upon a confrontation of the two accused persons. Inspector Salem Ishhaiber described the matter as follows :—

> "When the Accused was brought in, I told him 'There is Abdallah Fayez Hassan, the man you said committed the murder'. The Accused then said 'I did say that Abdallah Fayez Hassan committed the murder, but in fact the truth is that I committed it.' I then got a paper and recorded what Accused said and I told him he was free to make any statement, and I recorded the circumstances under which he made the statement."

The statement which the Accused then made was most detailed and of a highly incriminating nature. We have now to consider whether it was properly receivable in evidence.

In explaining the confrontation of these two persons, Inspector Salem Ishhaiber said, in answer to a question from the Court :—

> "I did not bring Accused in in order to confront him with Abdallah. It is not usual to confront accused persons with each other. I have not done it before."

It seems to us that what was in the mind of the Police Officer in confronting the Accused with Abdallah is not the point. What we have to consider is the effect on the Accused himself, having been charged with this murder and having previously stated to the Police that it was Abdallah who had committed it, of being confronted with Abdallah with the words "There is Abdallah Fayez Hassan, the man you said

committed the murder". Was that, in fact, tantamount to an invitation to reply ? After the most careful consideration, we have come to the conclusion that it was. From the point of view of the Accused, his confrontation with this person with whom he was already well acquainted was pointless unless he was, in fact, expected to make a statement in reply. The position, in our opinion, is not affected by the subsequent caution, which was only administered to the Accused after he had admitted his guilt and, therefore, from his point of view, after the damage had been done. We are of opinion, therefore, that this statement was not free and voluntary and was, therefore, inadmissible.

That being so, can the conviction stand ? In a recent case, which has so far not been reported, Criminal Appeal No. 14/42, this Court held that it is permissible to have regard to the subsequent course of the trial and particularly to the judgment itself to see whether the evidence which was wrongly admitted influenced the mind of the Court. In that case the judgment was long and exhaustive and, in fact, contained no mention at all of the piece of inadmissible evidence. This Court, therefore, thought it safe to draw the inference that the trial Court was not influenced by that piece of inadmissible evidence and that, had it not been admitted, the trial Court would have come to the same conclusion.

In the present case, however, the judgment begins by saying :—

> "The case for the prosecution turns largely on two pieces of evidence concerning which we have had a considerable amount of argument and also evidence."

And later it goes on :—

> "As I have said, the case for the prosecution hinged largely on the confession Exhibit P. 6 and the statement to the Magistrate, and had the confession P. 6 stood alone, it might well be that we might have hesitated to convict the Accused solely on this statement made to the Police, but not only has that been supported by other evidence of facts and circumstances, but it has been very strongly reinforced by the evidence of the Magistrate under the circumstances I have detailed."

It must be noted that the trial Court says that the evidence contained in the confession to the Police is supported by other evidence and reinforced by the statement to the Magistrate. In other words, the confession to the Police was the peg upon which the remainder of the case for the prosecution hung. That being so, if that peg is removed, the case for the prosecution falls to the ground. It follows that we cannot possibly say that the mind of the trial Court was not influenced by that confession and that had it not been received in evidence the

Court must inevitably have convicted on the strength of the corroborative evidence.

We are, therefore, of opinion that the wrongful reception in evidence of this confession is fatal to the conviction.

That is sufficient to dispose of the appeal, but we feel that we should say a word about the second alleged statement which was made to the Magistrate and about which considerable argument took place both in the trial Court and in this Court. Having considered the authorities, which were adduced before us by Mr. Hogan in the course of his able argument, and having regard to the limited application of subsections 6 and 7 of section 15 of the Criminal Procedure (Trial Upon Information) Ordinance, Chapter 36 of the revised edition, we are of opinion that the statement to the Magistrate was properly receivable in evidence, even although no caution was administered. We would add, however, that, in our view, the better practice in such a case, particularly when the Accused is not represented by counsel, is for the Magistrate to administer a caution. Further, where, in a case such as the present one, a caution is not administered and the Accused is not represented by counsel, we think that a Court of trial should be slow to attach weight to any such statement.

The result may perhaps be regarded as unfortunate, but in our opinion it is better that occasionally a guilty man should escape the penalty of his crime than that there should be any relaxation of the necessarily high standard of proof that is required from the prosecution in a murder charge.

For these reasons the appeal must be allowed and the conviction quashed.

Delivered this 3rd day of July, 1942.

British Puisne Judge.

HIGH COURT No. 58/42.

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

BEFORE : Copland, Edwards and Khayat, JJ.

IN THE APPLICATION OF :—

Joachim Suchier. PETITIONER.

v.

The Superintendent of the Detention Camp, Mazra'a, near Acre. RESPONDENT.

Habeas Corpus -- Person detained as enemy alien, Defence Regulations, Reg. 17B *— Allegation that Petitioner naturalized Palestinian citizen — Administering of oath of allegience — Affidavits — Onus of proof not discharged — Costs.*

Return to an order *nisi* in the nature of *Habeas Corpus,* issued on the 1st June, 1942, directed to the Respondent, calling upon him to produce the body of Joachim Suchier before the High Court for the purpose of his release and to await the further order of the Court.

The facts as set out in Petitioner's affidavits were that on 19.v.1940, after having paid the requisite fees, he had called at the Immigration Office, Tel-Aviv, to take the oath of allegiance ; that he had covered his head and taken the oath administered to him by a clerk in Mr. Wolfson's room while Mr. Wolfson read a certain note ; that, after he had taken the oath, Mr. Wolfson asked what his name was and that, on having given his name to Mr. Wolfson, he was sent away. On 2.vi.1940 the Petitioner was detained and, on 17.vi.40 he received a letter informing him that his certificate of naturalization was "withheld for the present". It was contended on behalf of the Petitioner that, having taken the oath of allegiance, he had become a Palestinian citizen, that his naturalization had never been revoked and that, consequently, he could not be detained as an enemy alien.

HELD : In a case of this nature it was upon the Petitioner to prove the facts alleged and the Petitioner had failed to discharge that onus.

ANNOTATIONS : See, on detention of enemy aliens, H. C. 25/42 (*ante,* p. 241) and note 1.

FOR PETITIONER : Weyl.

FOR RESPONDENT : Solicitor General — (Griffin).

ORDER.

This is a return to an order *nisi* on a petition in the nature of *Habeas Corpus* directed to the Superintendent of the Detention Camp Mazra'a, to show cause why one, Joachim Suchier, should not be released from custody. It is common ground that the Petitioner is detained under Regulation 17B, as it is alleged that he is an enemy alien, that is to say, he is still a German national. The whole question turns on whether or not the Petitioner has become a naturalised Palestinian. He entered the country in 1935 as a legal immigrant and, in due course, in 1940, he applied to the Department of Migration for a Certificate of Naturalization. He states, and it has not been denied, that he paid the proper fee for that application. Later on he made enquiries as to when the Certificate would be ready and he was informed to call at the Immigration Office in Tel-Aviv, where he would take the oath of allegiance and the certificate of naturalization would be handed to him. It appears that on the 19th May, 1940, he went to

the office for the purpose of taking this oath of allegiance. Either on that day or previously the necessary fee payable on the issue of a certificate of naturalization had been duly paid by the Petitioner.

The whole question depends on what, in fact, happened on this particular morning in 1940 with regard to this particular Petitioner. Mr. Wolfson, who has been cross-examined on his affidavit before us, says that in 1940 they used to issue the certificates of naturalization on one morning in the week and the average was about 100 and on some mornings it rose to 160. That, of course, may mean considerable pressure in the office, but Mr. Wolfson says that it is highly improbable and most unlikely that he would have administered the oath of allegiance to the Applicant and, to the best of his knowledge and belief, naturally after a period of two years, he declares that he did not do so. It is a fact that the certificate of naturalization is not signed either by the person named therein or by the Inspector of Migration and neither is the oath of allegiance signed by either of these two persons. The original forms, including the certificate of naturalization with the photos of the Applicant and his wife, have been produced to us. Mr. Melamede, also of the Department of Migration, has given evidence to us that a form is signed immediately after the oath has been administered by the clerk. He himself says he never signs it at the same time as the oath is given.

The Petitioner has filed his second affidavit and gives in considerable detail what he says took place on this morning of the 19th May, 1940. In a case of this nature the onus is on the Petitioner to prove the facts that he alleges. It is not on the department concerned to prove the negative. Taking the evidence as a whole, the affidavits and the answers which we have heard in cross-examination, we are not satisfied that the Petitioner has discharged that onus of proof which is laid upon him.

For these reasons, therefore, the order *nisi* must be discharged. The Solicitor General does not ask for any costs.

Given this 12th day of June, 1942.

British Puisne Judge.

CIVIL APPEAL No. 78/42.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Rahmo Nehmad. APPELLANT.

v.

1. Raphael (Abdu) Lalo,
2. Eliyahu Lalo. RESPONDENTS.

Summary Procedure — Action on promissory notes — Defence that notes were given as security and that no debt owing — When leave to defend given, R. S. C. J., Order 14, Red Book, 1938 — Non interference with discretion of Court below.

In dismissing an appeal from the order of the District Court of Tel-Aviv, dated 31st day of March, 1942, in Civil Case No. 61/42 :—

HELD : 1. (Frumkin, J., *dissentiente*) :
Absence of consideration is, as between immediate parties, a defence to an action on a bill of exchange and leave to defend should be granted if such defence is put forward.
2. (*Per Frumkin, J.*) :
Although leave to defend should not have been granted the discretion of the District Court in giving such leave should not be interfered with.

ANNOTATIONS : *Cf.* C. A. 51/40 (1940, S. C. J. 93).

FOR APPELLANT : Gluckmann.

FOR RESPONDENTS : Ben Ami.

JUDGMENT.

Copland, J. : This is an appeal from an interlocutory order of Judge Korngruen granting to the Respondents to the appeal leave to defend in an action lodged under the Summary Procedure Rules. The defence so far as I understand it, which it is sought to put forward, is that the two promissory notes, which are the subject matter of the action of the claim by the Appellants, were given as security for what might be found owing on an account, that the Respondents query certain items in the account which has been furnished to them and deny that they owe that money in those items and that it is, therefore, for them to bring forward their defence in order to show to the Court that they

do not owe a certain part of the money that is claimed from them. Their defence is that, deducting the items in the account which they say they do not owe, there is no money owing to the Appellants and, therefore, the promissory notes cannot be sued upon.

Rules as to Summary Procedure are found in the comments on Order 14 in the Red Book, in the Rules of the Supreme Court. In the 1938 Edition at page 162, it is stated that leave to defend should be given if a defendant shows that he has a fair case for defence, or a fair probability of a defence, or a plausible suggestion of a defence or if he shows facts which might constitute a defence or which raise a plausible dispute. The grounds, therefore, on which leave to defend are given are obviously very wide ones. It is further stated at the bottom of page 162 that — "When the affidavits are entirely contradictory and in order to decide the case between the parties, the evidence on both sides must be gone into ... that would be in effect trying the case upon affidavits ... which was not the object or intention of Order 14". In such a case, therefore, leave to defend should be given.

In actions on bills of exchange and promissory notes absence of consideration is a defence as between the immediate parties to the appeal (*sic*) and in such a case, again, leave to defend should be given.

In these circumstances, I think that the learned Judge came to a correct decision in granting leave. The appeal is, therefore, dismissed with total costs of LP. 10 to be paid by the Appellant, in any event.

Delivered this 18th day of June, 1942.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

Frumkin, J.: I should have thought that this is a case where leave to defend should have been refused if the rules as regards Summary Procedure are to be applied at all and if promissory notes and solemnly made bonds should not be disregarded. All what was put up against these documents, so far, was a denial of the debt and an allegation that there are certain accounts between the parties and the Defendant did not even suggest that if leave to defend is granted he will lodge a counterclaim. It seems, however, that the matter of granting leave or refusing it is a matter for the discretion of the judge trying the case and he having granted leave, I am not prepared to interfere.

Puisne Judge.

CIVIL APPEAL No. 59/42.

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

BEFORE : Copland and Edwards, JJ.

IN THE APPEAL OF :—

Zaki Rashid El Shanti & 7 ors. APPELLANTS.

v.

Yehoshua Hankin & 26 ors. RESPONDENTS.

AND BETWEEN :—

Zaki Rashid El Shanti & 7 ors. APPELLANTS.

v.

Yehoshua Hankin & 26 ors. RESPONDENTS.

(By order of the Supreme Court dated 4th June, 1942).

Land Settlement — Retrial ordered by Court of Appeal, C. A. 215/38 — Settlement Officer criticising judgment of Supreme Court, C. A. 33/41 — Unjustified remarks on the record, C. A. 135/41 — Directions on appeal to be followed — Remittal of case to another Settlement Officer.

In allowing an appeal from the decision of the Settlement Officer, Tulkarm Settlement Area, dated 21.2.42 in Case No. 3/Qalqilia, and in remitting the case to another Settlement Officer :—

HELD : 1. (Referring to C. A. 33/41) : The Settlement Officer was not entitled to criticise judgments of the Supreme Court and it was his duty to carry out the instructions contained in the remitting judgment.

2. (Referring to C. A. 135/41) : The use of a phrase in the middle of the record, showing that the Settlement Officer had already made up his mind on a vital point, was fatal to the proceedings.

3. It was highly desirable that the case should go before another Settlement Officer.

REFERRED TO : C. A. 215/38 (1938, 2 S. C. J. 177) ; C. A. 33/41 (1941, S. C. J. 113) ; C. A. 135/41 (1941, S. C. J. 526).

ANNOTATIONS :

1. See the previous proceedings in this case, C. A. 215/38 (*supra*) ; leave to appeal to the Privy Council from the above decision was refused in P. C. L. A. 15/38 (1939, S. C. J. 21).

2. Instructions in remitting judgments should be carried out : See, in addition to C. A. 33/41 (*supra*), C. A. 76/38 (1938, 1 S. C. J. 266), C. A. 109/38 (*ibid.*, p. 311) and C. A. 222/38 (1938, 2 S. C. J. 184). *Cf.* H. C. 99/41 (1941, S. C. J. 513) — District Courts not to criticise judgments of the Supreme Court.

3. On the last point see also C. A. 135/41 (*supra*, on p. 532).

FOR APPELLANTS : Nos. 1 & 4 — A. Salah.
Nos. 2, 3, 5 & 6 — Cattan.
Nos. 7 & 8 — W. Salah.

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

JUDGMENT.

Copland, J. : This is an appeal from a decision of the learned Settlement Officer of the Tulkarm Settlement Area, on a retrial which had been ordered by this Court, in Civil Appeal 215/38 (5 P. L. R. p. 553). In that judgment this Court held that the alleged settlement by Husein and Kamel, two of the heirs of Rashid el Shanti, with the Respondents, must be proved by the Appellant. That was a part of the judgment also of the Land Court.

This Court sent the case back to the Settlement Officer to decide the case on the lines suggested by the Land Court and in the light of the observations in the judgment of this Court. The case went back to the learned Settlement Officer and it has taken him nearly three years to decide the very simple points involved in the second judgment. The Settlement Officer proceeds to argue at considerable length that the Supreme Court was wrong in its first judgment in remitting the case to him for a retrial, that we had not understood the arguments and not understood the points in the case and that he was the only one, apparently, who had any idea of what he was talking about. As was remarked by this Court, differently constituted than what it is today, in Civil Appeal No. 33/41, "the Settlement Officer seemed to have misunderstood his functions. In a judgment of some twenty pages not only has he criticised the decision of this Court but he has also referred in the most unbecoming terms to an earlier consent judgment of this Court." This Court went on to say — "The Land Settlement Officer is not the Court of Appeal from this Court." It seems that the Settlement Officer in this case, who actually was not the same Settlement Officer as referred to in Civil Appeal 33/41, also considered himself a Court of Appeal from the Supreme Court. In his written decision granting the application for leave to appeal he also criticises this Court and says — "For conscientious reasons, I find myself unable literally to carry out the instructions of the Supreme Court in referring the case back to me for re-hearing that the Defendant is to be considered bound by certain admissions of two of the Plaintiffs". He goes on to say — "On equitable grounds, I could not see how Defendant's opposing parties should be able so to bind him" and so

on, and various other matters which he says he cannot see. It is quite immaterial to us whether he can see or not. His duty is to carry out the instructions of this Court which were perfectly lucid and clear and admit of no doubt whatsoever. That the Settlement Officer has not done, and his conduct in disregarding our judgment cannot be too strongly reprobated. In the middle of his record of proceedings he states, on no evidence whatever, that "here is the fraud". A very similar remark was made by this Settlement Officer in another appeal to this Court, when the use of such a phrase in the middle of a record, showing that the Settlement Officer had already made up his mind on a vital point, could not be justified, and on that ground alone the appeal had to be allowed.

Dr. Eliash has argued with very considerable but, if I may say so, unsound eloquence, that the Settlement Officer was entitled to take fresh points into consideration. Of course, Dr. Eliash does not purport to criticise the judgment of this Court or to support the language of the Settlement Officer, yet, in fact, he is trying to go round the very clear directions that we gave in the first judgment. That, of course, he is entitled to do but his efforts, I am afraid, do not succeed.

We have considered whether the case should be remitted to the Settlement Officer to proceed as we have previously directed, or whether we should give final judgment in this case. With regret we have come to the conclusion that the case will have to be remitted to the Settlement Officer in order that the terms of our original judgment should be complied with.

The appeal will, therefore, have to be allowed, the judgment of the Settlement Officer set aside and the case sent back, so that the Settlement Officer may deal with this case as directed by this Court and give effect to the judgment of this Court, without further delay.

It seems that the Settlement Officer has himself requested to be relieved from taking this case again. That is the only point in his judgment and in his decision on the application for leave to appeal with which I find myself in complete agreement. It is highly desirable that this case should go before a different Settlement Officer. The Appellants are entitled to costs, on the lower scale, to include the sum of LP. 10 for each of the advocates appearing on behalf of the Appellants, to be paid by the first Respondent.

Delivered this 4th day of June, 1942.

British Puisne Judge.

Edwards, J.: I agree that the case should be remitted on the lines suggested by My Lord. I also agree, generally, with most of the remarks made by My Lord as to the action taken by the Land Settlement Officer on the re-hearing ordered by this Court. I would merely add, the effect of such action on his part has been merely to impede and delay the final decision on the rights of the respective parties to this litigation.

British Puisne Judge.

CRIMINAL APPEAL No. 81/42.

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

BEFORE: Copland, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Mahmoud Diab Abed Saffouri. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Appeal against sentence — Previous convictions — Futility of succession of short sentences — Consecutive sentences not to be imposed.

In dismissing an appeal from the judgments of the District Court of Haifa, dated 19.5.42, in Criminal Cases Nos. 121/42 and 123/42, whereby Appellant was convicted under sections 297(a) and 309 of the Criminal Code Ordinance, 1936, and sentenced to 12 months' and 2 years' imprisonment respectively, and in ordering the sentences to run concurrently :—

HELD: 1. In view of Appellant's previous convictions the sentences were not excessive.

2. Save in special circumstances, which were not present in this case, consecutive sentences should not be imposed. It is the duty of the Police to bring to the notice of the prosecution, and the duty of the prosecution to inform the Court if more charges are pending against a particular prisoner.

ANNOTATIONS:

1. See, on the first point, CR. A. 54/42 (*ante*, p. 366) and note 4.
2. On the second point *vide* CR. A. 147/41 (*ante*, p. 17) and note.

APPELLANT: In person.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

We need not hear you Mr. Hogan.

The Appellant pleaded guilty to two charges of breaking into a store and committing theft therein and wilfully receiving stolen property. It is stated that the value of the property stolen was about LP. 700. The Appellant has nine previous convictions varying from six strokes in the year 1934 to one year in the year 1940. One of those convictions was for housebreaking, three for theft and one for possession of stolen property. This list of sentences shows the futility of a succession of short sentences. The Appellant was sentenced to two years' imprisonment from the date of his arrest. In our opinion that is not one day too much. The appeal is dismissed.

It appears that the Appellant was also sentenced on another charge to twelve months' imprisonment to commence after the expiration of the sentence of two years in the first case. There was ample evidence upon which the Court could act and that appeal is also dismissed. Save in special circumstances, which are not present here, the Court is of opinion that consecutive sentences should not be imposed. It is the duty of the police to bring to the notice of the prosecution, and the prosecution's duty to inform the Court if more charges are pending against a particular prisoner. In these circumstances we order that the two sentences of two years and twelve months respectively shall run concurrently from to-day, the date of the appeal.

Delivered this 15th day of June, 1942.

British Puisne Judge.

CIVIL APPEAL No. 30/42.

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

BEFORE : Rose, Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Zvi Werner. — APPELLANT.

v.

Agudath Hastudentim shel Hatechnion Haivri, Haifa. — RESPONDENTS.

Contracts — Damages for breach — Liquidated damages and penalty — Both parties in default.

In dismissing an appeal from the judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 30th January, 1942, in Civil Appeal No. 120/41 :—

HELD : 1. By arranging and carrying out the tombola the Respondents had committed a breach of their agreement with the Appellant.

2. The finding of the District Court that the sum of LP. 50.— provided for in the contract represented a genuine preestimate of the damages and not a penalty would not be upset.

3. By withholding payment of the balance due by him the Appellant also committed a breach of the contract which disentitled him to recover damages for the Respondents' breach.

ANNOTATIONS :

1. See, on the second point, P. C. 30/39 (1941, S. C. J. 279) and note 3. *Cf.* C. A. 116/41 (*ibid.*, p. 476 and *ante*, p. 293).

2. On readiness and willingness to complete *vide* C. A. 60/42 (*ante*, p. 352) and note 2.

3. On the last point see also C. A. 17 & 19/39 (1939, S. C. J. 142) and note. *Cf.* C. A. 261/40 (1941, S. C. J. 36).

FOR APPELLANT : Koch.

FOR RESPONDENT : Erdstein.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, dismissing an appeal from the Magistrate's Court. The facts are sufficiently set out in the two previous judgments and need not be referred to here. The Appellant contends that by reason of Clause 1 of the contract, which reads as follows :

> "The Students hereby give on lease to Mr. Zvi Werner the sole right of arranging on the 15th of February, 1941, a Buffet Bar, Café and Cigarettes in the Ball halls, and the Students shall not be entitled to allow anyone else to sell food or drinks or cigarettes in the halls of the Technical High School and those of the Students Association."

he was entitled to expect that no other drinks, cigarettes or food-stuffs should be sold or offered at the dance on the night in question except those which were provided by himself. He points out that the contingency of the students being presented with articles falling within the prohibition is met by clause 7 of the agreement which obliges Mr. Werner to buy at the wholesale price all such articles. I consider that his contention is sound and am, therefore, of opinion that by arranging and carrying out the tombola in question the Respondents broke clause 1 of the contract. Mr. Werner, however, did not elect to treat the contract as being at an end but continued to perform his part of it in that he continued the sale of his products up to the termination

of the dance. The matter would, therefore, seem to be one of damages, and the Magistrate, in fact, found that the Respondents' breach caused him substantial damage. Under Clause 15 of the agreement, there is a provision that any defaulting party shall pay LP. 50 as liquidated damages. The District Court held, and I see no reason to differ from its conclusion, that this sum represented a genuine estimate of the parties as to the damages likely to ensue from a breach of the contract, and was not a penalty.

In order, however, to entitle himself to succeed on his claim for damages, the Appellant was bound to satisfy the Court that he himself had performed, or at all material times was ready and willing to perform, his own obligations under the contract. Clause 2 of the contract provided that in consideration of his exclusive rights under the agreement the Appellant was to pay LP. 25 upon the signature of the agreement and a further LP. 75 by post-dated cheque to be met on the 16th February, 1941, which was the day following the ball. Unfortunately for him the Appellant decided to withhold payment of this balance of LP. 75, and the Respondents contend, and I agree with them, that he thus also committed a breach of the contract which disentitles him to recover damages for the Respondents' breach. I feel a certain sympathy for the Appellant in this matter, but would point out that in any event, by withholding this payment of LP. 75, he was retaining LP. 25 more than he would have been entitled to as the agreed damages under the contract.

The appeal is, therefore, dismissed. The Appellant must pay the Respondents' costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee of LP. 10.

Delivered this 16th day of June, 1942.

British Puisne Judge.

CRIMINAL APPEAL No. 85/42.

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

BEFORE : Gordon Smith, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Zaki 'Assaf. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal Procedure — Possession of dangerous drugs — Sufficiency of information — Actual or constructive possession — Corroboration — Whether witness an accomplice.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 3rd of June, 1942, in Criminal Case No. 85/42, whereby the Appellant was convicted of being in possession of dangerous drugs, contrary to Section 7 of the Dangerous Drugs Ordinance, 1936, (as amended in 1941) and sentenced to eighteen months' imprisonment :—

HELD : 1. The Appellant had been charged with possession, which might be physical or constructive, and he had not been misled by the form of the information.

2. Even if the principal witness for the prosecution was an accomplice — and there was no finding to that effect — his evidence was sufficiently corroborated.

ANNOTATIONS :

1. See, on defective informations, CR. A. 127/40 (1940, S. C. J. 453) and note.

2. On physical and constructive possession see CR. A. 11/42 (*ante*, p. 81) and note.

3. See, on the last point, CR. A. 39/42 (*ante*, p. 224) and notes 1 and 2.

FOR APPELLANT : Asfour and Eisenberg.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

We have already intimated that on the first point, *i. e.* the technical point as to the information being insufficient, we were against the counsel for the Accused in that respect. It is quite impossible to believe that the Accused was misled as to the details with which he was charged. He was charged with possession and that might be actual and physical or constructive, and, as was pointed out at the commencement of the trial, that was a question of fact which would transpire during the hearing.

As regards the other grounds, it is mainly on the question of corroboration — whether there was sufficient corroboration of the story told by Mureifeh. The Court did not find as a fact that he was an accomplice, but took the wise course of saying that, even if he was, there was sufficient corroboration in the evidence of two other witnesses. It is true that the last witness, Suleiman Mizzid, did not specifically identify the Accused as being one of the two men who carried the sacks out of the lorry. He says, "I saw Sulmi and another carrying something from the truck", but on the other hand we have the definite evidence of Darwish Biltagi that the Accused had got into this lorry

and drove off. We think that the evidence of Suleiman Abu Mureifeh is sufficiently corroborated to identify the Accused as being one of the two who did carry the sacks out of the lorry, even if Mureifeh was an accomplice, a fact that the lower Court did not definitely find.

The appeal must, therefore, be dismissed.

Delivered this 6th day of July, 1942.

Chief Justice.

CIVIL APPEAL No. 62/42.

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

BEFORE : Frumkin, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Abdul Rahman Ibn Muhammad el Khaldi. APPELLANT.

v.

Mahmud Ibn Ali el Khaldi. RESPONDENT.

Rights to land — Admissibility of oral evidence between relatives, Ottoman C. P. C., Art. 82 — Room built on mulk land of another — Ownership of building as distinct from ownership of land, Land Law (Am.) Ord., 1937 — Room built with legal justification, Mejelle, Art. 906 — Value of land less than value of the room — Land to be registered in builder's name upon payment of assessed value.

In dismissing an appeal from the judgment of the Magistrate's Court of Ramleh, sitting as a Land Court, dated 18.4.42 in Case No. 926/41, and in remitting the case to the Court below :—

HELD : 1. As the parties were uncle and nephew oral evidence was admissible in the action.

2. The room was built by the Respondent, paid for by him and was consequently within his ownership.

3. The land was not registered in the Land Registry and there could be no registration of the room thereon distinct from the land.

4. The room had been built with legal justification and as its value was greater than that of the land occupied by it the Respondent was entitled to have both the room and the land occupied by it registered in his name.

5. The registration would be effected upon payment by the Respondent of the value of the land, such value to be assessed by the Land Court.

ANNOTATIONS :

1. See, on oral evidence between relatives, C. A. 115/25 (cited in Hooper, The Civil Law of Palestine, Vol. II. p. 136), C. A. 29/29 (P. L. R. 433, C. of J. 502), C. A. 74/29 (C. of J. 235), C. A. 72/31 (P. L. R. 648, C. of J. 795), C. A. 8/33 (P. L. R. 858, C. of J. 333), C. A. 89/33 (2, P. L. R. 191, C. of J. 820) and C. A. 102/36 (C. of J. 1934—6, 388).

2. On Article 906 of the *Mejelle* see C. A. 68/40 (1940, S. C. J. 126) and note 1.

FOR APPELLANT : Elia.

FOR RESPONDENT : Kamleh.

JUDGMENT.

The Appellant in this case is the uncle of the Respondent. Some ten years ago a house consisting of two rooms was built on land admittedly purchased by the Appellant, by virtue of a private deed. The land is not registered and is situated within the boundaries of Inaba village. Since the construction of the house, the western part of it which consists of one room was occupied by the Respondent. No rent or compensation whatsoever has been paid during that period. The present action was brought by the Respondent claiming ownership of the room occupied by him. Evidence was heard, and it is not disputed that in view of article 82 of the Ottoman Code of Civil Procedure, oral evidence was admissible. As a result of such evidence heard, the Magistrate came to the conclusion that the room in question was built by the Respondent, paid for by him and is consequently within his ownership. We are not prepared to interfere with this finding of fact. The Magistrate, in view of this finding, ordered the registration of the room in question in the name of the Respondent without, however, there being any clear order as to the registration of the land occupied by the rooms. On this point the learned Magistrate says :—

> "As regards the land upon which the building is erected, the Defendant would have the right to claim its value in the legal way, should he so desire."

The first question of law which arises is whether, under the Land Law (Amendment) Ordinance, 1937, the registration of buildings could be directed without, at the same time, ordering the registration of the land upon which it is built. True there is a qualifying proviso in the said Ordinance, but it refers only to buildings already registered in the Land Registry at the time the said Ordinance came into operation. This is not the case here, because although the room was already erected in 1937, the land is not registered at all.

We have, therefore, to see who, under the law, is entitled to the land.

There seems to be no doubt that the land is *mulk*. Article 906 of the *Mejelle* is, therefore, applicable. Having come to the conclusion that the Respondent is the owner of the room we cannot come to any other conclusion but that the construction was made with the consent of the Appellant, and hence with what is termed in the *Mejelle* 'legal justification'. The second part of 906 is, therefore, to be invoked.

From the data submitted before us as to the area of the land and its value as well as the value of the room, there seems to be no doubt that the value of the land is much less than the value of the room occupied on that particular portion of the parcel. It follows that the Respondent, who is the legal owner of the room, is entitled to have both the room and the land occupied by it registered in his name.

It would, however, be unfair to direct the registration of the land in his name before his paying its price. The parties could not come to an agreement as to the value of the land occupied by the room, and we have, therefore, no alternative but to remit the case to the Magistrate to assess the value of the land and order the registration of both the land and the room in the name of the Respondent, upon payment of the assessed value by the Respondent to the Appellant, and we order accordingly.

The Respondent will have his costs which we assess at an inclusive sum of LP. 5.

Delivered this 7th day of July, 1942.

Puisne Judge.

CIVIL APPEAL No. 76/42.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Abdul Qader Ali Badah. — APPELLANT.

v.

1. Ali el Jaghlit,
2. Ahmad el Beisani. — RESPONDENTS.

Liability for loss of goods — Sub-contractors delivering goods to contractor's premises — Subsequent theft — Passing of property on delivery — Loss lies where it falls.

In dismissing an appeal from the judgment of the District Court of Jaffa, sitting as a Court of Appeal, dated the 3rd day of March, 1942, in Civil Appeal No. 12/42 :—

HELD : The goods in question had been delivered on the premises and had, thereby, become the property of the Appellant on whose account the work had been done ; their subsequent loss had, therefore, to be borne by the Appellant.

ANNOTATIONS : *Cf.* Art. 294 of the *Mejelle*.

FOR APPELLANT : Zein Eddin.

FOR RESPONDENTS : Elia.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, which reversed a judgment from the Magistrate's Court and remitted the case to the Magistrate to act in accordance with certain principles laid down by the District Court.

The present Respondents, who were the Plaintiffs in the Magistrate's Court, sued the present Appellant for a sum of LP. 115.230 mils being the balance of price of certain woodwork constructed by them for the Appellant. Apparently the work did not proceed very smoothly because the riots, which disturbed the country some few years ago, interfered with the process of construction and the work was stopped. What happened was that the woodwork and the various other articles required were placed upon the premises but part thereof at any rate, was stolen from the premises involved. The Appellant was the main contractor for finishing off this building and the Respondents were his sub-contractors and the real dispute centres round this very simple point who is liable for the stolen property. As I have said, the major part, if not all, the woodwork, and the accompanying articles were delivered on the premises. It is said that they were not delivered to any particular person. That may well be true but it makes no difference as to the legal liability. They were delivered on the premises and a very large part of them were actually fixed in their proper position in the premises. If the property was delivered on the premises the property became the property of the Appellant on whose account this work had been done. If it was lost after delivery then, as I said during the argument, the loss lies where it falls, in other words, it is the Appellant who must be the loser. For these reasons we think that the District Court came to a correct conclusion.

We have been asked to give final judgment for the balance but this

we do not wish to do for this reason : The contract, as perhaps one might expect in this country, was an oral one and not written. On that account, of course, there are naturally always various versions put forward by the contending parties. It seems to have been accepted by the Court below that some of the iron and some of the paint work had not been done which had been contracted to be done in this oral contract. That being so we are unable, unfortunately, much as we should have liked to have done, to give a judgment which finally determines the rights of the parties in this case. The appeal must be dismissed and the case will go back as ordered by the District Court to the Magistrate to deal with it in the light of the District Court judgment and in the light of the further remarks made by this Court on the appeal. The Respondent is entitled to his costs on the lower scale together with the sum of LP. 10 advocate's attendance fee.

Delivered this 24th day of June, 1942.

British Puisne Judge.

CIVIL APPEAL No. 25/42.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Ilbert Issler. APPELLANT.

v.

Jassin Ibrahim Doulhe. RESPONDENT.

Contracts — Action for return of machinery — Hire Purchase agreement or contract of sale — Passing of ownership, McEntire v. Crossley — Breach of contract by vendor.

Appeal from the judgment of the District Court of Tel-Aviv, dated 30.1.42, in Civil Case No. 258/41.

The District Court had found as a fact that the turning lathe in question had been acquired by the Respondent in 1935 by final sale from the partnership Dr. Adlerstein & Co. ; that one and a half years later the "hire purchase" agreement upon which the action was based had been executed in respect of the lathe as security for a debt due from the Respondent to the partnership ; that, on the day on which the agreement was signed, the partnership had undertaken to return to the Respondent certain promissory notes ; that these notes had been negotiated by the partnership to the Anglo Palestine Bank, which had obtained judgment thereon and was executing the judgment against the Respondent ; and that the "hire purchase" agreement had in 1941 been assigned to the Appellant.

HELD : 1. There was evidence to support the finding that the agreement was not a hire purchase agreement, but an ordinary contract of sale.

2. (Referring to McEntire *v.* Crossley) : The Appellant could not rely on the agreement as his predecessor in title had committed a breach of a condition closely connected with the agreement.

REFERRED TO : McEntire *v.* Crossley Bros., Ltd., 1895, A. C. 457.

ANNOTATIONS : See C. A. 24/39 (1939, S. C. J. 378) and notes ; later cases on hire purchase agreements : C. A. 71/40 (1940, S. C. J. 462) and C. A. 212/40 (*ibid.*, p. 519).

FOR APPELLANT : Elhanani.

FOR RESPONDENT : Porter.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, in which they dismissed the Appellant's claim to return certain machinery. The District Court held that a particular agreement (P/1), though on the face of it a hire purchase agreement was not, in fact, such a thing but was an ordinary contract of sale. There was evidence to support that finding and we see no reason to differ from the learned judges of the Court below.

The Appellant's main arguments were that the District Court were wrong in disbelieving the witnesses ; that they were wrong in holding that this contract (P/1) was an agreement for sale — in other words that they should have found all points in his favour. There is only one point which it is necessary to mention and that is the last one in which he says, quoting an English case, 1895, Appeal Cases p. 457, that if an agreement for sale contains a condition that the ownership shall not pass until the price has been paid, then there is no reason why that condition should not be fulfilled. That point, however, is disposed of by paragraph 2 of the conclusions at which the Court arrived, in which they said that :—

> "The undertaking of the partnership to return to Defendant certain bills is firmly bound with the agreement P/1 : and whereas the partnership committed a breach of the undertaking to the Defendant and endorsed the bills to a third party, it cannot rely upon the agreement P/1."

The District Court came to a right conclusion, and we see no reason to differ from them.

The appeal is dismissed. The Appellant will pay costs on the lower scale together with LP. 10 advocate's fee for attending the hearing of this appeal.

Delivered this 23rd day of April, 1942.

British Puisne Judge.

CIVIL APPEAL No. 84/42.

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

BEFORE : Copland and Edwards, JJ.

IN THE APPEAL OF :—

Mohammad Shannir. APPELLANT.

v.

Izzat Fateh Jaber. RESPONDENT.

Bills of Exchange — Allegation that amount altered — Whether alteration apparent — Onus of proof — Competence and credibility of experts.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 1st day of May, 1942, in Civil Case No. 100/41 :—

HELD : 1. The alleged alterations were not apparent on the face of the notes and the onus had, therefore, rightly been laid on the Defendant to prove that the notes had in fact been altered.

2. It was for the Court to determine what weight should attach to the evidence of the two experts whose evidence was admissible although neither of them would be really experts in the strict sense of the word as used in England.

ANNOTATIONS :

1. See, on the first point, C. A. 104/36 (C. of J. 1934—6, 438, P. P. 5.viii.37), C. A. D. C. T. A. 328/37 (Tel-Aviv Judgments, 1937, p. 102), C. A. D. C. T. A. 174/39 (*ibid.*, 1939, p. 23) and C. A. 252/37 (1938, 1 S. C. J. 83).

2. On the onus of proof *cf.* C. A. 14/42 (*ante*, p. 368) and note 1.

3. See, on the last point, C. A. 71/42 (*ante*, p. 350).

FOR APPELLANT : Cattan.

FOR RESPONDENT : Hanna.

JUDGMENT.

This is an appeal from a judgment of Judge Bodilly, sitting alone in the District Court of Jaffa. The action before him was on two promissory notes, one alleged to be for LP. 325 and the other for LP. 75. The Defendant alleged that the LP. 325 note, when he signed it, was for LP. 25 only, and that the LP. 75 note was for LP. 70 only. The learned Judge heard the evidence of two other gentlemen who were put forward as experts, one by each side. The learned Judge found in favour of the Plaintiff in the case saying that he was not satisfied that there had been the alterations alleged and he found that the Defendant, that is the present Appellant, had failed to discharge the onus upon him.

Two points have been taken by Mr. Cattan on this appeal. The first one is that the onus of proof was wrongly laid by the learned

Judge on the Defendant, and secondly that the evidence of Mr. Shukri Fiani, one of the so called experts, was inadmissible.

With regard to the first point that the onus of proof was wrongly laid and should have been laid upon the Plaintiff in the Court below, the argument is that the notes had been altered and that it was, therefore, for the Plaintiff to account for these alterations, that is to say, for him to prove that the alterations had been properly made. An expert's business is to give evidence as to what the writing, or whatever the subject may be on what he is called, shows. But an expert is really only in the position of an adviser to the Court and the judgment is the judgment of the Court and not the judgment of the expert ; that is not to say that a Court is entitled to disregard the evidence of experts entirely where there is nothing to contradict them without giving reasons for so doing. Now, if one looks at these notes, as one must presume the learned Judge himself did, quite frankly we cannot say that there are alterations apparent on the face of them. That being so we think that the onus of proof was rightly laid on the Defendant to prove that the notes had in fact been altered. Two experts, as I have said, were called, one for each party. Neither of them, I suppose, would be really experts in the strict sense of the word as it is used in England, but we cannot altogether disregard the evidence of Shukri Fiani. It is merely for the Court to determine what weight it should attach to this evidence just in the same way as the Court should determine what authority should be attached to the evidence of Abdul Khader Shehadeh. The learned Judge said that it was a difficult case and that it was difficult to decide whether the promissory notes had been altered or not but he makes a definite finding of fact that he is not satisfied that there have been the alterations alleged which we have detailed at the beginning of this judgment and he found that the Defendant, that is the Appellant, had failed to discharge the onus of proving the alterations, which onus in our opinion, was properly laid upon him.

In these circumstances we cannot say that the learned Judge went wrong. It is impossible to say that the judgment was against the weight of the evidence. The evidence was weighed up, such as it was on both sides, and the learned Judge found for the present Respondent. We see no reason to interfere with these findings and the appeal must, therefore, be dismissed with costs on the lower scale to include the sum of LP. 15 advocate's attendance fee on the hearing of this appeal.

Delivered this 8th day of July, 1942.

British Puisne Judge.